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Antitrust Language Barriers: First Amendment Constraints on Defining an Antitrust Market by a Broadcast's Language, and its Implications for Audiences, Competition, and Democracy

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Antitrust Language Barriers: First Amendment Constraints on Defining an Antitrust Market by a Broadcast’s Language, and its Implications for Audiences, Competition, and Democracy

Catherine J.K. Sandoval*

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I. INTRODUCTION

Does the language of a broadcast's program appropriately define an antitrust market, consistent with First Amendment and antitrust principles? The Department of Justice ("DOJ") has traditionally defined the market for mass media transactions by type of media, casting radio as competing in one market, and over-the-air television, for example, in another.¹ Within the medium of radio, the DOJ has divided the market by the *language of the broadcast*, defining Spanish-language radio as a separate market from English-language radio in its 2008 analysis of the proposed private equity firm buyout of Clear Channel, and in its 2003 review of the merger of Univision Communications, Inc. ("Univision") and Hispanic Broadcasting

1. See Howard Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 406 (2006).

Corporation (“HBC”), leading broadcasters of Spanish-language television and radio, respectively.² This Article contends that the decision to define an antitrust market by the broadcast’s language raises concerns about its constitutionality and its effect on competition and democracy. If inaccurate, the market definition may not only distort competition, it may limit the broadcaster’s freedom of speech and the public’s ability to hear that programming. The First Amendment protects speakers and those who wish to hear that speaker’s message.³

The debate about the relevant market for broadcasters engaged in Spanish-language programming continued to reverberate in the 2007 sale of Univision to a consortium of private equity firms. Federal Communications Commission (“FCC”) Commissioner Michael Copps criticized the FCC’s approval of the Univision sale for its failure to decide “whether Spanish-language programming constitutes a separate market segment that must be analyzed in isolation from English-speaking programming.”⁴ In its 2008 approval of the purchase of Clear Channel by a consortium of private equity firms, the FCC did not address the issue of whether the Clear Channel stations programmed in Spanish competed in a separate market, in contrast to the DOJ’s definition of the relevant market for analyzing the effect of the potential Clear Channel buyers’ equity and voting interests in Univision as “the provision of advertising time on Spanish-language radio stations.”⁵ Future transactions involving stations

2. U.S. v. Bain Capital LLC, Civ. Action 1:08-cv-00245, Complaint ¶ 22 (D.C. Feb. 13, 2008), [hereinafter *Bain, Clear Channel Complaint*]. In 2003, the DOJ approved the merger of Univision and HBC with conditions and defined the relevant market as “Spanish-language radio.” See Complaint for Injunctive Relief, U.S. v. Univision Comm’n Inc., No. 1:03CV00758, 2003 WL 23192527 (D.D.C. Dec. 22, 2003) at *4, ¶ 11, [hereinafter *Univision HBC Complaint*].

3. See *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (“[T]he right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”).

4. See *Shareholders of Univision Communications, Inc.*, (Transferor) and Broadcast Media Partners (Transferee), Memorandum Opinion and Order, 22 FCC Rcd 5842, 5876 (2007) (“*Univision BMP MO&O*”).

5. Clear Channel is the largest radio company in the United States controlling licenses for 1,172 radio stations and 35 television stations as of January 2008, and is also a leading provider of Spanish and bilingual radio programming. See Existing Shareholders of Clear Channel Communications, Inc. (Transferors) and Shareholders of Thomas H. Lee Equity Fund VI, L.P., Bain Capital IX, L.P., and BT Triple Crown Capital Holdings III, Inc. Transferees For Consent of Transfer of Control of Various Licenses, BTCCT-200661212AVR, et. al., Memorandum Opinion and Order ¶ 4 (January 24, 2008) [hereinafter *FCC Clear Channel MO&O*]; Press Release, Clear Channel, Clear Channel

programming in Spanish or other non-English languages that are sufficiently large to trigger antitrust merger review will require similar analysis of the role of language in defining an antitrust market.⁶

The FCC's reconsideration of the limits on how many radio and television stations an entity may control locally or nationally and its evaluation of the cross-media ownership rules limiting newspaper ownership of television stations in the same market highlighted the role of Spanish-language media in the overall media market.⁷ The FCC has

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/PressRelease.aspx?PressReleaseID=1243>. The FCC approved Clear Channel's sale to a consortium of private equity investors on January 24, 2008, requiring divestiture of the stations in 42 markets which did not comply with the FCC's multiple ownership rules. *FCC Clear Channel MO&O*, ¶ 11. The DOJ approved the transaction on February 13, 2007, pending Clear Channel's divestiture of certain stations including those Clear Channel stations that broadcast in Spanish in Houston, Las Vegas and San Francisco. *U.S. v. Bain Capital, et. al.*, Civ. Action 1:08-cv-00245, Competitive Impact Statement, Sec. III. C. 2. and IV. A. 2 (D.C. February 13, 2008), *available at*: <http://www.usdoj.gov/atr/cases/f230100/230166.htm>. [hereinafter *Bain, Clear Channel Competitive Impact Statement*]. The merger is expected to close by July 30, 2008 if approved at a special Clear Channel shareholders meeting. Press Release, Clear Channel, Clear Channel Sets Shareholders Special Meeting Date Of July 24, 2008 – Record Date of June 19, 2008, (June 12, 2008), *available at*: <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=2221>.

6. Pursuant to the Hart-Scott-Rodino Antitrust Improvement Acts, 15 U.S.C. §18(a)(2000) participants in a potential merger transaction must file a notice with the DOJ or the Federal Trade Commission ("FTC") requesting preclearance for the merger if as of 2007, the size of the transaction is \$59.8 million or higher. *See* Federal Trade Commission, 72 Fed. Reg. 2692 (Jan. 22, 2007). Acquisitions valued at between \$59.9 million and \$239.2 million are subject to preclearance if either the acquired or the acquiring person has net sales or total assets of \$119.6 million or more and the other person has net sales or total assets of \$12 million or more. *Id.* Many media transactions reach these thresholds because of the size and number of assets involved, particularly in transactions involving multiple stations. In practice, small transactions involving single stations might be allowed without preclearance, but as the company and size of the transactions grow, this market definition will become critical to the ability of companies specializing in Spanish-language broadcasting to expand.

7. *See* In Re. 2006 Quadrennial Regulatory Review - Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al., *Further Notice of Proposed Rulemaking*, MB Docket No. 06-121 (July 24, 2006), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-06-93A1.pdf. In that proceeding, the FCC examined its rules limiting cross-ownership of newspapers and television stations in the same market, as well as the rules that govern ownership of television or radio stations within a geographical market. To develop the factual basis for that proceeding, the FCC commissioned a study by Daniel Shiman, "News Operations," which revealed that between 2002-2005, after ABC, NBC, and CBS, Spanish-language television stations owned by or affiliated with Telemundo, Univision, or TV Azteca broadcast on average more minutes of news than stations affiliated with Fox or PBS, although stations owned and operated by Fox broadcast on average more news minutes than each of the Spanish-language networks. *See* Daniel Shiman, News Operations, Study 4, Table I-4, pg. I-35 (Sept. 20, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A5.pdf. These statistics demonstrate the critical role of Spanish-language media in disseminating news to the American public, and underscore the

previously rejected the contention that radio markets should be categorized by language based on evidence of ease of entry between program languages, and its conclusion that a market divided by program language would violate the ownership limits set by Congress in the Telecommunications Act of 1996.⁸ However, the FCC has granted several temporary and long-term waivers to Spanish- and non-English-language television and cable stations to foster program diversity.⁹ The DOJ has not yet articulated its position on whether there is a separate Spanish-language television market.

Using First Amendment jurisprudence, Section II of this Article analyzes the standard of review for evaluating a market definition based on a broadcast's language. It rejects the application of the commercial speech doctrines because the market definition is based on the language of the broadcast program, not the advertisement. It argues that the lower level of scrutiny used for structural broadcast regulations is an inappropriate standard for analyzing the market definition because it subjects certain types of speech (broadcasts in Spanish) and certain types of speakers (Spanish-language broadcasters) to higher burdens than their English-language counterparts, while limiting audiences' ability to hear Spanish-language broadcast speech. Section III examines whether defining an antitrust market by the broadcast's language is a content-based distinction requiring strict scrutiny or a content-neutral distinction necessitating intermediate scrutiny.¹⁰

This Article uses social science research on Spanish- and English-language radio and television to evaluate the nexus between language and

importance of analyzing the role of Spanish-language media in the context of media ownership rules, as well as antitrust law.

8. See *Shareholders of Hispanic Broad. Corp. & Univision Commc'n, Inc.*, 18 F.C.C.R. 18834, 18869-70 (2003) (noting frequency of program format changes between English and Spanish programming as evidence of lack of separate markets defined by program language) [hereinafter *FCC HBC UVN Order*]. See also Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(a), (b)(1), (c)(1)(B) (1996) (codified at 47 U.S.C. § 303(a) (2000)) [hereinafter *1996 Telecomm. Act*].

9. See Catherine J.K. Sandoval, *Antitrust Law on the Borderland of Language and Market Definition: Is There a Separate Spanish-Language Radio Market?*, 40 U.S.F.L. REV. 381, 415 n.203 (2006).

10. See *Turner Brdcast. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 642 (1994) (content-based regulations on speech require the most exacting scrutiny); *Id.* at 662 (content-neutral restrictions that impose an incidental restriction on speech are subject to intermediate scrutiny) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (content-neutral regulations on speech must not "burden substantially more speech than is necessary to further the government's legitimate interests.")).

content. The research indicates that Spanish- and English-language media offer distinctive content. For example, Spanish-language news emphasizes issues of importance to the Latino community and contains far more information about Latin America than is found on English-language newscasts. In 2003, the most common image of Latinos broadcast on English-language television newscasts featured would-be immigrants scaling a border fence.¹¹ Entertainment programs also embody messages about inclusion or exclusion evidenced in the paucity of Latino characters on English-language television and the portrayal of Latinos and Asians as speaking English with heavy accents.¹² These “regimes of representation”¹³ influence audience program choices. The overlap between language and content suggests that defining an antitrust market based on a program’s language is content-based.

While English- and Spanish-language radio and television broadcasts are characterized by distinctive content, that distinctiveness alone does not establish a separate antitrust market. Attempts to categorize and separate media markets may run afoul of constitutional and antitrust principles when the markets drawn do not reflect the diversity of media usage or ease of entry between the allegedly separate markets.¹⁴ Section IV A explores the “substitution” by broadcasters, audiences, and advertisers between program language, and advertiser alternatives if faced with a price increase by merging parties. The dynamic movement by broadcasters, advertisers, and audiences between languages and program formats indicates that media markets are not rigidly divided by language, but operate as one marketplace of ideas, with audience and advertiser loyalty contestable between languages.

Section IV B offers a “supply-side” antitrust analysis that focuses on broadcaster “entry” or substitution between languages and its relationship

11. See Roberto Suro, *Changing Channels and Crisscrossing Cultures: A Survey of Latinos on the News Media* 12-13, Pew Hispanic Center (Apr. 19, 2004), available at <http://pewhispanic.org/files/reports/27.pdf>; See Federico Subvervi et al., NETWORK BROWNOUT REPORT 2005: THE PORTRAYAL OF LATINOS AND LATINO ISSUES ON NETWORK TELEVISION NEWS, 2004 WITH A RETROSPECT TO 1995, QUANTITATIVE AND QUALITATIVE ANALYSIS OF THE COVERAGE, at 12, Nat’l Assoc. of Hispanic Journalists (June 2005), available at <http://www.nahj.org/resources/Brownout%20Report%202005.pdf>.

12. See Dana E. Mastro & Elizabeth Behm-Morawitz, *Latino Representation on Primetime Television*, 82 JOURNALISM & MASS MEDIA COMM’N. Q. 110, 125 (Spring 2005).

13. See Esteban Del Rio, *The Latino/a Problematic: Categories and Questions in Media Communication Research*, 30 COMM’N. YEARBOOK. 387, 390 (2006) (defining “regime of representation” as the “repertoire of imagery and visual effects through which ‘difference’ is represented at any one historical moment.”).

14. See Sandoval, *supra* note 9, at 385 n.9, 393-402, 427-37 (raising the issue of whether an antitrust market defined by language is a content-based distinction and focusing on whether antitrust standards used to define a relevant market regarding substitution and market participation were met).

to consolidation strategies designed to reap economies of scale. In defining the market, the DOJ assumed that no English-language broadcaster would change its format to compete directly in Spanish.¹⁵ This assumption was wrong at the time of the merger between HBC and Univision.¹⁶ Subsequent format changes by broadcasters moving between English- and Spanish-language programming confirmed that this assumption was misguided.¹⁷ Media consolidation following the 1996 Telecommunications Act made economies of scale a driving force in radio competition.¹⁸ Broadcasting in different languages has become another tool in the arsenal of consolidated competitors who seek advertisers and audiences through multilingual, multiformat and multiple-station approaches.

Whether language is the appropriate basis for defining a broadcast antitrust market has yet to be subject to rigorous judicial review in a contested proceeding.¹⁹ This results in part from the fact that many merger parties enter a consent decree with the DOJ (which is usually filed at the same time as the complaint) and agree to certain conditions, rather than challenge the market definition, because they value speedy closure of the deal.²⁰ Alternatively, the parties may agree to the DOJ's conditions based upon the Agency's market definition, and its resulting analysis of market

15. See Competitive Impact Statement, *United States v. Univision Comm. Inc.*, No. 1:03CV00758, 2003 WL 23192527, at *5, *8 (D.D.C. Dec. 22, 2003) [hereinafter *Univision Competitive Impact Statement*].

16. See FCC HBC UVN Order, *supra* note 8.

17. See Joe Howard, *United They Stand*, RADIO INK, June 19, 2006, available at <http://www.radioink.com/listingsEntry.asp?ID=446892&PT=industryqa> (discussing entry of traditionally English-language broadcasters into Spanish-language radio).

18. The Telecommunications Act eliminated the national cap on the number of AM or FM radio stations a single entity could control and established ownership limits per geographical market based on the number of radio stations in the market, prompting a wave of consolidation. See 1996 Telecomm. Act, *supra* note 8. See Mari Castañeda Paredes, *The Transformation of Spanish-language Radio in the U.S.*, 10 J. RADIO STUDIES 1 at 8 (2003) (consolidation in Spanish-language media has mirrored the industry consolidation trends since the 1996 Telecomm. Act).

19. The District Court for the District of Columbia approved of the consent decree between Univision and the DOJ, which was based on the market definition as "Spanish-language radio," but the court did not examine in depth, nor did the parties challenge that market definition. See *United States v. Univision Commc'n, Inc.*, 2003 WL 23192527, 2004-1 Trade Cases (CCH), ¶ 74,242 (D.D.C. Dec. 22, 2003). Univision was willing to accept the market definition because it valued the opportunity to acquire HBC more than the conditions imposed on the company.

20. See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 580 (2d ed. 2006) ("Faced with a premerger challenge, parties are likely to abandon the transaction or push for a settlement that allows completion of as much of the acquisition as possible without contested litigation.").

concentration and participation, to dissuade the DOJ from filing a complaint in U.S. District Court challenging the deal, and instead grant "early termination" approval of the merger.²¹ Thus, scholarly examination of whether language appropriately defines an antitrust market is critical since the merger process limits incentives for parties' legal challenges.

In a previous article, *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*,²² I argued that the DOJ's definition of the relevant antitrust market as "Spanish-language radio" did not meet the standard for a submarket definition which the Supreme Court articulated in *Brown Shoe v. United States*.²³ Although the DOJ's declared intent in defining the market as "Spanish-language radio" and ordering divestiture remedies was to protect and foster competition in the sale of advertising time on Spanish-language radio,²⁴ the justification for the market definition and attendant remedies rest on the assumption that the DOJ has correctly defined the market. The antecedent question is: What is the relevant market and what are the constitutional limits on using language as the basis to define an antitrust market in broadcasting?

II. THE COMMERCIAL SPEECH DOCTRINE AND LOWER LEVELS OF SCRUTINY USED FOR STRUCTURAL BROADCAST REGULATIONS DO NOT GOVERN ANTITRUST MARKET DEFINITION ANALYSIS

A. *Distinguishing Broadcast Programming From Commercial Speech*

A media merger's potential effect on advertising prices raises the question of whether the commercial speech doctrine should govern the analysis of constitutional issues involved in the market definition. Restrictions on commercial speech related to the economic interests of the speaker, such as regulations of advertising, are subject to a lower constitutional standard of review than noncommercial speech.²⁵

The DOJ views advertisers, rather than the audience, as a radio station's direct customers. Thus, the DOJ's primary concern in regulating radio mergers is to make sure that the advertisers are not faced with

21. *Id.* at 579 ("Today's cases tend to be settled through largely confidential agency-party negotiation without the benefit of publicly available judicial records and opinions.").

22. See Sandoval, *supra* note 9, at 381-86.

23. 370 U.S. 294, 325 (1962).

24. See Univision HBC Complaint, *supra* note 2, at 10.

25. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 562-63 (1980).

increased prices because of the merger.²⁶ In the HBC/Univision merger analysis, the DOJ's stated concern was that Univision's "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."²⁷

Broadcasters air programming in order to "create" audiences. Professors Webster and Phalen observed that "audiences are not naturally occurring 'facts,' but social creations."²⁸ Broadcasters commodify their audience, selling advertisers access to their listeners or viewers through a broadcaster's advertising time.²⁹

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the Supreme Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."³⁰ The Court distinguished between "speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," according "lesser protection to commercial speech than to other constitutionally guaranteed expression."³¹ The Court concluded, "the protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."³²

The market definition used by the DOJ in the Univision/HBC merger was based on the language of the broadcast, not the language of the advertisement.³³ Since the market definition is not rooted in the

26. See Response to Public Comments, *United States v. Univision Commc'ns Inc.*, No. 1:03CV00758, 2003 WL 23192527, ¶ 3 (D.D.C. Dec. 22, 2003), available at <http://www.usdoj.gov/atr/public/comments/201510.htm> [hereinafter *Response to Public Comments*]. In contrast, the Communications Act of 1934 codified that broadcast spectrum should be regulated "in the public interest," requiring that the FCC determine that a transfer of a station license would serve the "public interest, convenience, and necessity." Commc'n Act of 1934, 47 U.S.C. § 310(d) (2000).

27. Univision Competitive Impact Statement, *supra* note 15, at Sec. 1.

28. JAMES G. WEBSTER & PATRICIA F. PHALEN, *THE MASS AUDIENCE, REDISCOVERING THE DOMINANT MODEL* xiii (1997).

29. See AMÉRICA RODRIGUEZ, *MAKING LATINO NEWS, RACE, LANGUAGE, CLASS 5* (1999); PHILIP M. NAPOLI, *AUDIENCE ECONOMICS: MEDIA INSTITUTIONS AND THE AUDIENCE MARKETPLACE* (2003).

30. *Central Hudson*, 447 U.S. at 561.

31. *Id.* at 562, 563.

32. *Id.* at 563.

33. On many occasions, the language of the advertisement and the program broadcast are not the same. See, for example, Jose Antonio Vargas, *Spanish Ads on English TV? An Experiment*, WASH. POST, May 31, 2005, at C01 (Vehix.com ran Spanish-language

advertisement but in the broadcast programming, the commercial speech doctrine should not apply. Neither the market definition nor the remedy regulated the advertiser's commercial speech, though it sought a competitive market for the advertisers' speech. The market definition was not based on the language in which the advertisers broadcast, and did not seek to regulate the manner or content of advertising. Rather, it distinguished the market by the language of the non-commercial speech, the language of the news, public affairs, music and entertainment programming.

Though a broadcaster may air commercials, its programming does not inherently propose a commercial transaction. It offers free to the public music, entertainment, news, or public affairs programming. The fact that such programming may be supported by ads does not transform the programming itself into a commercial proposition for the audience.³⁴

Since the market definition is based on the programming language and not the advertising, the commercial speech doctrine does not govern the analysis of these issues. Accordingly, we examine other constitutional doctrines to determine the appropriate standard of review.

B. Antitrust Market Definition Should be Subject to a Higher Level of Scrutiny Than That Used for Structural Regulation of Broadcasting

Many broadcast regulations have been subjected to a lower level of constitutional scrutiny on the theory that such regulation was needed to ensure efficient use of the public airwaves. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld against a First Amendment challenge the FCC's ability to impose certain affirmative obligations on broadcasters and

commercials during an English-language broadcast of WWE Raw and WWE Raw Zone.); Della de la Fuente, Advertising: ¿Que? An All-Spanish Ad on English Language TV, Brandweek, Nov. 19, 2007, available at http://www.brandweek.com/bw/magazine/article_display.jsp?vnu_content_id=1003674384 (Spanish language ads promoting Las Vegas tourism airing on English-language programming on A&E, Bravo, Fox Sports Net and Logo). On March 29, 2007, the cable channel Spike TV showed a commercial in Spanish by the Ad Council and the National Transportation Safety Board on the benefits on wearing seatbelts during an English-language broadcast of *Voyager*. (Spike TV, March 29, 2007).

34. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 504 n.11 (1981) (distinguishing between commercial speech and individuals who have a commercial interest in protected speech such as radio stations and newspapers). See also *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964) (paid editorial advertisements in newspapers are entitled to full First Amendment protection). The lower level of scrutiny for commercial speech reflects in part the government's concern for regulating "forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563. Preventing deception is important for regulation of advertising, but is not generally applicable to news or entertainment programming rooted in a broadcaster's exercise of editorial discretion.

licensing constraints.³⁵ *Red Lion* was based on the need to regulate the airwaves given the limited amount of useable radio spectrum.³⁶ In light of spectrum scarcity, the FCC has been allowed to impose certain regulations on broadcast content, such as rules for political broadcasting advertisements during election season, prohibitions on indecent speech between 6 a.m. and 10 p.m., rules to prevent undue interference to other spectrum uses and multiple ownership regulations.³⁷ Those obligations and constraints apply equally to all broadcasters.

In reviewing regulations prohibiting the broadcast of indecent programs during hours when children were likely to listen, the Court commented in *FCC v. Pacifica* that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”³⁸ The justification for this lower level of protection rests on the pervasiveness of broadcasts, the medium’s accessibility to children and the scarcity of spectrum.³⁹

The Communications Act of 1934 required the FCC to promulgate regulations in the public interest to promote the efficient use of the radio spectrum.⁴⁰ The principal goal of U.S. antitrust analysis has become maintaining a competitive market.⁴¹ Evaluating constitutional constraints

35. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 385-86, 388-90 (1969).

36. *Id.* at 376-77.

37. See Codification of the Comm’n’s Political Programming Rules, 6 F.C.C.R. 5707 (1991); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Red Lion*, 395 U.S. 367, 385-86, 388-90; 47 C.F.R. § 73.21 (a) (3) (FCC regulation requiring certain classes of AM stations to reduce their power at night to prevent their strong nighttime signals from drowning out other signals). See also *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 809 (1978) (upholding the FCC’s decision to prohibit common ownership of newspapers and television stations in the same geographic market as a structural regulation of use of the airwaves that was not arbitrary and capricious); *Ruggiero v. FCC*, 317 F.3d 239, 244 (2003) (“Minimal scrutiny is appropriate to the indirect effect upon speech that may attend ‘structural’ regulation of the broadcast industry.”).

38. *Pacifica*, 438 U.S. at 748; *Reno v. ACLU*, 521 U.S. 844, 866-67 (1997).

39. *Pacifica*, 438 U.S. at 748-49. Since broadcasting is governed by statute and an extensive regulatory scheme, it has not been subject to “public forum” analysis except in extremely limited cases such as a televised debate of federal political candidates. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674-75 (1998) (forum analysis is incompatible with editorial discretion given by statute to broadcasters as public trustees).

40. See Commc’n Act of 1934, 47 U.S.C. § 310(d) (2000). *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (public interest standard is the touchstone of authority for the FCC). The FCC is required to ensure that mergers of broadcast licensees serve the public interest per section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d).

41. See Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986); SULLIVAN & GRIMES, *supra* note 20, (“If there is universal agreement on one

on the regulation of speech created by this market definition does not require the DOJ to adopt the FCC's charge of ensuring that mergers serve the public interest.⁴² Instead, it ensures the market is properly defined, consistent with antitrust law and constitutional limits. In its quest to protect competition, the government must not impose an undue burden on speech.⁴³

Defining a radio market by language is arguably a government-imposed distinction of a different character than those upheld under the *Red Lion* or *Pacifica* standard. Not all broadcast regulations warrant a lower level of constitutional scrutiny. In *FCC v. League of Women Voters*, the Court stated that "although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern."⁴⁴ The Court added, "these restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues, e.g., *Red Lion*."⁴⁵

In *League of Women Voters*, the Court struck down a 1981 Amendment to the Public Broadcasting Act of 1967 that prohibited non-commercial public broadcasters which received federal funds from airing editorials.⁴⁶ The statute was aimed at a particular type of speech: "expression of editorial opinion."⁴⁷ The Court characterized opinions about "controversial issues of public importance," as speech which "has always rested on the highest rung of the hierarchy of First Amendment values."⁴⁸ The Court held that the prohibition was a content-based restriction which "singles out noncommercial broadcasters and denies them the right to

antitrust goal, it is that antitrust should strive for the *efficient allocation of society's available goods and services.*") (emphasis in original).

42. See Shelanski, *supra* note 1, at 417 (the fact that most media merger cases do not pose a First Amendment problem does not necessarily mean that constitutional concerns will be absent should the basis for an antitrust enforcement action be content based).

43. The First Amendment provides: "Congress shall make no law...abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Corporations are accorded the protections of the First Amendment. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

44. *League of Women Voters*, 468 U.S. at 380.

45. *Id.* The FCC subsequently abandoned the requirement that broadcasters present balanced views in news reports, a regulation which was known as the Fairness Doctrine. Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5057, recon. denied, 3 F.C.C. 2d 2035 (1988).

46. 468 U.S. at 364.

47. *Id.* at 381.

48. *Id.*; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression, it is the essence of self-government").

address their chosen audience on matters of public importance.”⁴⁹ The Court held the Amendment did not meet the test of strict scrutiny and was overbroad in trying to promote balance by prohibiting certain speakers from engaging in certain types of speech.⁵⁰ It found the burdens on those prohibited from editorializing to be too large to outweigh the interests that the government cited to support the legislation.⁵¹

Similarly, defining a market by the broadcast’s language encompasses all who broadcast exclusively in Spanish because of the choice to use the Spanish language. While on its face it does not prohibit or limit a type of speech such as editorializing, its effect may be more pernicious. It sweeps in all who choose to express their messages in Spanish, targeting both particular speakers (those who broadcast in Spanish) and types of speech (any messages broadcast in Spanish). As discussed below, this classification creates disincentives to broadcast in Spanish because it makes it more difficult for companies who specialize in Spanish to grow than those who specialize in English programming. The market definition also ignores the extent to which broadcasters supply programming and sell advertising time in multiple languages within a geographic market, suggesting that language is part of a competitive spectrum, rather than a defining characteristic of a market. Accordingly, the burdens on speech must be weighed against the interests and evidence to support the market definition.

As currently devised, the market definition should also apply to English-language broadcasters who would be defined as competing in an “English-language radio market.” While this suggests a parity that was absent in *League of Women Voters*, it results in uneven burdens because of the size of the markets. Like the broadcasters in *League of Women Voters*, those on one side of the line can engage in more speech than those on the other side of the line. The larger number of market participants in the alleged “English-language market” yields lower concentration levels than the purported “Spanish-language market” when the Herfindahl, Hirshman Index (“HHI”), a tool used by the DOJ to measure market concentration, is applied.⁵² If these definitions are accepted without a structural analysis of

49. 468 U.S. at 384.

50. *See id.* at 395, 399.

51. *See id.* at 402.

52. “Market concentration is a function of the number of firms in a market and their respective market shares The HHI is calculated by summing the squares of the individual market shares of all the participants.” Market share in turn depends on how the market is defined. Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41557–58, § 1.5

competition between Spanish- and English-language broadcasters, factors influencing participation in the market, and an analysis of the likelihood of crossover by broadcasters in supplying programming in different languages, English-language broadcasters will be allowed more growth than those which specialize in Spanish, burdening the speech of potential Spanish-language broadcasters and their audiences. While the government may remedy antitrust violations in appropriate circumstances, the First Amendment values at stake in defining a broadcast market by programming language require a higher standard of review.

Heightened scrutiny may also be appropriate where the government distinguishes between potential speakers or types of speech. In *Bell South Corporation v. United States*, the parties challenged the Cable Act of 1984 and the FCC's regulations that prevented telephone companies and their affiliates from providing video services over telephone networks.⁵³ The district court found that the Act singled out telephone companies and their affiliates for special treatment; only they were subject to the law's proscriptions.⁵⁴ The court held that the restrictions on speech that only apply to certain types of speakers "must do more than rationally relate to a legitimate governmental interest . . . the degree of scrutiny . . . is either strict . . . or intermediate."⁵⁵

Arguably speakers in both the English and Spanish-language programming markets as defined by the DOJ are subject to the same market share and concentration analysis. However, that analysis depends on the premise that the market is correctly defined in the first place. If the market is defined incorrectly, it singles out the class of speakers in the smaller alleged Spanish-language market for harsher treatment. The thesis that language is the appropriate dividing line for an antitrust market in broadcasting should therefore be subject to either intermediate or strict scrutiny as a content-neutral or content-based distinction, respectively, rather than the lower level of scrutiny used for structural broadcast regulations.

(April 2, 1992, revised April 8, 1997) (F.T.C. never codified), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm> [hereinafter *Horizontal Merger Guidelines*]. The DOJ has defined both the English and Spanish markets by language rather than by format such as Spanish Contemporary as opposed to Tropical or Rock as opposed to Adult Contemporary. See *Bain, Clear Channel Complaint*, *supra* note 2, ¶ 17, 22, 31, 35 (HHI analysis is based on market shares in English for all formats in which Cumulus and Clear Channel compete and in Spanish for all formats in which Univision and Clear Channel compete). See also Sandoval, *supra* note 9, at 437-45 (analyzing the HHI's design to magnify concentration levels in markets with few participants, and examining structural factors affecting market participation in Spanish-language radio).

53. See *Bellsouth Corp. v. United States*, 868 F. Supp. 1335, 1337 (1994).

54. See *id.* at 1341-42.

55. *Id.* at 1339.

III. IS DEFINING AN ANTITRUST RADIO MARKET BY LANGUAGE A CONTENT-BASED OR A CONTENT-NEUTRAL DISTINCTION?

A. *Standard of Review*

The Supreme Court's analysis in *Turner I* provides a guide for determining whether regulations of broadcast speech that do not merit the lower level of scrutiny of *Pacifica* or *Red Lion* are content-based or content-neutral.⁵⁶ At issue in *Turner I* was the Cable Television Consumer Protection and Competition Act of 1992, which required cable system operators to offer local, over-the-air broadcast stations as part of their basic cable package.⁵⁷ That regulation is known as "must-carry" because of the requirement that cable operators carry broadcast signals.⁵⁸ To determine the appropriate level of constitutional scrutiny, the Supreme Court held that the threshold question is whether the regulation was content-based or content-neutral.⁵⁹

In *Turner I*, the Supreme Court stated that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."⁶⁰ "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."⁶¹ The Court emphasized in *R.A.V. v. City of St. Paul*, "[c]ontent-based regulations are presumptively invalid."⁶²

56. *Turner Brcdst. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 642-43 (1994).

57. Cable Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

58. See *Turner I*, *supra* note 10 at 630.

59. *Id.* at 642. Professor Wilson Huhn criticizes this "categorical approach" requiring a determination of whether the classification is content-based or content-neutral on the basis that most laws contain both elements. Wilson R. Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral*, 79 IND. L.J. 801, 814 (2004).

60. *Turner I*, *supra* note 10, at 642 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

61. *Turner I*, *supra* note 10, at 643 (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (ordinance prohibiting the posting of signs on public property "is neutral—indeed it is silent—concerning any speaker's point of view.")).

62. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Professor Barry McDonald's analysis of the twenty cases decided between 1980 through 2006 "where a majority of the Court has applied a strict scrutiny standard for reasons of content discrimination," noted that the Court "has found every one to be unconstitutional." (emphasis added) Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1365 (2006).

Content-based restrictions on speech require strict scrutiny, the demonstration of a compelling state interest in the regulation, and the choice of the least restrictive means to accomplish that objective.⁶³ A content-based distinction must be narrowly tailored to achieve a compelling state interest.⁶⁴ If strict scrutiny is required, the government must use the least restrictive means.⁶⁵

Content-neutral regulations require intermediate scrutiny and a showing of a substantial government interest in the regulation or government distinction.⁶⁶ A content-neutral regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests."⁶⁷

To justify regulation of speech, the government must do more than "posit the existence of the disease sought to be cured."⁶⁸ "[The government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."⁶⁹ The government bears the burden of demonstrating that it has a compelling or substantial interest in ameliorating the alleged harm, and that its remedy is appropriately tailored.⁷⁰ The Court concluded in *Turner I*, "[o]ur precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."⁷¹

B. Is the Market Definition Content-Based or Content-Neutral?

The *Turner I* Court observed that cable systems were subject to the must-carry regulation because of the technical medium—cable, not broadcast—that they used to transmit their messages.⁷² Must-carry regulations burdened cable systems and benefited over-the-air television broadcasters irrespective of the content of the over-the-air broadcast programs.⁷³ The must-carry requirement was triggered by the technical

63. See *Turner I*, 512 U.S. at 642.

64. See *Boos v. Berry*, 485 U.S. 312, 321 (1988).

65. See *id.* at 326.

66. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

67. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

68. *Turner I*, 512 U.S. at 664 (1994) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

69. *Turner I*, 512 U.S. at 664.

70. See *Ark. Writers Project Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (government bears burden of proof for content-neutral regulation).

71. *Turner I*, 512 U.S. at 642 (citing *Simon & Schuster v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

72. See *Turner I*, 512 U.S. at 645.

73. See *id.*

distinction between the facilities used to reach the audience. The Court in *Turner I* commented:

It is true that the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry: Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored.⁷⁴

The technical distinctions between the cable and broadcast media determined whether cable companies had to carry broadcasters under the must-carry rules, and created the imperative for the must-carry regulation to prevent cable companies from using their facilities to reduce competition from broadcasters.

In contrast, an antitrust market defined by the broadcast's language is not founded on technical distinctions such as those that led the *Turner I* Court to conclude that the must-carry regulation was content-neutral. Spanish- and English-language radio and television broadcasters use the same spectrum to transmit their messages.

Spanish-language broadcasters do not use a different "media" in the sense that over-the-air broadcast television uses a different telecommunications medium from cable. The dividing line between Spanish and English-language broadcasters is based on programming language, not the technical transmission method or spectrum efficiency goals such as limiting interference so other licensed stations can be heard.⁷⁵

The *Turner I* Court noted that the interests cited to support must-carry were not related to "the suppression of free expression" or to the "content of any speakers' messages."⁷⁶ The must-carry rules were content-neutral because the "objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint or format, but rather to preserve free television programming for the 40 percent of Americans without cable."⁷⁷ Thus, one of the Cable Act's goals was to preserve structural competition between over-the-air television and cable.⁷⁸

74. *Id.*

75. See *Red Lion supra* note 35, at 385-86, 388-90; 47 C.F.R. § 73.21 (a) (3) (FCC regulation requiring certain classes of AM stations to reduce their power at night to prevent their strong nighttime signals from drowning out other signals).

76. *Turner I*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

77. *Turner I*, 512 U.S. at 646 (1994).

78. See *id.* at 652.

Defining a media market by the broadcasts' language is not designed to preserve structural competition between Spanish- and English-language radio, akin to competition between cable and over-the-air television. In fact, the market definition *assumes no competition between Spanish- and English-language media*. It seeks to preserve a competitive market *within* Spanish-language radio and selects which stations fall within which market based upon the choice to broadcast messages in Spanish.

The government's principal purpose in evaluating the HBC/Univision merger was to determine whether the merger would lessen competition in the relevant market which it defined as "the provision of Spanish-language radio advertising time," and it proposed a remedy requiring that Univision divest of some of its equity and rights in Entravision to "preserve competition in the sale of radio advertising time on Spanish-language stations"⁷⁹ On its face, promoting competition within a media market is similar to one of Congress's principal motives in the must-carry regulations at issue in *Turner I*: promoting fair competition in the market for video programming.⁸⁰

The government might argue that this market definition is a content-neutral structural regulation to preserve competition within each broadcast language market, rather than a content-based regulation that seeks to regulate speech within markets. However, even if conceived of as a structural regulation, that goal rests on the assumption that there is a separate market to be dominated. The government bears the burden of proof that the markets are separate, the antitrust aspects of which are analyzed in Section IV of this Article. For constitutional analysis, the use of language to define the market raises the question of whether that dividing mechanism is a proxy for content.

In its "Response to Public Comments" about the HBC/Univision merger, the DOJ emphasized that it "is not the role of the United States to use the antitrust laws to regulate actual content . . . [but the] United States does seek to ensure that content is determined in a competitive marketplace . . ." ⁸¹ The DOJ concluded that the "relief in the Final Judgment that protects advertising competition also serves to protect individual audience members by maintaining vigorous competition between the Spanish-

79. See Univision Competitive Impact Statement, *supra* note 15, at Sec. I, VI.

80. *Turner I*, 512 U.S. at 662. Through must-carry, Congress also sought to promote the widespread dissemination of information from a multiplicity of sources. *Id.*

81. *Response to Public Comments*, *supra* note 26, at 12. Professor Shelanski observed that antitrust law is "primarily concerned with competition and economic performance, defined in terms of prices and quantities of goods (or services) in a given market." Shelanski, *supra* note 1, at 397. This contrasts with a "democracy model of the public interest . . . [which] sees diversity and quality of programming as values in themselves." *Id.*

language radio stations owned by Univision/HBC and those owned by Entravision.”⁸²

Claiming that the decision to define and regulate the market is neutral as to content does not make it so. *League of Women Voters* demonstrates that an ostensibly content-neutral justification (i.e., safeguard the public's right to a balanced presentation of public issues through the prevention of either governmental or private bias) will not save a government regulation from a First Amendment challenge when it targets speech by content (i.e. expression of editorial opinion) and creates undue burdens on protected speech.⁸³ While the justification of protecting competition may appear neutral on its face, we must examine whether choosing language as the characteristic that delineates the market is based on content, and weigh its effects on protected speech.

Like the ban against a noncommercial broadcaster editorializing in *League of Women Voters*, the market definition affords opportunities for expression in large part according to the language the broadcaster chooses. Defining a market by language sweeps in all content, ideas, and views, depending on whether the speaker chooses to express them in Spanish or English. The broadcasters are slotted into this market definition based on *the language they choose to express their messages*.⁸⁴ The choice of language is laden with meaning, and as discussed below, is often closely associated with the content and character of the message.

In *Cohen v. California*, the Supreme Court recognized the choice of words as speech, rather than a “manner” of speech or conduct.⁸⁵ The Court observed in *Cohen* that “words are often chosen as much for their emotive as their cognitive force” such that the emotive aspect “may often be the more important element of the overall message sought to be communicated.”⁸⁶ The Court held that an attempt to ban expression of speech based on the language of the message is a regulation of speech, not

82. Response to Public Comments, *supra* note 26, at 12.

83. *League of Women Voters*, 468 U.S. at 380, 381.

84. See *Asian American Bus. Group v. City of Pomona*, 716 F. Supp. 1328, 1330 (C.D. Ca. 1989) (Language is expression of national origin, culture and ethnicity. Consequently, a regulation requiring that signs in a foreign alphabet devote half of the space to English alphabetical characters is a regulation of content).

85. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (reversing a criminal conviction for disturbing the peace by offensive conduct when a man wore a jacket through the courthouse corridor bearing the words “Fuck the draft.”).

86. *Id.*

a regulation of conduct which has an incidental effect on speech.⁸⁷ While *Cohen* involved a choice of words within the English-language, its logic indicates that the choice to use a different language should also be viewed as a regulation of speech, not conduct.

In *Ruiz v. Hull*, the Arizona Supreme Court reviewed the constitutionality under federal and state law of an amendment to the Arizona state constitution requiring that the "State and all political subdivisions of [the] State shall act in English and in no other language."⁸⁸ The court rejected the ballot proponent's argument that "the decision to speak a non-English language does not implicate pure speech rights, but rather only affects the 'mode of communication.'"⁸⁹ The court concluded that the ban on government speech in a language other than English "bars communication itself."⁹⁰ Thus, "its effect cannot be characterized as merely a time, place, or manner restriction because such restrictions, by definition, assume and require the availability of alternative means of communication."⁹¹ The Arizona Supreme Court applied strict scrutiny to the amendment because it impinged on First Amendment rights.⁹²

The decision to speak in a particular language is a choice rooted in speech itself. In *Yniguez v. Arizonans for Official English*, the Ninth Circuit concluded, "[s]peech in any language is still speech and the decision to speak in another language is a decision involving speech alone."⁹³ The Ninth Circuit found that a regulation requiring the state of Arizona to "act" in English did not single out one word for repression, "but rather entire vocabularies."⁹⁴ Similarly, defining a market by language may restrict not just words or subject matters, but a wide range of expression implied by the choice of language.

In *Asian American Business Group v. City of Pomona*,⁹⁵ the district court reviewed the City of Pomona's ordinance requiring a sign containing "foreign" alphabetical characters to devote half of its advertising copy space to English text and display the address in Arabic numerals. The court determined that "[b]y requiring one half of the space of a foreign alphabet

87. See *id.* at 18, 26.

88. *Ruiz v. Hull*, 957 P.2d 984, 987 (9th Cir. 1998) (internal citations omitted), *cert. denied*, 525 U.S. 1093 (1999).

89. *Id.* at 998.

90. *Id.*

91. *Id.*

92. See *id.* at 991.

93. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995) (vacated on other grounds because plaintiff lacked standing after she quit her job with the state of Arizona).

94. *Id.* at 935.

95. 716 F. Supp. 1328 (C.D. Cal. 1989).

sign to be devoted to English alphabetical characters, the ordinance regulates the cultural expression of the sign owner.”⁹⁶ In light of cases finding a tie between language and national origin, the court emphasized that “[c]hoice of language is a form of expression as real as the textual message conveyed. It is an expression of culture.”⁹⁷ It concluded, “[s]ince the language used is an expression of national origin, culture and ethnicity, regulation of the sign language is a regulation of content.”⁹⁸ Thus, it applied strict scrutiny to the ordinance as a content-based regulation.

Under the *Asian American Business Group* standard, separating radio markets by language is a content-based distinction, closely linked with expression, culture and national origin. Professor Christopher Cameron has written, “language is not merely a *carrier* of content, whether latent, or manifest. Language itself *is* content . . . and [manifests] the large-scale value-laden areas of interaction that typify every speech community.”⁹⁹

This analysis indicates that the decision to define markets by the broadcast’s language is based on speech. This conclusion is supported by the fact that the choice of language often conveys distinctive messages. An analysis of the social science research on media content discussed in the following section demonstrates that Spanish- and English-language broadcasters tend to offer distinctive content. These differences indicate

96. *Id.* at 1330.

97. *Id.*

98. *Id.* The correlation between the market definition based on language and the predominance of Latino- and Spanish-speakers in the audience raises the question of whether the market definition violates the requirement of equal protection under the law. See U.S. CONST. amend. XIV, § 4. In *Ruiz v. Hull*, the Arizona Supreme Court concluded that a ban on Arizona officials “acting” in a language other than English violates the Fourteenth Amendment as applied to the states because it impinges on the fundamental right to participate equally in the political process and the right to petition the government. *Ruiz v. Hull*, 957 P.2d 984, 1002 (9th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999). Language-based regulation may also raise equal protection issues. See Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1248 (2000) (noting that the Supreme Court in *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) prohibited national origin discrimination against non-English speaking students, and “treated non-English speaking ability as a substitute for race, color, or national origin.”). An examination of an equal protection claim is beyond the scope of this Paper, but this issue emphasizes the speech and political rights at stake.

99. Christopher David Ruiz Cameron, *How the Garcia Cousins Lost their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261, 279 (1998) (quoting Fishman, *The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society*, in 1 ADVANCES IN THE SOCIOLOGY OF LANGUAGE, 217, 219).

that the choice of language is closely intertwined with content, as well as culture and meaning. This association calls into question whether language is a content-neutral means of distinguishing antitrust markets or is infused with content-based criteria and should be subject to a strict scrutiny.

C. *Benefits and Burdens Imposed by Distinguishing Radio Markets by the Broadcast's Language: Distinctive Content of Spanish-Language Broadcasts*

Programming content and language are often intertwined. For example, original programming broadcast in Spanish seeks to serve its audience through news, public affairs, and entertainment programming geared toward that audience. Though a market definition based on a radio broadcast's language may encompass any subject matter or viewpoint, Spanish-language media often conveys a different message than English-language media. This indicates that the criteria used to identify which broadcasters fall within the Spanish-language radio market definition are infused with content.

In determining that the must-carry regulations were not based on content or viewpoint, the Court in *Turner I* determined that the must-carry regulations imposed burdens and conferred benefits without reference to the content of speech.¹⁰⁰ Congress imposed the must-carry rule on all but the smallest cable operators, regardless of the content of their broadcasts.¹⁰¹ The rules required cable operators to carry all full-power, over-the-air stations, regardless of the content of their programs.¹⁰² The Court concluded, "[n]othing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select."¹⁰³

In defense of the market definition, the government might argue that it is defined by language, not the underlying content of the programming. However, language is not a neutral layer that can be peeled away from content. Original programming intertwines content and language so that the language is one manifestation of distinctive content. Many audience members listen to or watch Spanish-language media because of the distinct content it offers. Not only is the content conveyed in Spanish, but the news and public affairs information is more specifically tailored to the interests

100. *Turner I*, 512 U.S. at 642. Professor McDonald suggests assessing "whether the government's interests (the benefits to society) justify or warrant the claimed infringement (the costs to individual and societal interests of the First Amendment)." McDonald, *supra* note 62, at 1413.

101. See *Turner I*, 512 U.S. at 661.

102. *Id.* at 630-31 (cable operators are required to carry the signals of all "full-power" television broadcasters).

103. *Id.* at 644.

of Spanish-speaking audiences. When the first twenty-four-hour Spanish-language station began broadcasting in Seattle, Washington in 2002, the station managers expressed their desire that “listeners [could now] be entertained as well as informed about an immigration law or local police shooting.”¹⁰⁴

The relationship between language, culture, and content is exemplified by the role Spanish-language and bilingual radio stations played in spreading the news of the pro-immigrant protest marches in 2006. In Los Angeles, Spanish-language radio disc jockeys (“DJs”) played a key role in attracting more than 500,000 people to a peaceful demonstration on March 25, 2006.¹⁰⁵ The protesters rallied against a bill then pending in Congress proposing to make undocumented immigrants and those who assist them felons and to build a 700-mile fence along the U.S.-Mexico border.¹⁰⁶ After a Los Angeles summit, Spanish-language DJs agreed to promote the marches on the air and to urge participants to bring American flags.¹⁰⁷

In urging people to attend the pro-immigrant rallies, the DJs did more than “report the news.” They used the medium to inform people of upcoming events and to encourage participation in the marches to support immigrants’ rights.¹⁰⁸ Professor Felix Gutierrez observed that the “strong advocacy of the disc jockeys and other Spanish-language media contrasted sharply with other outlets.”¹⁰⁹ Gutierrez commented, “[They] played it more as how will this affect you, how will it affect your job, how will it affect your kids. . . . They were much closer to the audience in terms of direct effect.”¹¹⁰ These examples demonstrate the “pull” factors that draw audiences to Spanish-language programming because of its unique content, tailored to the interests of Spanish-speaking and Latino audiences.

104. Castañeda Paredes, *supra* note 18, at 9.

105. Teresa Watanabe & Hector Becerra, *The Immigration Debate: How DJs Put 500,000 Marchers in Motion*, L.A. TIMES, Mar. 28, 2006, at A1.

106. *Id.*

107. *See id.*

108. Encouraging massive turnout at the demonstrations may have also served the interests of the corporations such as Univision, whose DJs urged people to attend. It manifested the size of the audience of those radio stations, making companies like Univision, which shortly thereafter put itself up for sale to private equity bidders, a more attractive acquisition target.

109. Watanabe & Becerra, *supra* note 107, at A11.

110. *Id.* at 5.

Audiences may also tune to Spanish-language and bilingual media to escape stereotypes of Latinos on English-language television.¹¹¹ A study by the National Hispanic Academy for the Arts and Children Now found that in 2001, Latinos constituted only two percent of primetime television characters, down from three percent the previous year.¹¹² Of the forty-eight Latinos on primetime, forty percent were classified as tertiary characters, not relevant to the plot, while Latinos in nonrecurring roles were portrayed in lower socio-economic status occupations compared to primary and secondary characters.¹¹³ Similar trends were found in a 2004 study of Latinos on primetime television.¹¹⁴ After surveying the ethnic landscape of over 100 primetime sitcoms, dramas, reality shows, news magazines, and other programs, researchers determined that nearly forty percent of all primetime programs had all-white regular casts.¹¹⁵ The study, spanning three years, indicated that the number of Latino regular characters decreased slightly, even as the Latino population has grown.¹¹⁶

Even when Latinos are portrayed, they are often typecast to conform to preconceived images. ABC's *Ugly Betty* resorted to stereotype in 2007 when one character came home unannounced during the middle of the day and met for the first time her maid who had worked for her for fourteen years and spoke English with a pronounced Spanish accent.¹¹⁷ The actor who played the maid, Liz Torres, was also a regular character on the television show *Gilmore Girls* where she spoke in perfect American English and ran a dance studio.¹¹⁸

111. See Maria T. Padilla, *Hispanics Decry Negative Image in Media; Stereotypes Cause Many Latinos to Turn to Spanish-Language Broadcasts, Leaders Say*, ORLANDO SENTINEL, Sept. 12, 1997, at A1.

112. National Hispanic Foundation for the Arts, *Prime Time for Latinos: Report II: 2000-2001 Prime Time Television Season (2001)*, available at <http://www.hispanicarts.org/Media/REPORT2.pdf>.

113. *Id.*

114. See Chon Noriega & Alison Hoffman, *Looking for Latino Regulars on Prime-Time Television: The Fall 2004 Season*, UCLA CHICANO STUDIES RES. CTR. RES. REP. No. 4, at 2 (2004), available at http://www.chicano.ucla.edu/press/reports/documents/crr_04Dec2004_000.pdf.

115. *Id.*

116. See *id.*

117. *Ugly Betty* (ABC television broadcast, Feb. 7, 2007). Produced by Mexican-born Selma Hayek, *Ugly Betty* is an English-language adaptation of the successful Spanish-language soap opera *Yo Soy Betty La Fea*. See <http://abc.go.com/primetime/uglybetty/index?pn=about> (last visited Mar. 21, 2008).

118. For a list of Liz Torres' acting credits, see TV Guide, <http://www.tvguide.com/celebrities/liz-torres/190440> (last visited Mar. 21, 2008). See also Russell Robinson, *Casting or Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 24 (2007) ("[S]tudios cast [actors of color] specifically because of their race and expect them to perform it, often in line with negative traits historically ascribed to their group."). "Latinos, Asian Americans and Native Americans are stamped as inherently 'exotic' or

Professors Mastro and Behm-Morawitz found in their content analysis of primetime television during the 2002 season that Latino characters had the heaviest accents on television.¹¹⁹ They noted: “cultivation theory proposes that long-term exposure to television’s stable set of selective messages ultimately shifts viewers’ social perceptions toward the television version of reality, regardless of its accuracy.”¹²⁰ The portrayal of Latinos as the “youngest, most inappropriately dressed characters, with the heaviest accents on television” may, in the researchers’ view, “ultimately result in a belief in the authenticity of these characterizations.”¹²¹ Entertainment speech embodies messages about priorities, inclusion, exclusion, stereotypes, or the lack thereof. These images not only shape perceptions of Latinos, they may also shape media habits as audiences react to stereotypes.¹²²

However, some Spanish-language media are just as likely to employ stereotypes or archetypes.¹²³ While Spanish-language media are not free of the stereotypes that permeate the United States, some watch programs involving Latino characters or listen to music by Latinos as an alternative to the exclusion of accented stereotypes that often characterize English-language media.

‘foreign’ . . . [which] often requires actors to adopt different mannerisms such as exaggerated accents.” *Id.* at 25. “Latino actors who speak fluent English report being told to ‘fake a Spanish accent to be more convincingly Hispanic.’” *Id.* (citing Mireya Navarro, *Actors in All-Latino Cast Savor a “Historic Moment,”* N.Y. TIMES, Dec. 2, 2003, at E1.)

119. Mastro & Behm-Morawitz, *supra* note 12, at 125.

120. *Id.* at 111

121. *Id.* at 125-26 (citing George Bergner et al., *Growing up with Television: Cultivation Process*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 43-67 (Jennings Bryant & Dolf Zillmann, eds., Lawrence Erlbaum Assoc. 2002)).

122. Richard Delgado and Jean Stefancic commented, “[t]he reigning First Amendment metaphor—the marketplace of ideas—implies a separation between subjects who do the choosing and the ideas or messages that vie for their attention.” Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Ills?*, 77 CORNELL L. REV. 1258, 1280 (1992). Instead, “[w]e subscribe to a stock of explanatory scripts, plots, narratives and understandings that enable us to make sense of—to construct—our social world.” *Id.* Consistent with cultivation theory, speakers (including broadcasters and advertisers), reinforce existing narratives, and audiences interpret those messages in light of pre-existing narratives and conceptions.

123. See Jack Glascock & Thomas Ruggiero, *Representations of Class and Gender on Primetime Spanish-Language Television in the United States*, 52 COMM’NS Q. No. 4, 399 (Fall 2004) (study of Spanish-language telenovelas (prime-time soap operas) found light skinned characters were represented more frequently and in major roles, whereas dark skinned characters when they were shown at work appeared primarily in service jobs or as law enforcement).

Nor is English-language news programming neutral in its treatment of Latinos. English-language “news discourses continue to marginalize Latinas/os as sources and subjects.”¹²⁴ In its annual “Network Brownout Report,” the National Association of Hispanic Journalists (“NAHJ”) reviewed the Vanderbilt University Television News Archives, analyzing two weeks’ of news coverage in 2005 on ABC, NBC, and CBS.¹²⁵ They found that out of an estimated 12,600 stories aired by the big three networks, only 0.8% were exclusively about Latinos or Latino-related issues.¹²⁶ The top five topics for news stories on the big three networks about Latinos were categorized as “Domestic Government” (twenty stories), crime (nineteen stories), human interest (eighteen stories), immigration (fifteen stories), and sports (twelve stories).¹²⁷ The previous year “[i]mages of undocumented immigrants crossing the U.S.-Mexico border was a common visual in most stories.”¹²⁸ NAHJ’s reports indicate that the time the big three English-language networks devote to news about Latinos and topics chosen does not reflect the size or contributions of the U.S. Latino population.

Professor Juan F. Perea commented, “Latinos were rendered invisible through the lack of portrayal in the visual and print media.”¹²⁹ Professor Hall used the term “regimes of representation” to refer to the “repertoire of imagery and visual effects through which ‘difference’ is represented at any one historical moment.”¹³⁰ Professor Del Rio observed that the “dominant, historical regime of representation for Latinas/os consists of invisibility, marginalization, and negative stereotypes.”¹³¹ These content-based regimes of representation create “push” factors driving audiences from some English-language media to Spanish-language media.

The Pew Hispanic Center’s 2004 study of both Spanish- and English-speaking Latinos and their media usage revealed that forty-four percent of

124. Del Rio, *supra* note 13, at 402 (citing Paula M. Poindexter, Laura Smith, L., & Don Heider, *Race and Ethnicity in Local Television News: Framing, Story Assignments and Source Selections*, 47 J. OF BROAD. AND ELECTRONIC MEDIA 524-536 (2003)).

125. Daniela Montalvo & Joseph Torres, *Network Brownout Report: 2006*, Nat’l Ass’n of Hispanic Journalists, available at <http://www.nahj.org/resources/2006Brownout.pdf>.

126. *Id.* at 4.

127. *Id.*

128. Subvervi et al., *supra* note 11, at 12. See also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1563 (2005) (using social cognition research to argue that local news, referring to English-language news, contains stereotypes of race that serve to reinforce pre-conceived ideas about race and group identity).

129. Juan Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 966 (1995).

130. Stuart Hall, *The Spectacle of the “Other” in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES* 223-290 (S. Hall, ed., 1997).

131. Del Rio, *supra* note 13, at 390.

Latinos believe that English-language media contribute to a negative image of Latinos in the United States.¹³² This concern is highest among Latinos who get all of their news from English-language media.¹³³

The absence or stereotyping of Latino characters on English-language television may also drive viewers to watch Spanish-language television or listen to Spanish-language radio to catch a glimpse of their culture or to learn about topics relevant to Latinos. Professor Castañeda Paredes observed that many American-born Latinos consume the media products their parents or grandparents use (including media in Spanish) in a search for “cultural content and ethnic identification.”¹³⁴ The Pew Hispanic Center found that coverage of news from Latin America is the strongest draw for use of Spanish-language media.¹³⁵ One study of Univision’s newscasts found that news from Latin America constituted forty-five percent of its news topics.¹³⁶ Additionally, fifteen percent of Univision’s television news stories were about U.S. Latinos,¹³⁷ a far higher number than observed on U.S. English-language networks. While this may reflect Univision’s “transnational and transcontinental approach to Hispanic culture,”¹³⁸ it also indicates that its content is distinctive. Berta Castañer, News Director of the Chicago Univision affiliate stated, “We serve the needs nobody else will, because they don’t have to. . . We give them [the audience] information they can’t get elsewhere.”¹³⁹

A 2007 study the FCC commissioned as part of its review of media ownership rules revealed that between 2002 and 2005, after ABC, NBC, CBS, and stations owned and operated by Fox, Spanish-language television stations owned by or affiliated with Telemundo were on average the fifth largest providers of news, followed by Univision in sixth place and TV Azteca in seventh place.¹⁴⁰ Telemundo stations provided an average of 2.6 hours of news per day during the two weeks per year studied, while Univision broadcast 2.3 hours per day, and TV Azteca television broadcast

132. Suro, *supra* note 11, at 3.

133. *Id.*

134. Castañeda Paredes, *supra* note 18, at 8.

135. Suro, *supra* note 11, at 13.

136. *Id.*

137. America Rodríguez, *Objectivity and Ethnicity in the Production of the Noticiero Univision*, 13 CRITICAL STUDIES IN MASS. COMM. 66-68 (1996).

138. Arlene Dávila, *Latinos Inc.: The Marketing and Making of a People* 159 (2001).

139. Rodríguez, *supra* note 29, at 146.

140. Shiman, *supra* note 7, n. 19, Table I-4, pg.I-35.

1.9 hours of news per day.¹⁴¹ Those stations, which primarily broadcast Spanish-language programming, provided more news minutes than Public Broadcasting System (PBS) which averaged 1.8 hours of news daily during the study period, and almost twice as many news minutes as the former UPN, which averaged twenty-nine minutes of news daily and WB, which averaged thirty-eight minutes a day.¹⁴² Thus, the “big seven networks” for news in the United States include three Spanish-language networks.

This significant commitment to news by Spanish-language television stations not only informs viewers, it increases democratic engagement. Professors Oberholzer-Gee and Waldfogel found that local Spanish-language television news increases Latino voting.¹⁴³ Like the editorial which the Supreme Court accorded the highest rung of First Amendment protection in *League of Women Voters*,¹⁴⁴ this is exactly the democratic participation the First Amendment seeks to engender and First Amendment analysis should safeguard.

The radio industry is facing competition from other sources such as satellite radio, portable music players and online music sources and its listening audience has declined somewhat, especially among young people.¹⁴⁵ However, Hispanic radio listening increased by one percent between 2002 and 2006 for all Hispanic age groups except men ages 18-24 and teenage Latinas.¹⁴⁶

For Latino adults, fifty-eight percent reported getting some news from the radio on an average weekday, reflecting greater reliance on radio as a news source than for the U.S. population overall.¹⁴⁷ Of Latino radio listeners, forty-three percent get their news from English-language radio, while thirty-four percent get their news from Spanish-language radio and twenty-three percent get their news from both English- and Spanish-language stations.¹⁴⁸ For foreign-born Latinos living in the United States,

141. *Id.* n.19, pg. I-17, I-35. Data calculations by Professor Sandoval based on Shiman’s table I-4 (divide total news minutes reported in table I-4 by 14 for the number of days recorded in the study to derive the number of news minutes per network per day, then divide that number by 60 to express those minutes in hours.)

142. *Id.*

143. Felix Oberholzer-Gee & Joel Waldfogel, *Media Markets and Localism: Does Local News en Español Boost Hispanic Voter Turnout?* (HARVARD BUSINESS SCHOOL WORKING PAPER NO. 07-062, 10 2006), available at <http://www.nber.org/papers/w12317.pdf>.

144. *League of Women Voters*, 468 U.S. at 380, 381.

145. See Arbitron, *Radio Today 2008 Edition* at 86 (2008), available at www.arbitron.com/downloads/radiotoday08.pdf.

146. Arbitron, *Hispanic Radio Today 2007 Edition* at 56, available at <http://www.arbitron.com/downloads/hispanicradiotoday07.pdf>

147. Suro, *supra* note 11, at 12-13.

148. *Id.*

fifty-six percent get their radio news in Spanish,¹⁴⁹ indicating that forty-four percent are using English-language radio for their news. These statistics emphasize that many Latinos rely on both English and Spanish media, and highlight the public stake in any regulation of broadcast speech. If audiences are driven to Spanish-language media by English-language media's stereotyping or lack of inclusion of Latino characters, or to Spanish-language media's distinctive entertainment or news programming, audiences are in fact choosing Spanish-language media for its content or even its viewpoint. Spanish-language media is not simply a translation of English-language media but offers something different. Content and language are tightly interwoven. In this manner, regulation of competition within a language is regulation of content, mandating strict scrutiny to ensure that the means are narrowly tailored to a compelling state interest.

One factor in determining the contours of an antitrust submarket requires identification of a product's "peculiar characteristics and uses."¹⁵⁰ While audience use of Spanish-language stations to receive programming or information tailored to the interests of Spanish-speaking and Latino listeners or viewers may indicate that the product has "peculiar characteristics or uses," that distinctiveness represents the essence of protected First Amendment values. The close relationship between content and the broadcast's distinctiveness suggest the need for constitutional scrutiny of potential content-based regulation.

A radio or television broadcast often involves speech about news and public affairs, which has been given the highest rung of First Amendment protection.¹⁵¹ In its 2007 approval of the private equity consortium BMP's acquisition of Univision, the FCC commented:

Because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment's free press guarantee, licensees are entitled to the broadest discretion in the scheduling, selection and presentation of news programming.¹⁵²

Public policy relies on broadcast station owners with "respect to diversification of content . . . editorial comment and the presentation of

149. *Id.*

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

151. *League of Women Voters*, 468 U.S. at 365 (holding that opinions about controversial issues of public importance have always rested on the highest rung of the hierarchy of First Amendment values).

152. *UVN BMP MO&O*, *supra* note 4, at 5856 (citing *NBC v. FCC*, 516 F.2d 1101, 1112-13, 1119-20, 1172 (D.C. Cir. 1974); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973)).

news.”¹⁵³ Speech and the protections of the First Amendment underlie broadcasters’ ability and duty to control the messages communicated on their stations.

In the context of the Voting Rights Act, the Supreme Court deferred to Congress’s judgment that the ability to read or understand Spanish-language newspapers, radio, and television is as effective a means of obtaining political information as the ability to read English.¹⁵⁴ The vital role of Spanish-language media in informing people of news and public affairs underscores the need to balance the government’s purported interest in protecting competition based on its conception of a radio market separated by program language with its effect on speech. Two sets of speech rights are at stake: that of the broadcaster who wishes to transmit a message in Spanish, and that of the audience that wishes to receive such messages.

D. *The Public’s Interest in Broadcasters’ Speech*

Language-based regulations of speech restrict not only the speaker’s discretion in communicating a message, but also the ability of the potential recipient of that speech to hear the message. In *Ruiz v. Hull*, the Arizona Supreme Court expressed concern that an ordinance requiring the State of Arizona to “act” only in English would have severe consequences not only for Arizona’s public officials and employees, “but also for the many thousands of persons who would be precluded from receiving essential information from government employees and elected officials in Arizona’s governments.”¹⁵⁵ The *Ruiz* court expressed concern that the amendment “deprives limited- and non-English speaking persons of access to information . . . when multilingual access may be available and may be necessary to ensure fair and effective delivery of governmental services to non-English speaking persons.”¹⁵⁶ Professor Perea observed, “[s]ometimes [Latinos] are silenced through prohibitions on the use of Spanish.”¹⁵⁷ Such restrictions not only mute the speaker, they also deprive the listener of the opportunity to hear that speech and incorporate it into their speech.

In *Yniguez*, the Ninth Circuit stressed the First Amendment interests of the potential recipients of speech in holding a ban on state speech in a

153. *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (1973).

154. *Katzenbach v. Morgan*, 384 U.S. 641, 655 (1966).

155. *Ruiz*, 957 P.2d at 991.

156. *Id.* at 997. See also, Initiative Petition No. 366, 46 P.3d 123 (Ok. 2002) (holding Oklahoma ballot initiative that would require all Oklahoma state documents, transactions, proceedings and meetings be in English unconstitutionally infringes freedom of speech, freedom to petition the government for redress, as well as upon the legislature’s policy-making function).

157. Perea, *supra* note 1519, at 966.

language other than English to be unconstitutional.¹⁵⁸ The Ninth Circuit commented:

[i]t is frequently the need to convey information to members of the public that dictates the decision to speak in a different tongue. If all state and local officials and employees are prohibited from doing so, Arizonans who do not speak English will be unable to receive much essential information concerning their daily needs and lives.¹⁵⁹

In holding that regulation of language is regulation of content, the Ninth Circuit observed that, “[t]o call a prohibition that precludes the conveying of information to thousands of Arizonans in a language they can comprehend a mere regulation of ‘mode of expression’ is to miss entirely the basic point of First Amendment protections.”¹⁶⁰

The Supreme Court emphasized in *R.A.V. v. St. Paul* that the “First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”¹⁶¹ While regulating by language does not appear to disfavor any subject, it limits those who choose to express their ideas through a particular idiom. Broadcasters would have to choose whether to program in English (or possibly in a bilingual format depending on how much Spanish is spoken) to avoid the narrowly defined Spanish-language market. Firms may be dissuaded from specializing in Spanish-language programming because the smaller market size and number of participants limits a broadcaster’s ability to grow more than if it broadcast in the larger “English-language market” or in both languages.¹⁶² These incentives create a burden on speech in Spanish that is greater than the burden on English-language broadcasters because the smaller Spanish-language market as defined makes it more difficult to grow by providing more Spanish-language programming.

158. *Yniguez*, 69 F.3d at 920.

159. *Id.* at 936.

160. *Id.*

161. *R.A.V.*, 505 U.S. at 377, 391, 394 (citing *Simon & Schuster v. Members of New York State Crime Victims Board*, 502 U.S. 105, 116 (1991); *Ark, Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987)).

162. Many broadcasters air programming in Spanish and English such as Entravision, Univision, Clear Channel, Liberman, Bustos Media, Border Media Partners, SBS, and Radio One, Multicultural. For a list of arbitron-rated stations by format and owner, see Radioandrecords.com (select “format,” follow the hyperlink to select a market such as Dallas, San Antonio, Seattle or Chicago). Broadcasters may air programming in different languages to reach a broader range of listeners and advertisers in a market. Defining an antitrust broadcast market by language creates incentives to avoid concentration in Spanish since it will limit a broadcaster’s ability to grow by acquiring other stations that also program in Spanish.

While the DOJ's intent may have been to ensure a competitive Spanish-language radio market,¹⁶³ the DOJ's market definition may actually discourage firms from providing Spanish-language programming through several stations in a geographical market. If a broadcaster wants to specialize in Spanish in a geographic market, the market definition limits its expansion alternatives. If the broadcaster already controls several stations in a market, it can convert some or all of those stations to another language without any regulatory approvals. If, however, it needs to acquire another station to expand its program offerings and that proposed acquisition requires antitrust approval, the small number of broadcasters defined as Spanish-language market participants and concomitant high market shares will make it very difficult for a Spanish-language broadcaster to expand by acquiring a station already programmed in Spanish. For example, in requiring that Clear Channel divest its stations currently programmed in Spanish in Houston, Las Vegas and San Francisco as a condition of approval of the equity firm buyout of Clear Channel, the DOJ found in February 2008 that "Clear Channel and Univision's combined Spanish-language listener share exceeds 75 percent in Houston, 73 percent in Las Vegas, and 70 percent in San Francisco."¹⁶⁴ These high market shares are a consequence of the fact that only three firms broadcast in Spanish in Houston and garner enough audience members for the Arbitron rating service to report their rankings, and four firms have such rating levels in San Francisco.¹⁶⁵

Consequently, if the deal requires antitrust approval, a Spanish-language broadcaster can only expand in a geographical market if it intends to provide more Spanish-language programming by changing the format of stations it already controls or acquiring stations which currently broadcast

163. Univision HBC Complaint, *supra* note 2, at 10.

164. *Bain, Clear Channel Complaint*, *supra* note 2, at ¶ 35.

165. *See, e.g.*, Radio & Records, <http://www.radioandrecords.com/RRWebsite/> (follow "ratings" hyperlink; then follow "Houston" hyperlink) (showing that Houston, Texas as of May 2007 has eight stations broadcasting in Spanish or Latin formats with ratings high enough to be reported by Arbitron, broadcast by three companies: Univision, Clear Channel and Lieberman) (last visited April 14, 2008); *see, e.g.*, Radio & Records, <http://www.radioandrecords.com/RRWebsite/> (follow "ratings" hyperlink; then follow "San Francisco" hyperlink) (showing that San Francisco, California as of April 2008 has seven stations broadcasting in Spanish or Latin formats with ratings high enough to be reported by Arbitron, broadcast by four companies: Univision, Clear Channel, SBS and San Joaquin) (last visited April 14, 2008). Although the data indicates that some broadcasters are able to offer more than one Spanish-language station in a market, the market definition limits the acquisition and sale options for those broadcasters to a greater extent than English-language broadcasters who have similar market shares because there are more market participants in the English-language market as currently defined. This is true even though some broadcasters such as Clear Channel offer programming in both English and Spanish and sell advertising packages that cross languages.

in English, and are thus classified as participating in a different market. Stations currently programmed in the English language are likely to sell for more than stations with comparable audience ratings broadcasting in Spanish because the advertising industry pays more for English-speaking than Spanish-speaking audiences.¹⁶⁶

The increased costs of growth for Spanish-language broadcasters as compared to English-language broadcasters indicate that the “reasonable alternatives” are not equivalent. Those restrictions would also affect broadcasters when they want to sell or trade stations with other broadcasters. If the broadcaster wants to sell a radio station currently programmed in Spanish to another company that also broadcasts in Spanish in that geographic market, the market definition would regulate that transaction if the deal is valued above the dollar threshold that requires DOJ antitrust approval.

The role of content in the market definition is illustrated by contrasting its effects to content-neutral regulations such as a city’s prohibitions against posting signs on public property. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, the Court stressed that the City’s proscriptions against posting signs were “neutral,” indeed “silent” as to the viewpoint expressed in the signs; all signs were prohibited from being affixed to the City’s property, regardless of what they said.¹⁶⁷ The Supreme Court in *Taxpayers for Vincent* stressed the even-handedness of the application of the regulation against signs on public utility poles and property.¹⁶⁸

Defining a radio market by language distinguishes between programming in Spanish and English as if the signs in *Taxpayers for Vincent* were distinguished based on the *language used* to express their

166. Stations programmed in English are often more expensive to buy because advertisers pay more to reach non-minority audiences, resulting in higher station values when stations are sold based on a multiple of revenues earned. See 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 fifty percent racial or ethnic minorities earned less advertising revenues than those whose audiences were predominantly nonminority). Forcing Spanish-language broadcasters to grow by purchasing the assets of an English-language station raises their capital costs as compared to English-language broadcasters who may grow by buying either English or Spanish-programmed stations.

167. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

168. *Id.* at 804. See also David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 220-21 (1987).

message. The effect of the market definition is to permit less speech in Spanish than in English, as if the ordinance in *Vincent* permitted fewer signs to be erected in Spanish than in English. While not expressly based on the “content” expressed in the signs, the distinction would be made based on the content of the sign as indicated by the language the speaker chose to express her message. That limitation extends beyond the effects (visual clutter of the signs or the need to promote competition) to the content of the messages.

In *Police Dept. of City of Chicago v. Mosley*, the Supreme Court invalidated an ordinance which permitted peaceful picketing near the school regarding school-labor management disputes but prohibited all other types of peaceful picketing.¹⁶⁹ “The operative distinction is the message on a picket sign.”¹⁷⁰ The Court emphasized, “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁷¹

Effectively, the market definition sets an artificial limit on how much speech in Spanish a broadcaster can air in a geographic market, unrelated to how much Spanish-language programming audiences desire. This limit is also incongruent with the ownership limits imposed by Congress in the 1996 Telecommunications Act.¹⁷² Defining a broadcast market by language may also result in requiring divestitures of stations currently programmed in the English-language, however, it is easier to reach that threshold if the station is programmed in Spanish. The DOJ also required Clear Channel to divest one station currently programmed in English in Houston, and two stations currently programmed in English in Cincinnati as a condition of the 2008 approval of the equity firm buyout of Clear Channel, finding “Clear Channel and CMP’s [Cumulus’] combined advertising revenue share exceeding 37 percent in Houston and 65 percent in Cincinnati.”¹⁷³ Based on the market shares for what is effectively the English-language market, the DOJ concluded the merger would yield “post-acquisition HHIs of approximately 2,100 in Houston and approximately 4,700 in Cincinnati.”¹⁷⁴ While this illustrates that defining a market by language may also result in high concentration levels in the market effectively defined by its English-language broadcasts, the larger number of broadcasters offering English-language programming produces lower average HHIs than in the alleged

169. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

170. *Id.*

171. *Id.*

172. 1996 Telecomm. Act, *supra* note 8 at 110 Stat. 110.

173. *Bain, Clear Channel Competitive Impact Statement*, *supra* note 5, Sec. III. C. 1. and IV.

174. *Bain, Clear Channel Complaint*, *supra* note 2, ¶ 32.

Spanish-language market. Nor does the market definition take account of cross-selling between languages as broadcasters offer programming and advertising packages in both languages.

Regulations which impose a financial burden on speech because of its content operate as a disincentive to speak, raising First Amendment concerns.¹⁷⁵ This market definition effectively discourages specialization in Spanish-language broadcasting within a geographical market, creating disincentives that burden broadcasters and audiences' speech interests.

Nor is it sufficient that broadcasters may expand in other geographic markets. The 1996 Telecommunications Act permits broadcasters to control up to eight radio stations in a large market.¹⁷⁶ By permitting more consolidation for English-format broadcasters within a geographic market than for Spanish-format broadcasters, the market definition affords more opportunities for English-language broadcasters to develop and capitalize on local economies of scale. It also allows English-language broadcasters to reap the benefits of those economies from the larger English-language radio market as currently defined, and bring them to the allegedly separate Spanish-language market. Consequently, the market definition creates a burden on speech in Spanish that also limits a broadcaster's ability to finance its growth into other geographic markets.

In *R.A.V. v. City of St. Paul*, the Court quipped, "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."¹⁷⁷ Drawing antitrust markets for media by language discourages companies from specializing in Spanish-language programming in a local market because their growth will be limited, while ignoring the entry of English-language broadcasters into Spanish-language programming. Effectively, Spanish-language broadcasters have one hand tied if they specialize in Spanish, while English-language broadcasters are free to compete in the alleged "Spanish-language market" and have more room to grow in the "English-language market."

These disincentives affect not only the broadcaster's speech, but the audience's ability to receive programming, including news and public

175. *Simon & Shuster Inc.*, 505 U.S. at 117 (1991).

176. 1996 Telecomm. Act, *supra* note 8 at 110 Stat. 110.

177. *R.A.V.*, 506 U.S. at 392.

affairs, in Spanish or other non-English languages.¹⁷⁸ The First Amendment protects the communication, its source, and its recipient.¹⁷⁹ The interests of the recipients, especially those who rely on Spanish-language broadcasts for news and public affairs information, highlight the importance of the First Amendment values at stake in defining the market by language.

E. Defining a Broadcast Market by Language is Not a Reasonable Time, Place or Manner Restriction

The Supreme Court has recognized that “time, place or manner” restrictions that involve speech may be entitled to intermediate rather than strict scrutiny. Some regulations have been upheld as reasonable time, place, and manner restrictions where they focused on ameliorating the negative “secondary effects” of the speech, rather than on regulating the speech itself. A regulation of speech may in some instances be justified without reference to the content of the regulated speech.¹⁸⁰

In *Renton v. Playtime Theatres, Inc.*, the Court distinguished between a zoning regulation that applied only to “adult theaters,” which sought to regulate the “effects” of adult theaters on nearby schools and areas where children were present, as opposed to the actual “content” of the programs shown therein.¹⁸¹ The government evaluated the actual or potential harmful effects from the proximity of the adult theaters to the schools, justifying the zoning regulation, despite its effect on speech.

Unlike *Renton*, the “Spanish-language radio market” depends on the premise that the DOJ has correctly defined the market—the area of potential harm—if competition is unduly constrained. In *Renton*, the physical presence of the theaters in relation to the schools defines the zone of potential concern about “secondary effects.” However, the “secondary effects” justification is circular where the rationale depends on the speech itself. The government must show more than concern about competition in Spanish-language radio to prove that a separate Spanish-language radio market exists.

178. See *Bd. of Education v. Pico*, 457 U.S. 853, 867 (1982) (“the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”).

179. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976).

180. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); McDonald, *supra* note 62, at 1306-07 (criticizing this secondary effects rationale emphasizing, “[t]o call a selective content restriction ‘content-neutral’ because it purportedly targets the ‘secondary effects’ of the speech is oxymoronic—it is by definition targeting effects associated with the selected type of speech”).

181. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46-47 (1986).

Protecting competition within the “Spanish-language radio market” posits a purpose based on the alleged “effects” of speech in Spanish as a result of a merger: the effect on competition, rather than the content of the speech itself. Though the acquisition of monopoly power is an undesirable consequence, those presumed “effects” do not also delineate the market. The DOJ has the burden of proving the existence of a “Spanish-language media market,” and cannot presume such a market to regulate its alleged consequences.

The Supreme Court emphasized that in order to be classified as content-neutral, regulations concerning speech must provide “reasonable alternative avenues of communication.”¹⁸² In *Turner I*, the Supreme Court relied in part on the fact that cable companies could not “avoid or mitigate its [must-carry] obligations under the [Cable] Act by altering the programming it offers to subscribers” to conclude that the must-carry regulations were content-neutral.¹⁸³

The opposite is true for an antitrust market defined by language. A broadcaster’s choice to air solely Spanish-language programming brings it squarely within a more restrictive market definition. If the broadcaster chooses to air a mix of Spanish- and English-language content, depending on how much English it uses, the broadcaster may shift to a larger market with fewer antitrust restrictions on expansion. If a broadcaster switched to English-language programming, it would move to a large market that would permit more expansion. By changing its programming, a broadcaster could avoid the harsh effects of this regulation and enjoy greater latitude to expand.

A language-based market definition effectively tells broadcasters ‘change the language of your content and you will not be subject to this classification.’ However, a program’s language is often inextricably linked with the content itself. Where it is original content designed and tailored for those who wish to watch or listen in that language, its messages are distinct, not a mere translation of a message in another language. The inability to escape an artificially restrictive market definition except by changing program language (and, thereby program content) is quintessential content-based regulation. Despite the lack of apparent animosity toward particular views, the language-based market definition creates incentives and disincentives to broadcast content as indicated by the

182. *Id.* at 42 (approving city’s decision to prohibit adult theaters from locating 1,000 feet from a school, but allowing them to do business in certain designated locations).

183. *Turner I*, 512 U.S., at 644.

language chosen to express that content. A government's otherwise content-neutral regulations that affect programming are "subjected to demanding First Amendment scrutiny because of their direct impact on programming."¹⁸⁴

Spanish-language broadcasters can only escape this regulation by changing the language and with it the likely content of their broadcasts or by ceasing to be radio broadcasters. Those who choose to transmit their messages through another means such as the Internet are not acting as "radio broadcasters" within the FCC's or the DOJ's definition of the media market and would be competing in a fundamentally different medium and market.¹⁸⁵ Those who choose to air Spanish-language programming on the radio twenty-four hours a day, seven days a week, could not escape the market definition by broadcasting Spanish-language content at another time, or in another place or manner. For radio broadcasters, no matter the time of the show, nor where an operator broadcasts on the spectrum designated by the FCC for "radio," the market definition would apply because of the language of the broadcast.

Accordingly, the market definition creates disincentives to specialize in non-English languages. The best way to avoid the potential limits to growth posed by the narrow market definition is to stop providing minority language broadcast content, or at least to not specialize in such programming. This Hobson's choice places a burden on speech in Spanish or other minority languages that the broadcaster might otherwise choose to provide.

In contrast, the adult theaters in *Renton* were allowed to locate within the 520 acres designated in the zoning plan for such uses and were only prohibited from locating near schools.¹⁸⁶ The zoning regulation in *Renton* merely restricted the "time, place or manner" of speech. Upon remand in *Turner Broadcasting System v. FCC ("Turner II")*¹⁸⁷ the Court concluded

184. Preferred Commc'n Inc. v. City of Los Angeles, 13 F.3d 1327, 1331 (9th Cir. 1994).

185. Susannah Fox & Gretchen Livingston, Latinos Online, Hispanics with lower levels of education and English proficiency remain largely disconnected from the internet, Pew Hispanic Center, (March 14, 2007), available at <http://pewhispanic.org/files/reports/73.pdf> (noting that in 2006, fifty-six percent of Latino adults used the Internet, compared to seventy-one percent of non-Hispanic whites and sixty percent of non-Hispanic blacks. For Spanish-dominant Latinos, thirty-two percent use the Internet, indicating that it is not a substitute for radio and television.); See also Leonard M. Baynes, *Race, Media Consolidation and Online Content: The Lack of Substitutes Available to Media Consumers of Color*, 39 U. MICH. J.L. REFORM 199, 202 (2006) (noting that the Internet is not a direct substitute for radio and television for people of color including Latinos and African-Americans).

186. *City of Renton*, 475 U.S., at 53.

187. *Turner Broad. Inc. v. FCC (Turner II)*, 520 U.S. 180 (1996).

that the actual effects of the regulations on the cable companies' speech were modest; cable operators had been able to satisfy their must-carry obligations eighty-seven percent of the time using previously unused cable channel capacity.¹⁸⁸ The *Turner II* majority felt that this burden was congruent to the benefits it afforded: preserving free over-the-air broadcasting for the forty percent of Americans who did not subscribe to cable.¹⁸⁹

Unlike cable operators who could fulfill must-carry obligations to over-the-air broadcasters by using available capacity, radio broadcasters must make a one-for-one substitution to switch radio formats. The old programming is displaced in favor of the new. Currently, radio broadcasters have a limited amount of capacity to transmit one message at a time. Full-time Spanish-language broadcasters proposing transactions subject to prior antitrust approval cannot escape the market definition unless they switch some or all of their Spanish-language broadcasts to English. The lack of reasonable alternatives for those in the alleged Spanish-language radio market calls into question not only the means chosen to implement this definition, but also whether the market definition is content-based and subject to strict constitutional scrutiny. Even if it is content-neutral and requires intermediate scrutiny, the ability of broadcasters to provide programming in both languages and sell packages to advertisers that straddle language calls into question whether the classification burdens "substantially more speech than is necessary to further the government's legitimate interests."¹⁹⁰

Furthermore, broadcast speech in Spanish is an example of what the First Amendment prizes, not what it proscribes. Unlike fighting words or obscenity, the Spanish-language itself does not fall within the category of "proscribable speech;"¹⁹¹ it embodies the very diversity that the First Amendment values. We should be particularly cautious of claims of "secondary effects" arising from our most valued speech, including that about news and public affairs. Though preventing monopoly or undue concentration is a recognized statutory goal, it cannot be accomplished at the expense of unduly limiting protected speech.

188. *Id.* at 214.

189. *Id.* at 215-16.

190. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

191. *Cf. R.A.V.*, 506 U.S. at 384-85.

IV. MARKET STRUCTURE, SUBSTITUTION, LIKELIHOOD OF ENTRY, AND COMPELLING OR SUBSTANTIAL STATE INTEREST

A. *Product Substitution*

To demonstrate that the government has a compelling interest or a substantial interest (under a strict or intermediate scrutiny standard, respectively) in defining a broadcast market by the language of the programming, the government must first substantiate its claim that language defines the relevant broadcast market. The government bears the burden of proof that it has established the contours of the antitrust market.¹⁹² This should include evidence that other products are not a substitute for Spanish-language radio. It must also include an analysis of the likelihood that competitor entry into the alleged market will ameliorate potential anticompetitive effects arising from the merger.

In antitrust terms, the test of market definition turns on reasonable substitutability.¹⁹³ This requires the court to determine whether or not products have “reasonable interchangeability” based upon “price, use and qualities.”¹⁹⁴ The district court in *U.S. v. Oracle* stressed that these differences must be based on more than customer preferences.¹⁹⁵ The DOJ defines the relevant market as “the smallest collection of products and geographic areas within which a hypothetical monopolist would raise prices significantly.”¹⁹⁶

“Defining the relevant market is critical in an antitrust case because the legality of the proposed merger in question almost always depends upon the market power of the parties involved.”¹⁹⁷ Market power is based on the ability to control prices and deter entry within the relevant market.¹⁹⁸ How the market is conceptualized often determines whether the merger

192. “Determination of relevant product market is a fact question for which the burden of proof rests on the plaintiff.” *General Indus. Corp. v. Hartz*, 810 F.2d 795, 805 (8th Cir. 1987); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1305 (11th Cir. 1997). *See also* Sandoval, *supra* note 9, at 445-47 (questioning whether the DOJ met the standard for demonstrating a submarket under *Brown Shoe v. U.S.*, 370 U.S. 294, 325).

193. *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 392-93 (1956).

194. *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) (citing *E. I. du Pont de Nemours & Co.*, 351 U.S. at 404).

195. *Id.*

196. *See* DOJ and FTC, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, Overview of Guidelines Analysis (March 2006), available at <http://www.usdoj.gov/atr/public/guidelines/215247.htm> [hereinafter *Merger Guidelines Commentary*].

197. *Oracle*, 331 F. Supp. 2d at 1123.

198. *See E. I. du Pont de Nemours & Co.*, 351 U.S. at 392 (market power is the ability to control prices or exclude competition).

will be viewed as likely to lessen competition.¹⁹⁹ Professor Shelanski observed that “a calculation of market share is only as strong as the underlying market definition.”²⁰⁰

The market definition used in the HBC/Univision merger was based in part on the DOJ’s conclusion that Spanish- and English-language radio were not adequate demand substitutes.²⁰¹ As it did in analyzing the private equity buyout of Clear Channel, the DOJ cited its conclusions that a substantial number of advertisers in the relevant geographic market “consider Spanish-language radio, either alone or as a complement to 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.”²⁰² The DOJ did not reveal the source of these conclusions but they were likely based on interviews with unidentified advertisers and market participants and a review of undisclosed documents. For both the Clear Channel private equity buyout and the HBC/Univision merger, the DOJ averred that advertisers would not switch to English-language media if prices were to rise postmerger.²⁰³ The nature of the advertiser and other witness statements about the product substitutability would have to be examined in more detail if the market definition were challenged in court.²⁰⁴

Perceptions of product substitution should also be analyzed in light of the economic interests of those interviewed. Professor Dávila, in *Latinos Inc.: The Marketing and Making of a People*, points out that some advertising agencies stress the use of the Spanish-language as a

199. In the analysis of the potential merger between Staples and Office Depot, the district court observed, “[a]s with many antitrust cases...this case hinges on the proper definition of the relevant product market.” *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).

200. Shelanski, *supra* note 1, at 409.

201. Univision Competitive Impact Statement, *supra* note 15, at 4–5.

202. *Bain Clear Channel Complaint*, *supra* note 5, ¶ 22.

203. *Id.* Univision had a substantial equity investment in Entravision which Univision was required to reduce as a condition of approval of its merger with HBC.

204. Professors Sullivan and Grimes criticized the premerger notification and review process for limiting public access to merger documents and the ability to meaningfully review DOJ and FTC actions in such cases. “[T]he absence of judicial records and information from the agencies deprives practitioners and scholars of information with which to critique enforcement policy.” SULLIVAN & GRIMES, *supra* note 20, at 580. “Current federal antitrust law does not require disclosure of a premerger filing and strict confidentiality provisions prevent the agency from disclosing the content of the filing.” *Id.* In contrast, the FCC posts an exhaustive record of the pleadings and comments filed in its merger review process, sparingly issuing protective orders to redact information.

distinguishing factor requiring “special” advertising for Hispanics.²⁰⁵ This distinctiveness is part of the justification for having advertisers use their services to reach audiences. Professor Dávila commented, “[l]anguage means money for Hispanic media and marketing agencies, and this equation is likely to continue to affect the correlation of Latinas with Spanish, impairing attempts to broaden the media’s definition of Latinas.”²⁰⁶ Thus, an advertising agency’s statements that it perceives the Spanish- and English-language markets as separate also serves its own economic interests.

Ken Heyer commented that in evaluating a potential merger, “[c]ustomer views are, however, best employed as a complement to, rather than as a substitute for, economic analysis.”²⁰⁷ The sample of customers may also affect the validity of the customer data and a court’s willingness to accept these statements as representative of customer views.²⁰⁸ The public records of the DOJ’s analysis of the HBC/Univision merger settlement and the Clear Channel private equity buyout did not include any economic analysis or data to assess the validity of the customer sample.

It is common practice for customers to be interviewed regarding their perceptions of market definition. Heyer notes that “if all customers state that they have no close alternatives and would continue purchasing roughly the same quantities of the candidate relevant product even following a small, but significant and nontransitory increase in price (SSNIP), this seems to suggest strongly that there is a relevant antitrust product market.”²⁰⁹ However, as the Whole Foods case demonstrates, the appropriate question is not whether some core customers would refuse to switch, but whether marginal customers would switch.

In *FTC v. Whole Foods Market and Wild Oats Markets*, the district court focused on the question Heyer raises: what would customers do when confronted with price increases? In *Whole Foods*, the FTC argued that the relevant market was “premium natural and organic supermarkets,” of which Whole Foods and Wild Oats were the only two national competitors.²¹⁰ The merger parties presented evidence that substantial

205. Dávila, *supra* note 1408, at 4, 8, 38, 86.

206. Arlene Dávila, *Mapping Latinidad: Language and Culture in the Spanish TV Battlefield*, 1 TELEVISION & NEW MEDIA, 75-94 (2000).

207. Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 ANTITRUST L. J. 87, 87 (2007).

208. See *U.S. v. SunGard Data Systems*, 172 F. Supp. 2d 172, 191-92 (2001) (the government failed to show that the number of customers who would not shift in light of a SSNIP was “substantial enough that a hypothetical monopolist would find it profitable to impose such an increase in price.”).

209. Heyer, *supra* note 211, at 104.

210. *F.T.C. v. Whole Foods Mkt.*, 502 F. Supp. 2d 1, 4 (D.D.C. 2007).

numbers of their customers engaged in “cross-shopping” for natural and organic foods, switching between Whole Foods and supermarkets such as Safeway, for example.²¹¹

The Whole Foods defendants argued that the “FTC improperly uses differentiation or uniqueness as the basis to define the market, while the defendants view differentiation as but one competitive dimension in which Whole Foods and Wild Oats engage in competition with other firms.”²¹² The district court stressed: “Differentiation, however, does not equate to a unique relevant product market for antitrust purposes.”²¹³ The question is whether the differences are so substantial that the merging parties could retain most of their customers even if, “post-merger, it were to raise price or reduce quality?” The determinative question is not “are there any differences?” but “would customers switch.”²¹⁴

In *Whole Foods*, the district court held that the appropriate question is not whether “core” customers would switch but whether “marginal customers” would switch.²¹⁵ In the *Whole Foods* case, a marginal customer was defined as “someone who would switch where he or she shops in response to a SSNIP . . . a small but significant and nontransitory price increase.”²¹⁶ The district court concluded that the “effect of the proposed merger on marginal consumers is more important than the effect on such core consumers, as it is the marginal consumers for whom the stores must and do vigorously compete.”²¹⁷ Thus, in analyzing whether Spanish-language radio competes in a separate market, the appropriate antitrust question is whether marginal customers would switch to English-language radio or buy advertising packages that include Spanish and English-language radio if merging Spanish-language providers instituted a SSNIP.

In its analysis of Oracle’s proposed merger with PeopleSoft in 2004, the district court noted that there was little, if any, customer testimony about what they would or could do or not do to avoid a price increase post merger.²¹⁸ Instead of interchangeability, the customer witnesses testified about their preferences.²¹⁹ Preferences toward one product over another do

211. *Id.* at 16.

212. *Id.* at 26.

213. *Id.*

214. *Id.*

215. *Whole Foods Mkt.*, 502 F. Supp. 2d at 17.

216. *Id.*

217. *Id.* at 23.

218. *Oracle*, 331 U.S., at 1131.

219. *Id.*

not negate interchangeability.²²⁰ The *Oracle* court quoted Professor Pitofsky's observation:

There will almost always be classes of customers with strong preferences * * * but to reason from the existence of such classes to a conclusion that each is entitled to * * * a separate narrow market definition grossly overstates the market power of the sellers.²²¹

Thus, the DOJ was unable to block the merger between Oracle and PeopleSoft in large part because the trial court found that the Justice Department failed to prove the accuracy of the product and geographic markets it had alleged in its complaint.²²²

In analyzing whether parties to a merger could sustain a SSNIP, countervailing buyer power must also be considered. In *U.S. v. Engelhard*, the Eleventh Circuit found that the government did not make a prima facie case against a proposed merger, noting that "it is possible for only a few customers who switch to alternatives to make the price increase unprofitable, thereby protecting a larger number of customers who would have acquiesced in higher [] prices."²²³

A review of the top twenty Spanish-language advertisers in 2006 shows that with few exceptions, they are the largest brands in America that also advertise heavily on English-language media: Procter & Gamble Co., AT&T, General Motors, McDonalds, Verizon, Ford Motor Co., Sears, Toyota Motor Corp., Johnson & Johnson, Wal-Mart, DaimlerChrysler, Walt Disney, Pepsico, Coca-Cola, Home Depot, and Loreal.²²⁴ Broadcasting Media Partners Inc., the company that controlled Univision until its 2007 sale to a private equity group, was the largest Spanish-language advertiser in 2006, but other "brand name" advertisers spent millions.²²⁵ While there may certainly be small businesses, local panaderias (bakeries) for example, that may only advertise through Spanish-language media, their power as customers is dwarfed by the corporate giants listed above. Large, experienced corporate advertisers could likely resist unilateral price increases, especially since they also advertise on English-language media and may buy discounted package deals that cross languages and formats. Their resistance may benefit small buyers as the

220. *Id.*

221. *Id.* (citing Robert Pitofsky, *New Definitions of the Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1816 (1990)).

222. Shelanski, *supra* note 1, at 415 (citing *Oracle* at 1108, 1175).

223. *U.S. v. Engelhard*, 126 F.3d 1302, 1306 (11th Cir. 1997).

224. Press Release, Nielsen, *Spanish-language Advertising Rose 14.4% in 2006*, NIELSEN MONITOR-PLUS REPORTS, May 3, 2007, <http://www.nielsenmedia.com> (follow "news" hyperlink; choose "general" and "2007" from drop-down boxes; then scroll down to "May 3, 2007" for article).

225. *Id.*

Eleventh Circuit recognized in *Engelhard*.²²⁶ The power of such large buyers coupled with the power of consolidated competitors serving several languages and formats may serve as a check on the ability of Spanish-language broadcasters who merge to raise their prices in a significant fashion.

Regarding substitutability, it is important to look at the options available to both advertisers and audiences, although the DOJ focuses on the effect of the merger on the advertiser. Professor Shelanski observed that “what advertisers view as substitutes may not correspond at all to what consumers view as substitutes.”²²⁷ However, the advertisers’ primary objective is to reach their intended audience. If the audience uses radio and television in both English and Spanish, advertisers and antitrust authorities must consider to what extent they are substitutes.

There is substantial evidence of audience cross-over between languages, a fact many advertisers grasp in trying to appeal to Spanish-speaking or Latino customers.²²⁸ Spanish-language media is particularly important for reaching subsets of the Latino community: Latina women are the most loyal viewers of the “telenovelas,” soap-operas that dominate daytime television in Spanish in the U.S.²²⁹ Hispanic males surveyed by the marketing firm Cheskin reported watching slightly more than eleven hours of each English- and Spanish-language television per week, with English-language viewing leading by a slight margin.²³⁰ Latino children switch back and forth between languages, leaning heavily toward English-language media.²³¹ Television watching is often a family affair for Latinos, who switch languages and channels to accommodate the range of preferences within the family.²³² These viewing patterns indicate that many audience

226. See *Engelhard*, 126 F.3d at 1306.

227. Shelanski, *supra* note 1, at 406.

228. For example, during the 2007 Super Bowl, Toyota ran a bilingual ad for its 2007 Camry Hybrid. Stephanie Mehta reported that “[i]n the 30-second spot, developed by Conill (Toyota’s Hispanic ad agency), a father speaks to his son in Spanish and English, drawing comparisons to the car’s ability to switch from gas to electric power.” Stephanie Mehta, *Speaking the Wrong Language, Marketers Looking to Reach a Lucrative Swath of the U.S. Hispanic Population Need to Rethink Their Pitch*, CNN MONEY.COM, April 27, 2006 http://money.cnn.com/2006/04/27/news/companies/pluggedin_fortune/index.htm.

229. FELIPE KORZENNY & BETTY ANN KORZENNY, *HISPANIC MARKETING, A CULTURAL PERSPECTIVE* 261 (2005).

230. See *id.* at 260.

231. See *id.* at 295.

232. See *id.* at 261.

members “cross-shop” between English, Spanish, and bilingual programming.

A 2003 study of Hispanic media habits by Yankelovich found that U.S. Latinos who learned Spanish as their first language divided their television viewing time almost equally between Spanish- and English-language programming, with a slight preference for English: 13.64 hours of English-language television per week as compared to 13.48 hours of Spanish-language television weekly.²³³ Latinos who identified English as their first language still reported watching 5.21 hours of Spanish-language programming per week.²³⁴ Arbitron, a company that charts radio listening, found that “Rhythmic Contemporary Hit Radio,” an English-language format, was the third most popular format for Hispanics in 2006, just behind “Spanish contemporary.”²³⁵

Although there are some who use media exclusively in one language, the overlap suggests that for bilingual audiences, substitution between program languages is more than incidental. The DOJ did not discuss any analysis of the overlap between listeners to Spanish- and English-language radio, or the overlap of advertisers. Nor did it address the extent to which English-language broadcasters compete directly with Spanish-language broadcasters for audiences and advertisers.

Latino identity (and strategies to reach them), straddles race, ethnicity, language, region, nationality, citizenship, self, and externally imposed conceptions.²³⁶ Broadcasters have been instrumental in the creation of a pan-Latino or Hispanic identity that attempts to bridge U.S. Latino communities across divides of national origin, race, region, generation, and language.²³⁷ In 1980, the U.S. Census for the first time amalgamated various ethnic groups under the “Hispanic” category,²³⁸ calling attention to the size of this “group,” composed of people of Mexican, Puerto Rican,

233. *See id.* at 109.

234. *See id.* at 109.

235. Arbitron, HISPANIC RADIO TODAY, HOW AMERICA LISTENS TO RADIO 19, 28-32, 40-42 (2007), available at <http://www.arbitron.com/downloads/hispanicradiotoday07.pdf> (detailing substantial Hispanic audiences for the English formats “Pop Contemporary Hit Radio,” “Adult Contemporary” and “Country”).

236. *See* Del Rio, *supra* note 13, at 389-90.

237. *See id.* at 413 (noting Spanish-language news creates a “Latinidad,” a conceptualization of Latina/o identity “that, in turn, affirms the vitality and legitimacy of the Latina/o market and television networks such as Univision”).

238. *Id.* at 395; Professors Felipe and Betty Ann Korzeny commented, “The label Hispanic, as if it were a brand, became the symbolic handle by which everyone could refer to a population that had been seen as disparate before...a name creates the reality it is supposed to represent.” KORZENY & KORZENY, *supra*, note 229, at 287 (2005). This article uses the terms “Latino” and “Hispanic” interchangeably.

Cuban, Central, and South American ancestry.²³⁹ The 2000 Census reported over thirty-five million Hispanics living in the United States, excluding Puerto Rico and the U.S. Island areas.²⁴⁰ As the size of the Hispanic category has grown, so too has its diversity. This has led some marketers to stress the need for “segmentation” to reach across Latino categories: one-size and one-language does not fit all.

The characterization of first-generation Latinos as solely consumers of Spanish-language media is a fallacy. Latinos whose first language was English spent half of their television viewing time in the year 2000 watching English-language television.²⁴¹ This indicates that Spanish-language broadcasters and those who advertise through them must consider English-language media as a competitor.

In light of the increasing numbers of Latinos using both English- and Spanish-language media, Professor Felipe Korzenny, Director of the Center for Hispanic Marketing Communications at Florida State University, observed that “network TV, and all mainstream English language programming, can now compete for a large sector of the Hispanic market.”²⁴² These trends are resulting in more “segmentation” of media messages to reach Latino audiences through the range of languages and programs they view.²⁴³ Professor Korzenny counsels advertising agencies to focus on “cultural commonalities of the Hispanic market rather than be limited to the Spanish language.”²⁴⁴

Some advertisers use Spanish-language media because they believe it to be more effective in reaching a specific segment of their target audience. Studies by Roslow Research Group indicate that many Latino audience members more readily retain advertising messages in Spanish.²⁴⁵ Professor

239. Del Rio, *supra* note 13, at 393 (“Authority often assigns individuals or groups to categories, whereas identity stems from below.”); OSCAR GANDY, COMMUNICATION AND RACE: A STRUCTURAL PERSPECTIVE 48 (1988); (“While the acceptance of a classification as a marker of index of one’s identity may be enabling, oft it is not.”).

240. U.S. Census Bureau, THE HISPANIC POPULATION, CENSUS 2000 BRIEF (May 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>.

241. KORZENNY & KORZENNY, *supra* note 229, at 261.

242. See *id.* at 295. Bilingualism is increasing overall in America. Professor Christina Rodriguez noted that the Census “projects that by 2044, a majority will speak a language other than English, though not necessarily to the exclusion of English.” Christina Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687, 692 (2006).

243. See KORZENNY & KORZENNY, *supra* note 229, at 295.

244. *Id.*

245. See Roslow Research Group, Spanish vs. English Advertising Effectiveness Among Hispanics 2, 13 (2000), available at <http://www.roslowresearch.com/studies/33.doc>; Roslow

Korzenny observed that superior comprehension or recall of Spanish-language ads may be attributed to “the fact that ads in English are not culturally relevant, not to the language used in those ads.”²⁴⁶

Professor América Rodríguez observed that the “clearly defined panethnic conceptualization of Hispanic audience, the nexus of which is the Spanish language, is being challenged.”²⁴⁷ The “overarching cultural conflation of ethnicity, race, and the ‘foreign’ Spanish language has been reinforced in general market media, in both journalistic and fictional productions,”²⁴⁸ Rodríguez commented. Additionally, “Latino-oriented Spanish language media marketers also emphasize the Spanish language as the central identifying characteristic of the Hispanic audience . . .”²⁴⁹ She noted that “[f]rom a marketing point of view . . . [s]egmenting Hispanics by language use has the potential of producing a more tightly defined audience, one that is targetable not only by ethnoracial identity but also by class.”²⁵⁰

Professor Dávila commented that Latinos have been constructed for the market so that “the Spanish language is built as the paramount basis of U.S. Latinidad . . .”²⁵¹ Through this process “Latinos are continually recast as authentic and marketable, but ultimately as a foreign rather than intrinsic component of U.S. society, culture and history . . .”²⁵² Similarly, characterizing Spanish-language radio as a separate antitrust market may reflect corporate dogmas about the role of Spanish in marketing to U.S. Hispanics, rather than the actual patterns of advertiser and audience substitution. Furthermore, it reifies the conception of Spanish-speaking Latinos as separate, other, and not part of the greater media market. This

Research Group, Spanish vs. English Advertising Effectiveness Among Hispanic Teens 3, 12 (2000), available at <http://www.roslowresearch.com/studies/91.doc>.

246. *Spanish, English or Spanglish—That is the Question*, UNIVERSIA KNOWLEDGE@WHARTON, Apr. 20, 2005, <http://www.wharton.universia.net/index.cfm?fa=viewfeature&id=950&language=english> (last visited Mar. 22, 2008). See also Robinson, *supra* note 120, at 56 n.286 (citing Osei Appiah, *Black, White, Hispanic and Asian American Adolescents' Responses to Culturally Embedded Ads*, 12 HOW. J. COMM. 29, 31 (2001) (Hispanic viewers prefer to see ads with Hispanic models)). Ads developed for Spanish-language television with culturally-based themes using Hispanic actors contribute to message retention and advertising effectiveness, suggesting that language is not the only differentiating factor—content and culture are also relevant. See KORZENNY & KORZENNY, *supra* note 229, at 88 (cultural representations that connect with the consumer are more important for effectiveness than language code alone).

247. Rodríguez, *supra* note 29, at 131.

248. *Id.* at 132.

249. *Id.*

250. *Id.*

251. Dávila, *supra* note 1408, at 4.

252. *Id.*

separated archetype is at odds with the reality of Latino media usage and advertisers' efforts to reach them.

In contrast to this conception of a separate Spanish-language or Hispanic market, in August 2007, Nielsen, which tracks television viewers, announced it was integrating its reports on Spanish-language television and Hispanic viewers with its "general television viewer" report, abandoning the practice of separating the "Hispanic" and "General Market."²⁵³ This rating system provides advertisers with new tools to evaluate audience use of Spanish- and English-language television, and make decisions about media buying across languages.

In defining the market, it must also be recognized that audiences and advertisers have different incentives. Advertisers generally pay less per audience member to air their messages on Spanish-language stations than they pay on English-language stations.²⁵⁴ Spanish-language advertising is generally less expensive than English-language advertising so advertisers may not view English-language programming as a substitute since it costs more per audience member.²⁵⁵ Whether or not audiences are using both Spanish- and English-language media, advertisers may have a preference for the less costly medium.

The reasons cited for the price difference between English- and Spanish-language media vary; some attribute it to the lower average income of Spanish-language audience members, more time spent watching television or listening to the radio, and thus more opportunities to capture

253. See Press Release, Nielsen, *Nielsen to Generate National Ratings for Both English- and Spanish-Language Television from the Same Panel* (Aug. 27, 2007), available at http://www.nielsen.com/media/pr_070827.html. In the first week of the "single national panel" Univision outranked ABC, NBC, CBS, Fox and CW for audience ratings by all adults 18-34, not just Hispanics. See Press Release, Univision, *Univision #1 Network for Entire Week Beating ABC, CBS, NBC, Fox and CW* (Sept. 6, 2007), available at http://corporate.univision.com/corp/en/pr/Miami_06092007-1.html.

254. See Napoli, *supra* note 169, at 181; Cf. ARBITRON, RADIO'S LEADING INDICATORS, AUDIENCE RATINGS AND THEIR IMPACT ON REVENUES, FORMAT CHOICE AFFECTS REVENUE 7 (2005) (finding that in 2005 Spanish radio earned a power ratio, revenue share divided by audience share, of 0.95 compared to 1.79 for English-language easy listening stations or 1.45 for adult contemporary, available at <http://arbitron.com/downloads/leadindicator2005.pdf>. A power ratio of 1 indicate the radio station has a good balance of audience share to advertising dollar while a share less than one indicates it is not reaping ad dollars commensurate to its audience size. Napoli *supra* note 169, at 172.

255. See SPANISH LANGUAGE MEDIA AFTER THE UNIVISION-HISPANIC BROADCASTING 39 (Luis V. Nuñez, ed., 2006) [hereinafter SPANISH LANGUAGE MEDIA]. See also Shelanski, *supra* note 1, at 406 ("[W]hat advertisers view as substitutes may not correspond at all to what consumers view as substitutes.").

the audience, or that some advertisers do not value Spanish-speaking and Hispanic customers as much as English-speaking customers.²⁵⁶ Minority audiences including Latinos also suffer from advertisers' stereotypes that keep them from advertising to Hispanics or are used to justify paying less for any ads.

The FCC documented this in the study it commissioned in 1999 which found that minority-formatted stations earned less for their audiences, and were often subjected to stereotypes and even edicts against advertising with them in the form of "No Urban" or "No Spanish" dictates.²⁵⁷ Such dictates indicate that no matter what the price of the ad or the popularity of the station, an advertiser will not buy an ad targeted at that minority group.²⁵⁸ Professor Dávila recounted the experience of an advertising executive with Zubi Advertising in Coral Gables, Florida (a firm specializing in Hispanic marketing) who reported that a potential corporate client "rejected her pitch to advertise a luxury good (which she declined to name) on the grounds that 'you all came in boats' and could never afford the product."²⁵⁹ The advertising executive reflected, "[i]t just dawned on me that for him we were all *pobretones* (shoddy and impoverished)."²⁶⁰

For Spanish-language media, price increases are also an attempt to close the gap between historic payment rates for English- and Spanish-language media. Yet, advertisers were still buying. Between 2005 and 2006, advertising spending for Spanish-language media increased 14.4% to \$5.59 billion.²⁶¹ This increase may be due in part to the power of companies such as Clear Channel and Univision to leverage their multiple channels, formats, and geographic markets to demand higher rates. Telemundo reportedly received higher advertising revenues per its audience share than Univision.²⁶² Luis Nuñez commented, "[p]art of the explanation for Telemundo's higher ratio of advertising revenues to audience share [as compared to Univision] is the benefit of being part of a large English language media company."²⁶³ At the same time, advertising

256. 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 24-25 (1999) (submitted to the Office of Communications Business Opportunities, FCC), available at http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study.

257. See *id.* at 12.

258. See *id.* at 25-26, 28.

259. Dávila, *supra* note 1408, at 129.

260. *Id.*

261. Press Release, Nielsen, *supra* note 231.

262. See SPANISH LANGUAGE MEDIA, *supra* note 262, at 36.

263. *Id.*

prices rose overall in the radio industry, with the cost of radio advertising doubling since the enactment of the Telecommunications Act of 1996.²⁶⁴

The power of consolidated entities with interests in both Spanish- and English- language programming to close the revenue gap indicates that although advertisers may wish for the cheapest alternative to reach their customers, the defining factor for that alternative is not programming language but industry-wide consolidation. In other words, the ability of broadcasters to exercise economies of scale across languages indicates that the power to control prices is most forceful across languages, formats, and market conceptions, rather than within them.

Even though there are significant differences between Spanish- and English-language media, broadcasters are increasingly competing for the same audiences and advertisers. As the district court concluded in *Whole Foods*, differentiation “does not, however, indicate that differentiated supermarkets do not compete with each other; to the contrary, it is how they compete with each other.”²⁶⁵ Many Latinos use English-language programming, and many traditionally English-language broadcasters offer Spanish-language and bilingual programming. This dynamic movement between languages creates alternatives for advertisers that undercut the conclusion that the markets are separate.

B. Supply-Side Antitrust Analysis: The Role of Market Entry and Structure in Proving a Compelling or Substantial Government Interest

The DOJ based its conclusion in the Univision merger with HBC that the English- and Spanish-language radio markets are separate in large part on the *assumption* that no broadcaster would change its format to Spanish because of the expenses involved.²⁶⁶ Yet, the DOJ and FTC recognize that competitor entry might ameliorate anticompetitive effects and forestall the need for additional review of the merger.²⁶⁷ The Agencies stress that “[i]f the conditions necessary for an anticompetitive effect are not present—for

264. See George Williams, REVIEW OF THE RADIO INDUSTRY, 2007, 15-16 (2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf.

265. *Whole Foods*, 502 F. Supp. 2d at 32 (quoting the testimony of an expert report) (emphasis in the original).

266. See *Univision Competitive Impact Statement*, *supra* note 15, at 8-9. The DOJ also assumed reformatting of radio stations from programming targeted at other demographics would not be profitable in its 2008 analysis of the private equity firm buyout of Clear Channel. *Bain, Clear Channel Complaint*, *supra* note 2.

267. See Merger Guidelines Commentary, *supra* note 199, at 2.

example, because entry would reverse that effect before significant time elapsed—the Agencies terminate their review because it would be unnecessary to address all of the analytical elements.”²⁶⁸ Timely entry may counteract the market power allegedly arising from a merger. Analysis of the likelihood that entry will deter price increases is fundamental to demonstrating that the government has either a compelling or substantial interest requiring remedial action.²⁶⁹

In the DOJ and FTC’s 2006 Commentary on the Horizontal Merger Guidelines (“Merger Guidelines Commentary”), the Agencies emphasized the importance of an “integrated approach” to merger analysis.²⁷⁰ The five-part structure of the Merger Guidelines: “(1) market definition and concentration; (2) potential adverse competitive effects; (3) entry analysis; (4) efficiencies; and (5) failing and exiting assets,” are, as the DOJ and FTC emphasized, not to be considered “as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets.”²⁷¹ The Merger Guidelines Commentary stressed:

The market definition process is not isolated from the other analytic components in the Guidelines. The Agencies do not settle on a relevant market definition before proceeding to address other issues. Rather, market definition is part of the integrated process by which the Agencies apply Guidelines principles, iterated as new facts are learned, to reach an understanding of the merger’s likely effect on competition.²⁷²

Thus, entry analysis should influence market definition as part of an integrated assessment of the merger’s likely competitive effects.

The Agencies noted that

[t]he Guidelines’ approach to market definition reflects the separation of demand substitutability from supply substitutability—i.e., the ability and willingness, given existing capacity, of firms to substitute from making one product to producing another in reaction to a price change. Under this approach, demand substitutability is the concern of market delineation, while supply substitutability and entry are concerned with current and future market participants.²⁷³

The DOJ’s evaluation of the HBC/Univision merger and the Clear Channel private equity buyout did not bear the hallmark of such an integrated approach. The market was defined based on interviews with undisclosed

268. *Id.*

269. See generally Sandoval, *supra* note 9, at 437–45 (arguing that entry analysis should examine factors affecting participation in the alleged “Spanish-language” market).

270. Merger Guidelines Commentary, *supra* note 199, at 2.

271. *Id.*

272. *Id.* at 5.

273. *Id.*

advertisers and a document review.²⁷⁴ Market participation was analyzed under the assumption that no English-language broadcaster would enter the market to contest incumbent Spanish-language broadcasters for market share and advertising profits.²⁷⁵ Market concentration was measured by applying the HHI to the existing number of Spanish-language broadcasters yielding extremely high concentration numbers in the small market as defined.²⁷⁶

In many markets, a small number of broadcasters air Spanish-language programming.²⁷⁷ If the market is defined by the programming language, the small number of market participants yields high concentration numbers because the HHI favors markets with larger numbers of participants.²⁷⁸ Even if a dummy variable were added to the

274. See Univision Competitive Impact Statement, *supra* note 15, at 4; Bain, *Clear Channel Competitive Impact Statement*, *supra* note 5, Sec. III. A. 2. (The DOJ asserted that “many local and national advertisers also consider Spanish-language radio to be particularly effective or necessary to reach their desired customers, especially consumers who listen predominantly or exclusively to Spanish-language radio. A substantial number of these advertisers consider Spanish-language radio, either alone or as a complement to 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. These advertisers would not turn to other media, including radio that is broadcast in a language other than Spanish, if faced with a small but significant increase in the price of advertising time on Spanish-language radio.”) The DOJ did not identify the source of those conclusions but as in most merger complaints they are based on interviews with actual or potential customers and competitors and document reviews.

275. Univision Competitive Impact Statement *supra* note 15, at 8 (a dearth of competition for Spanish-language radio advertising dollars would not, as its sole basis, be enough to entice English-language stations to reformat).

276. See Univision HBC Complaint, *supra* note 2, at 6-7, ¶ 21.

277. See, e.g., Radio & Records, <http://www.radioandrecords.com/RRWebsite/> (follow “ratings” hyperlink; then follow “Austin” hyperlink) (showing that Austin, Texas has five stations broadcasting in Spanish or bilingual formats including Regional Mexican, Latin Pop, and Tejano with ratings high enough to be reported by Arbitron, broadcast by two companies: Univision and Border Media Partners) (last visited Mar. 22, 2008); See also Radio & Records, <http://www.radioandrecords.com/RRWebsite/> (follow “ratings” hyperlink; then follow “Tucson” hyperlink) (showing that Arizona has four stations broadcasting in Spanish with ratings high enough to be reported by Arbitron, provided by three companies: Clear Channel, Lotus and Entravision) (last visited Mar. 22, 2008).

278. See Univision HBC Complaint, *supra* note 2, at app. A (definition of HHI). In its analysis of the Clear Channel buyout by a consortium of private equity firms, the DOJ concluded that “Clear Channel and Univision’s combined Spanish-language listener share exceeds 75 percent in Houston, 73 percent in Las Vegas, and 70 percent in San Francisco. Additionally, Clear Channel and Univision’s combined Spanish-language advertising revenue share exceeds 79 percent in Houston, 78 percent in Las Vegas, and 63 percent in San Francisco.” Bain, *Clear Channel Complaint*, *supra* note 2, ¶ 35. This results in post-acquisition HHIs exceeding 6,500 in all three markets where the market is defined as

HHI analysis to account for the likelihood of Clear Channel, for example, converting one or two of its English-language radio stations to Spanish, the small number of market participants would yield HHI levels in many markets far above levels considered to be competitive. In 2005, "Spanish" radio formats accounted for approximately two percent of the nation's commercial radio formats, with English-language formats dominating the airwaves, topped by American Country programming.²⁷⁹ This is reflected at the local level in the small number of broadcasters offering Spanish-language and bilingual programming.

The DOJ and Federal Trade Commission (FTC) reported that for telecommunications industry mergers challenged between 1999-2003, most had HHI levels 2,400 and resulted in post-merger HHI increases above 500.²⁸⁰ These high HHI levels reflect markets with either a small number of participants or high market shares by the merging parties. The American Antitrust Institute commented that the Agencies public statements on mergers "have frequently focused on the number of competitors, rather than the HHI, as a key part of their analysis."²⁸¹ The Merger Guidelines Commentary concedes that market shares and concentration levels "frequently are used as at least a starting point" in merger reviews.²⁸² However, market share and concentration levels depend on an accurate market definition and should account for marketplace changes including entry.

Professor Hovenkamp noted that a market definition "captures all the alternative suppliers that consumers view as producing products that can substitute for each other and that therefore compete to attract customers."²⁸³ For those who wish to advertise in Spanish, the available supply of advertising sources (broadcasters programming in Spanish or formats appealing to Spanish-speakers and Latinos) will change with broadcasters' decisions about program formats.

Spanish-language radio. *Id.* ¶ 36. These high HHI numbers are largely a result of the small number of broadcasters providing Spanish-language programming in each of these geographic markets.

279. See Peter DiCola, Future of Music Coalition, False Premises, False Promises, A Quantitative History of Ownership Consolidation in the Radio Industry 87 (2006), available at <http://www.futureofmusic.org/images/FMCradiostudy06.pdf>.

280. See Federal Trade Commission and the U.S. Department of Justice, Merger Challenges Data, 1999-2003, Table 6 (2003), available at <http://www.usdoj.gov/atr/public/201898.htm>.

281. See AMERICAN ANTITRUST INSTITUTE, COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE WORKING GROUP ON MERGER ENFORCEMENT 4 (2005), available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_enforcement.htm (click on link to American Antitrust Institute Comments).

282. Merger Guidelines Commentary, *supra* note 199, at 2.

283. Shelanski, *supra* note 1, at 389-90 (citing Herbert Hovenkamp, Federal Antitrust Policy, The Law of Competition and Its Practice 83 (3d ed. 2005)).

A buyer's view of substitutes may also be influenced by the products currently available from current suppliers. This narrow outlook does not capture the potential of entry (or innovation and product cross-selling) to affect substitution. Where broadcasters have already programmed in Spanish in other markets and have stations in the geographic market in question, the possibility of entry, and thus of new substitute suppliers, is increased. Heyer noted that "[c]ustomers are unlikely . . . to be very knowledgeable about the profitability to a would-be entrant of coming into the market in a timely and sufficient fashion following an otherwise anticompetitive merger."²⁸⁴ In other words, customers may be poor predictors of market entry.

In the wake of the Telecommunications Act of 1996, "consolidation of radio outlets by Spanish-language media conglomerates" has paralleled consolidation in the radio industry as a whole.²⁸⁵ During that time, the number of stations offering Spanish-language broadcasts has increased, mostly from owners changing the station's format from English to Spanish.²⁸⁶ Between 1980 and 2002, the number of Spanish-language radio stations in the United States grew by nearly 1000 percent.²⁸⁷

This cross-format and multistation consolidation is being pursued not only by "traditional Spanish-language media conglomerates,"²⁸⁸ but also by behemoth media conglomerates such as Clear Channel and NBC who acquired stations or companies or converted some of their existing media assets to target the Latino community through Spanish, as well as bilingual and English-language programming. While the DOJ's goal was to prevent dominance *within* an alleged Spanish-language radio market, the market definition shifted power to large, incumbent English-language broadcasters who possess the ability to compete in different languages and alleged markets.

Clear Channel's success in Spanish-language and bilingual broadcasting demonstrates the fallacy of the DOJ's no-entry assumption. In 2004, shortly after the Univision merger with HBC closed, Clear Channel

284. Heyer, *supra* note 211, at 108.

285. Castañeda Paredes, *supra* note 18, at 8.

286. See 18 F.C.C. R. 18834, 18857 (2003) (noting 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).

287. Castañeda Paredes, *supra* note 18, at 5.

288. See Howard, *supra* note 17 (noting that several large Spanish-language broadcasters such as Univision, Entravision and Bustos Media broadcast in English as well as Spanish).

changed the format of more than twenty of its stations to Spanish.²⁸⁹ In September 2005, Clear Channel declared its “Hispanic Division” a success, noting increases in the number of listeners ranging from twenty-four percent in some markets to 312% in others.²⁹⁰ As of January 2008, Clear Channel broadcast in Spanish on twenty stations.²⁹¹ It also broadcasts in a bilingual “Hurban” format, so named for its appeal to “Hispanic Urban” listeners.²⁹²

In November 2006, Clear Channel announced it was putting the company up for sale and would sell all of its radio stations in markets ranked below the top 100.²⁹³ Only five of its twenty-two Spanish-language stations are in smaller markets where that station will be sold.²⁹⁴ However, in light of Clear Channel’s success in Spanish, the station buyer may continue to broadcast in a Spanish-language format. Clear Channel has

289. See Press Release, *supra* note 5.

290. See *id.*

291. See Clear Channel, <http://www.clearchannel.com/Radio/StationSearch.aspx?RadioSearch=Spanish> (type in Spanish as the search term) (last visited Mar. 22, 2008).

292. See Press Release, *supra* note 5; see also Clear Channel, <http://www.clearchannel.com/Radio/StationSearch.aspx?RadioSearch=urban> (type in *urban* as the search term) (list of Clear Channel’s current *Hurban* radio stations) (last visited Mar. 22, 2008). It is noteworthy that Clear Channel’s bilingual *Hurban* format station in Houston, KLOL-FM, is not listed by Clear Channel in a search for the company’s Spanish formats. Though the *Hurban* format combines Spanish and English in its music and DJ banter, Clear Channel is positioning it as distinct from Spanish. Nonetheless, the DOJ required Clear Channel to divest of KLOL as a condition of approval of its acquisition by several private equity firms and classified it as a Spanish-language station. *Bain, Clear Channel Competitive Impact Statement*, *supra* note 5, Sec. IV. A. 2. In July 2007, Entravision’s KSSE Spanish-hits format in Los Angeles added three to four English-language hits an hour. *Super Estrella/L.A. in English? KSSE adds English Music*, <http://www.radioandrecords.com/RRWebSite/Search.aspx?search=KSSE> (follow article title hyperlink) (July 13, 2007) (last visited Mar. 22, 2008). Though primarily a Spanish format, the mixture of Spanish and English programming demonstrates the difficulty in classifying stations by language. This highlights the potential constitutional vagueness of defining a market by the program’s language. How much English within a Spanish mix gets a broadcaster out of the “Spanish” market and into the “English” market? Though an exploration of the vagueness issue is beyond of the scope of this paper, the lack of a clear standard raises the potential that the market definition is constitutionally vague, leading broadcasters to steer clear of programming decisions to avoid the ramifications of the smaller “Spanish” antitrust market. See *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (“[W]here a vague statute ‘abuts upon sensitive areas of First Amendment freedoms,’ it ‘operates to inhibit the exercise of those freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.’”) (internal quotations omitted).

293. See Press Release, Clear Channel, Clear Channel Announces Plan to Sell Radio Stations Outside the Top 100 Markets and Entire Television Group, (November 16, 2006) <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1825>.

294. For a list of the top fifty radio markets, see ARBITRON RADIO MARKET RANKINGS: SPRING 2007, available at http://www.arbitron.com/radio_stations/mm001050.asp; see also Clear Channel Spanish stations list, <http://www.clearchannel.com/Radio/StationSearch.aspx?RadioSearch=Spanish> (type in search term Spanish) (last visited Mar. 22, 2008).

announced no plans to discontinue Spanish-language and bilingual broadcasting in its remaining markets.

Clear Channel received FCC approval to transfer its thirty-five full and low-power television stations to Newport Television LLC (“Newport”).²⁹⁵ Newport is wholly owned by investment funds that are controlled by affiliates of Providence Equity Partners, Inc. (“PEP”).²⁹⁶ As a result of the March 2007 sale of Univision to a consortium of private equity investors including PEP, PEP holds an attributable, nineteen percent interest in Univision.²⁹⁷ PEP holds an attributable, sixteen percent interest in Freedom Communications Holdings, Inc. (“Freedom”) which runs several newspapers.²⁹⁸ “PEP’s interests in Univision and Freedom resulted in violation of Section 73.3555(d) of the Commission’s Rules (the ‘newspaper/broadcast cross-ownership rule’) in five markets.”²⁹⁹

In its 2007 approval of the Univision sale to several equity investors, including PEP, the FCC required PEP to comply with the newspaper/broadcast cross-ownership rule within six months of consummation of the Univision sale transaction. It was given the choice of divesting “either the necessary broadcast stations in those markets where PEP’s interest in Freedom resulted in violation of the broadcast/newspaper cross-ownership rule, or divesting PEP’s minority interest in Freedom.”³⁰⁰ In approving the sale of Clear Channel’s television stations to PEP, the FCC decided that it would not grant an additional six-month waiver that PEP requested to comply with the newspaper/broadcast cross-ownership rules and required PEP to comply with the rules prior to consummation of its purchase of the Clear Channel television stations.³⁰¹

One noteworthy aspect of the FCC’s decision not to give PEP more time to comply with the newspaper/broadcast cross-ownership rules is that the FCC did not extend the waiver to come into compliance with the rules based on the fact that the Univision and Entravision television stations in which PEP has an attributable interest primarily broadcast in Spanish. In contrast, in 2002:

295. See Clear Channel Broadcasting Licenses, Inc., For Assignment of License of Station WPMI-TV, Mobile, Alabama, *Memorandum Opinion and Order*, 22 F.C.C.R. 21196, para. 1, (2007) [hereinafter *Clear Channel TV sale*].

296. *Id.* at para. 2.

297. *Id.* at para. 3.

298. *Id.*

299. *Id.* at para. 4; see also 47 C.F.R. §73.3555(d) (2006).

300. See Clear Channel TV Sale, *supra* note 302, at para. 4.

301. *Id.* at para. 13.

[T]he 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.³⁰²

“The [NBC] 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.”³⁰³ In light of the FCC’s 2003 approval of Univision’s merger with HBC based on the Commission’s conclusion that Spanish- and English-language radio do not compete in separate markets,³⁰⁴ it is noteworthy that that the Commission did not even discuss language differences as relevant to the request to extend the time for PEP to comply with the newspaper/broadcast cross-ownership rules.

PEP’s purchase of Clear Channel’s television stations would also violate the FCC’s rules limiting common ownership of television stations in nine markets.³⁰⁵ The FCC concluded that because the television sale is “occurring within the context of the larger sale of Clear Channel to BT Triple Crown, which will also entail the potential spin-off of a number of radio stations” it is “reasonable to grant a short period of time to permit the restructuring of PEP’s investments and/or sale of television stations.”³⁰⁶

Accordingly, the FCC determined that “with the exception of the Albany-Schenectady-Troy, NY, market, it would be in the public interest to grant Newport a temporary, six-month waiver of the local television ownership rule in the eight markets subject to [certain] conditions.”³⁰⁷ Again, it is noteworthy that the language of the broadcasts was not a factor in the FCC’s decisions. Rather, the Commission expressed concerns that its rules concerning multiple ownership be respected, approving the extension in light of the fact that the overall transactions might increase ownership diversity.

For the Clear Channel sale of the remainder of the company including its radio assets, Thomas H. Lee Partners (“TLP”) will control fifty percent of the equity in the holding company that will control Clear Channel once

302. Sandoval, *supra* note 9, at n. 203.

303. *Id.*

304. See FCC HBC UVN Order, *supra* note 8, at 18869-70.

305. See Clear Channel TV Sale, *supra* note 302 at para. 7.

306. *Id.* at para. 20.

307. *Id.* at para. 21; see also Telemundo Commc’ns, Inc. & TN Acquisition Corp., *Memorandum Opinion and Order*, 17 F.C.C.R. 6958 (2002).

the deal is closed.³⁰⁸ TLP also controls 23.314% of Univision's equity and voting shares, as does PEP and Madison Dearborn Partners.³⁰⁹

In its 2008 review and approval of the sale of Clear Channel to a consortium of private equity firms, the DOJ once again defined the relevant market for analysis of TLP's interests in the Clear Channel deal as "the provision of advertising time on Spanish-language radio stations" and expressed concern that the merger would decrease competition because of TLP's interests in Univision which also broadcasts Spanish-language radio programming in three markets where it competes with Clear Channel's Spanish-language radio stations.³¹⁰

Bain Capital LLC (Bain), another member of the equity consortium trying to acquire Clear Channel, controls together with TLP 50 percent of the voting interests of Cumulus Media Partners (Cumulus), a major radio company that competes against Clear Channel in two markets.³¹¹ The DOJ noted that companies that operate radio stations like Clear Channel, Cumulus and Univision "sell advertising time to local and national advertisers in each geographic market where they operate," and defined the relevant product market as "the provision of advertising time on radio stations."³¹² The DOJ analyzed the potential buyers' interests in Cumulus according to the "advertising time on radio stations market definition," and TLP's interests in Univision according to the "Spanish-language radio station definition."³¹³ The DOJ noted that Cumulus and Clear Channel's

308. Press Release, Clear Channel, Clear Channel Announces Second Amendment to Merger Agreement with Private Equity Group co-led by Bain Capital Partners, LLC and Thomas H. Lee Partners, L.P.. (May 18, 2007), <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1965>. Bain and TLP will each control fifty percent of the entity that will acquire voting and equity control of Clear Channel. See Form S-4 Registration Statement, BT Triple Crown Capital Holdings III, Inc., (July 9, 2007), <http://www.sec.gov/Archives/edgar/data/1400891/000095013407014815/d47142a1sv4za.htm#251>.

309. Broadcast Media Partners, Inc. (BMPI), a private equity consortium of Thomas H. Lee Partners; Madison Dearborn Partners, LLC; Providence Equity Partners, Inc.; Saban Capital Group ("Saban"); Texas Pacific Group paid \$13.7 billion in 2007 for Univision's radio, television and other assets. Each entity except Saban holds 23.314% of the votes and equity stock of BMPI and names two members of the BMPI Board of Directors. Saban holds a 6.744 percent voting and equity interest and can designate one director. *Univision BMP MO&O*, *supra* note 4, at 5844-5845").

310. *Bain, Clear Channel Complaint*, *supra* note 2.

311. *Id.* at ¶ 3.

312. *Id.* at ¶ 17, 21.

313. *Id.* at ¶ 28-36.

stations were similarly formatted and competed to attract listeners from each other, as were Clear Channel's Spanish-language stations and Univision's stations in overlapping geographic markets.³¹⁴ The DOJ required divestiture of Clear Channel's stations in the three markets in which it competes with Univision and in the two markets in which it competes with Cumulus as a condition of approval of the acquisition of Clear Channel by the equity investors.³¹⁵ The DOJ's continued use of a Spanish-language radio station product market definition in the 2008 Clear Channel case highlights the need to analyze the antitrust and constitutional issues, and potential impact on broadcaster and audience speech, raised by this market definition.

The FCC's approval of the Clear Channel private equity buyout transaction did not include any explicit analysis of competition within languages or formats but focused on compliance with the multiple ownership rules.³¹⁶ The FCC noted the potential for the deal to increase competition because of the sale of stations in forty-two markets where Clear Channel was not in compliance with the multiple ownership rules because of changes in the ways the markets were measured. It required as a condition of the merger that TLP comply with the FCC's previous order that TLP divest its interest in Cumulus if Univision retained its broadcast stations in markets where both Cumulus and Univision operate.³¹⁷

These transactions also demonstrate that broadcast owners (and investors who control them) frequently cross the perceived language divide in their corporate acquisition and programming choices. Professor Castañeda Paredes observed that "interlocking interests" between Spanish-language and English-language media are changing the media landscape.³¹⁸ TLP's interests in both Univision and Clear Channel (once the deal is closed), and PEP's interests in Univision, Entravision and Clear Channel, exemplify the interlocking equity and directorate interests that shape media strategies across languages, companies, and alleged markets.

Similarly, NBC leverages its programs and resources across languages through its control of the television network Telemundo, which it acquired in 2002.³¹⁹ NBC's control of Telemundo creates advertising synergies between NBC's English, Spanish, and bilingual programming.

314. *Id.* at ¶ 29, 33.

315. *Bain, Clear Channel Competitive Impact Statement*, *supra* note 5, Sec. IV A.

316. *FCC Clear Channel MO&O*, *supra*, note 5.

317. *Id.*, ¶ 2, 10; *Univision BMP MO&O*, *supra* note 5.

318. Castañeda Paredes, *supra* note 18, at 14.

319. See *NBC and Telemundo Commc'n Group, Inc.*, Transaction Records (April 10, 2002), available at <http://www.fcc.gov/transaction/nbc-telemundo.html>.

Steve Mandala, executive vice president for sales at Telemundo, stated: “Our sales organization is quite literally a part of NBC’s overall sales organization.”³²⁰ Luis Nuñez commented, “[p]art of the explanation for Telemundo’s higher ratio of advertising revenues to audience share [as compared to Univision] is the benefit of being part of a large English language media company.”³²¹

Language-switching is also common among broadcasters with roots in Spanish-language broadcasting. Traditionally, Spanish-language broadcasters such as Univision, Entravision, Border Media Partners, and Bustos Media also air English-language broadcasts.³²² Those companies air English-language programming to reach either a target audience within a market or a wider audience including Latinos. Since English-language programming generally pays more than Spanish-language programming, it also makes economic sense to diversify broadcast language formats. Broadcasting in different languages is a strategic choice of companies with roots in both English and Spanish, demonstrating the unity rather than the separation of the market.

The Supreme Court recognized in *United States v. General Dynamics Corp.*³²³ that “[e]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company’s future ability to compete.”³²⁴ In its monopoly case against Microsoft, the D.C. Circuit concluded that “because of the possibility of competition from new entrants, looking to current market share alone can be ‘misleading.’”³²⁵ “Market share reflects current sales, but today’s sales do not always indicate power over sales and price tomorrow.”³²⁶ Furthermore, “[e]ven if one could define markets and assign market shares in the marketplace of

320. Kevin Downey, *Telemundo Gets Its Share*, BROAD. & CABLE, Sept. 8, 2003, at 30, available at <http://www.broadcastingcable.com/article/CA321261.html>.

321. SPANISH LANGUAGE MEDIA, *supra* note 262, at 36.

322. See Howard, *supra* note 17 (noting that Bustos Media broadcasts two stations in Eastern Washington in English). At least five of Entravision’s forty-seven radio stations broadcast in English. See Entravision Communications Corp., Radio Station Listings, <http://www.entravision.com/template.cfm?page=media&subpage=radioAll> (last visited Mar. 22, 2008). At least four of Univision’s seventy radio stations broadcast in English formats. See Univision Radio, Station List, http://www.univision.net/corp/en/urg_list.jsp (last visited Mar. 22, 2008).

323. 415 U.S. 486 (1974).

324. *Id.* at 501.

325. *United States v. Microsoft Corp.*, 253 F.3d 34, 54 (D.C. Cir. 2001).

326. *Id.* (citing *Ball Mem’l Hosp. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986)).

ideas, just how reliable would these historic market shares be under dynamic market conditions?"³²⁷ To judge the "probable anticompetitive effect" of the merger "its structure, history and probable future" must be considered.³²⁸ This should include consideration of the likelihood of format changes and new entrants into programming as part of market analysis.

The lack of structural barriers to entry for English-language broadcasters planning to broadcast in Spanish indicates that current market share may not be a good predictor of market power. While a large market share might indicate some current influence over price and competition, new entrants may take some of that market share through program innovation or price competition. "Market share is just one pathway to estimating market power, which is the ultimate consideration."³²⁹

If market shares are "in flux or if new firms are regularly entering the market, a firm's momentarily large (or small) share of the market may say little about that firm's market power (or lack thereof)."³³⁰ Professor Shelanski observed that in broadcasting, "[c]urrent market shares may only reflect transient popularity of programming."³³¹ Professor Shelanski also observed that:

First Amendment values may be at stake if antitrust authorities base merger enforcement decisions on the popularity of a particular media provider's content. If merger clearance hinges on how much market share a particular media outlet has at a given moment, then the antitrust process might appear to be a form of handicapping where the government allows less popular speakers to merge and gain any attendant benefits of consolidation, but denies the same benefits to other speakers based solely on the fact that they are already popular.³³²

Market share also reflects current market participants. Broadcasters frequently change formats and can quickly contest not only market share but conceptions about the market.

In the *Microsoft* case, the D.C. Circuit emphasized that in determining market share, we must also consider whether structural barriers protect the company's future position.³³³ The DOJ and FTC state in the Commentary

327. Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 277 (2001).

328. *Brown Shoe*, 379 U.S., at 322 n.38.

329. Stucke & Grunes, *supra* note 335, at 300.

330. Shelanski, *supra* note 1, at 410.

331. *Id.* Market share in radio may also be affected by programming content, as well as a station's signal strength and its ability to use its economies of scale to attract talent and advertisers to develop programming and gain audience share.

332. Shelanski, *supra* note 1, at 411.

333. See *Microsoft*, 253 F.3d at 54-5 ("Considering the possibility of new rivals, the court focused not only on Microsoft's present market share, but also on the structural barrier that protects the company's future position.").

on the Merger Guidelines that they take into account the obstacles to entry including regulation, intellectual property, and economies of scale.³³⁴

Unlike cable operators, even the largest Spanish-language broadcasters do not possess a bottleneck monopoly over a physical pathway that would allow them to control competitors' access.³³⁵ In passing the Cable Act, Congress was concerned that cable operators could use their control over which stations to carry to shut out over-the-air broadcasters, reducing the viability of the broadcast medium and the public's access to their content and viewpoint.³³⁶ This "bottleneck" control meant that cable operators could "silence the voice of competing speakers with a mere flick of the switch."³³⁷ Some broadcast signals are more powerful and can be heard over a wider area, yet broadcasters are prohibited from interfering with their rivals' signals, and do not have the bottleneck power over competitors' programming that concerned the Supreme Court in *Turner I* and *Turner II*.

Additionally, broadcasters lack the intellectual property protections for their radio formats that deter others from competing for their audience. While the broadcast itself may be protected by copyright, the format is not, whether it be Spanish, bilingual, or country music. Broadcasters can and often do imitate "hot" formats and change their formats to suit audience tastes and demographics. A broadcaster may distinguish itself through radio personalities or the mix of music it chooses or news it airs. However, unlike pharmaceutical markets, which require extensive investment, testing, and government approval for the introduction of a new drug, once a broadcaster is licensed by the FCC, it is free to determine what formats to offer and may change formats at will.³³⁸ For those with FCC licenses, no intellectual property or regulatory requirements stand in the way of changing formats or languages.

In the computer sphere, network effects raise entry barriers as a standard becomes imbedded, attracting not only more users, but more programs, such as software applications, for those users.³³⁹ To a certain extent, audience size and common interests may create the equivalent of

334. Merger Guidelines Commentary, *supra* note 199.

335. *Cf. Turner I*, 512 U.S. at 662.

336. *Id.* at 623-24.

337. *Id.* at 656.

338. *See FCC v. WNCN Listener's Guild*, 450 U.S. 582, 600 (1981) (relying on the market to determine program diversity in entertainment formats); *Deregulation of Radio*, 84 F.C.C.2d 968 (1981) (eliminating FCC programming guidelines).

339. *See Microsoft*, 253 F.3d at 55.

network effects in radio or television. The larger an identifiable audience, the more likely it is to attract programming targeted to its interest.³⁴⁰ This results in an abundance of English-language programming, geared at what advertisers and producers view as the “mainstream,” predominantly white audience, whether or not that audience still predominates.³⁴¹ Professor Philip Napoli commented “[m]inority-targeted media content suffers not only from the potentially lower valuations of minority audiences, but also the fact that, by definition, it appeals to a small audience.”³⁴² However, the U.S. Latino population is large and growing.³⁴³ Its buying power is also increasing.³⁴⁴ Its growth is attracting more programming, both in English and in Spanish. However, “Spanish” formats still constitute only two percent of radio formats nationally.³⁴⁵

While cohesive groups may arguably produce the equivalent of network effects, the question is whether they also erect the kind of entry barriers characteristic of the software market. Broadcasters lack proprietary control over the factor driving the network effects—population growth. Unlike a computer operating system whose code is controlled by one company and whose popularity attracts users and software developers, population growth attracts programmers but does not give them any control over the market. While one broadcaster may initially attract a large portion of that population, the very growth of the population will likely attract more broadcasters and programmers to compete for a share of that market. In the absence of structural barriers to entry, the loyalty of that audience is subject to competition.

In analyzing entry, the DOJ and FTC state in the Commentary on the Merger Guidelines that they take into account the “likelihood, timeliness, and sufficiency of the supply response.”³⁴⁶ The Agencies examine sunk

340. See Steven S. Wildman & Theomary Karamanis, *The Economics of Minority Programming*, ASPEN INSTITUTE COMMUNICATIONS & SOCIETY ROUNDTABLE ON DIVERSITY IN THE MEDIA 2-3 (1997), available at http://www.aspeninstitute.org/site/c.huLWJeMRKpH/b.785521/k.7429/The_Economics_of_Minority_Programming.htm (positing that until the number of broadcast stations or the size of the minority audience grows, it will be more profitable to serve the majority).

341. See *id.* at 2-4.

342. Napoli, *supra* note 169, at 181.

343. See Mark Mather & Kelvin Pollard, *Hispanic Gains Minimize Population Losses in Rural and Small-Town America*, POPULATION REFERENCE BUREAU (2007) (“Between 2000 and 2006, the Hispanic population grew from 35.3 million to 44.3 million, a 26 percent increase.”), available at <http://www.prb.org/Articles/2007/HispanicGains.aspx>.

344. Latinos in the U.S. controlled \$798.3 billion in buying power in 2006, 8.4 percent of U.S. consumer purchasing power. Jeffrey M. Humphreys, *The Multicultural Economy 2006*, 66 Ga. Bus. & Econ. Conditions (Third Quarter) 1, 10 (2006), available at <http://www.selig.uga.edu/forecast/GBEC/GBEC063Q.pdf>.

345. DiCola, *supra* note 286, at 87.

346. Merger Guidelines Commentary, *supra* note 199, at 37.

costs that cannot be recovered after entry, and likely returns associated with entry.³⁴⁷

For incumbent broadcasters who already have FCC licenses and broadcasting facilities, the sunk costs to change formats would be associated with hiring new talent as needed to air the programming or in purchasing programming from other syndicated sellers such as ABC radio which produces and sells Spanish-language programming.³⁴⁸ If a broadcaster already programs in Spanish in one market, the sunk costs to change formats in another market are substantially lowered. They can transfer that programming using the Internet or satellites, while broadcasting local “inserts” about weather and news. No regulatory approvals are needed to change formats.

The right to play music in Spanish or English is already afforded to broadcasters through the licenses that they purchase from Broadcast Music, Inc. (“BMI”) or the American Society of Composers, Authors and Publishers (“ASCAP”).³⁴⁹ The music licenses are “blanket” licenses that permit a radio or television broadcaster to play any of the music within the BMI or ASCAP catalogue.³⁵⁰ Under these agreements, English-language broadcasters are already paying for the rights to play Spanish-language music and Spanish-language broadcasters are paying for the rights to play bilingual and English, as well as Spanish-language music. Thus music licensing costs are not an additional entry barrier to changing a broadcast’s language.

A shortage of personnel with the skills to change formats might lead the antitrust agencies to conclude entrants would be unable to secure essential “human resources.”³⁵¹ However, consolidation in the radio industry has led many companies to fire personnel, making people available for new formats.³⁵² Broadcasters can also train their staff to sell additional formats, using their skills and resources gained in other markets.

347. See *id.* at 37-38.

348. 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.

349. See generally *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 5 (1979).

350. *Id.*

351. See Merger Guidelines Commentary, *supra* note 199, at 44.

352. See Peter DiCola, *Employment and Wage Effects of Radio Consolidation*, in *MEDIA DIVERSITY AND LOCALISM, MEANING AND METRICS* 65, 72 (Philip Napoli ed., 2007) (noting that following the 1996 Telecomm. Act through 2002, employment per station dropped from 9.54 to 8.70. “Greater consolidation, as measured by stations per owned, has a negative and

The DOJ has justified its assumption that broadcasters will not change their formats by questioning whether broadcasters would be willing to forgo the revenue associated with a format change.³⁵³ The number of switches between language formats suggests that many broadcasters are not only willing to make such a short-term sacrifice, but that it often leads to long-term profits. For example, Clear Channel stated that its Hispanic division was a "hit," citing its leading ratings in most markets in which it had changed format.³⁵⁴

The DOJ and FTC also examine "whether firms would have an adequate profit incentive to enter at prices prevailing before the merger."³⁵⁵ They note that in a market with "well-established brands, successful entry usually requires a substantial investment in advertising and promotional activity over a long period of time to build share and achieve widespread distribution through retail channels."³⁵⁶

Incumbent broadcasters already possess the equivalent of a retail channel, a mechanism through which to distribute their product: programming which attracts audiences. Many Spanish-language broadcasters face the opposite situation of Staples and Office Depot in their proposed merger, which was abandoned after FTC objection. In *FTC v. Staples*,³⁵⁷ the government persuaded the court that a new office superstore entrant would have "difficulty in achieving economies of scale in, among other things, advertising and distribution."³⁵⁸

Even the largest Spanish-language radio broadcaster, such as Univision, which controlled seventy radio stations after its merger with

statistically significant association with employment of both news reporters and broadcast technicians.").

353. See 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), available at <http://www.usdoj.gov/atr/public/speeches/1055.htm>. See also, *Bain, Clear Channel Complaint*, *supra* note 2, at ¶ 45 (the DOJ concluded entry would not deter anticompetitive effects of the Clear Channel private equity buyout because "(f)or those stations in these markets that have large shares in other coveted demographics, a format shift solely in response to small but significant increases in price by Clear Channel, [Cumulus], or Univision is not likely because it would not be profitable. For those radio stations that may have incentives to change formats in response to small but significant increases in price by Clear Channel, CMP, and Univision, their shift would not be sufficient to mitigate the anticompetitive effects resulting from this acquisition.")

354. See Press Release, *supra* note 5.

355. See Merger Guidelines Commentary, *supra* note 199, at 38.

356. *Id.* at 38-39.

357. *Staples*, 970 F. Supp 991.

358. *Merger Guidelines Commentary*, *supra* note 199, at 38-39 (citing the proposed merger of Staples and Office Depot as an example of risks associated with entry caused by the merger parties' market share and economies of scale); see also Hovenkamp, *supra* note 290, at 40 (noting that "scale economies can permit incumbent firms to earn monopoly returns up to a certain point without encouraging new entry.").

HBC, had few stations in 2005 compared to broadcasters such as Clear Channel, which controlled 1,184 radio stations, Cumulus, which controlled 295 radio stations, Citadel, which controlled 223 radio stations, or CBS-owned Infinity, which controlled 178 radio stations.³⁵⁹ Even after Clear Channel sells all 448 of its stations in markets ranked below 100, the company will still control 766 radio stations, all in top-100 markets.³⁶⁰ Thus, the economies of scale weigh in favor of large, predominantly English-language broadcasters, indicating this is not a high barrier to entry from which to defend market share in the allegedly separate “Spanish-language” radio market.

Some broadcasters claimed that Univision did not allow them to advertise their rival programs on Univision’s television stations or on Entravision’s radio stations before Univision’s merger with HBC.³⁶¹ The FCC declined to find that was a basis for prohibiting or imposing conditions upon Univision’s merger with HBC, particularly in light of the

359. See Univision Radio: Our Story, <http://www.univision.net/corp/en/urg.jsp> (last visited Mar. 22, 2008); DiCola, *supra* note 284, at 36.

360. DiCola, *supra* note 284, at n. 13.

361. See *e.g.*, Telemundo Commc’n Group, *Ex Parte Letter*, FCC MB Docket No. 02-235, 5-6 (August 21, 2003), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514683779 (complaining that Univision and related entities refused to accept ads for Telemundo’s rival Spanish and bilingual television programs. As such, Telemundo suggests that the FCC establish a rule that “no radio station in which [Univision] has any ownership interest will discriminate on prices, terms or conditions . . . against the purchase of radio advertising time by any other Spanish-language television entity, including Telemundo.”); compare SPANISH LANGUAGE MEDIA, *supra* note 260, at 46 (calling for rules to prohibit dominant companies from using their existing market power in an anticompetitive fashion, by “prohibiting companies that exceed threshold levels of audience share for unique populations from refusing to accept competitors’ advertising), with *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 124 (1973) (recognizing a broadcaster’s prerogative to reject ads as an essential component of its right to exercise editorial judgment). To impose a different rule on broadcasters who serve Spanish-speakers, Chinese-speakers or other discrete populations while allowing English-language broadcasters the liberty to choose whether or not to accept advertisements would create disincentives to air programming serving minority-language communities because they would face more restrictions than their English-language counterparts, raising First Amendment concerns. Additionally, where a company has refused to open up its facilities to its rivals, the Supreme Court has been reluctant to recognize a duty to cooperate with rivals in all but the most limited circumstances. See *Verizon Commc’n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). While an analysis of this proposal is beyond the scope of this paper, it highlights the constitutional and antitrust law issues at stake in determining whether Spanish-language media compete in a market different from English-language media and should bear additional burdens.

resources and alternatives available to competitors such as Telemundo, a wholly-owned subsidiary of NBC.³⁶²

The ability of Clear Channel and others to use their capital from English- and Spanish-language programming across markets and languages emphasizes the transient nature of market share and the lack of barriers between the alleged "markets." Changing formats, whether within or between languages, requires advertising and promotion, but many broadcasters have found it worthwhile to do so. The more stations a company controls, the greater its ability to use those economies of scale in advertising, promotion, and selling across formats to make its programming even more attractive to audiences and advertisers. While Univision may have developed a loyal following of audiences and advertisers, Clear Channel's economies of scale make it an instant formidable competitor if it chooses to use those resources for Spanish-language programming. Goliaths may enter and quickly take a dominant position in Spanish-language formats, demonstrating the fallacy in assuming they will not enter.

From the advertiser's perspective, once the English-language broadcaster has entered the alleged "Spanish-language radio market," the advertiser will have more firms from which to purchase ads during Spanish-language broadcasts. The former English-language broadcaster would be defined as participating in the alleged "Spanish-language" radio market according to the market definition used in the DOJ's analysis of the Univision merger with HBC. However, if that broadcaster still has other English-language stations in the same geographic market, it may offer discounted multiformat, multilingual packages, selling the Spanish-language station at a cheaper price than its competitor if an ad is also bought on the English-language station.³⁶³ The advertiser's ability to buy packages across languages challenges the concept that the markets are rigidly separated by language.

This also raises the issue of whether English-language broadcasters who air Spanish-language programming only in certain geographic markets should be classified as participants in the alleged Spanish-language radio

362. *FCC HBC UVN Order*, *supra* note 8, at n.107 (emphasizing that Telemundo is a subsidiary of NBC and has many resources and alternatives with which to compete).

363. See Comments of Catherine J.K. Sandoval, et. al. re: 2006 Quadrennial Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, MB Dockets No. 06-121, 02-277, 01-235, 01-317, 00-244 at 5-6 (October 23, 2006), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518535748 (noting that some broadcasters package minority-oriented programming with "general market programming," offering to sell advertisements on minority-oriented stations for highly discounted prices, a practice known as a "Dollar a Holler").

market in other geographic markets where they only air English-language programming. The Horizontal Merger Guidelines indicate that such a firm should be viewed as a market participant if, in response to a “small but significant and nontransitory” price increase, it 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.³⁶⁴ The assessment of whether the firm will likely incur significant sunk costs of entry and exit is critical in this analysis.³⁶⁵ The DOJ simply dismissed any likelihood that English-language firms would change the language of their programming in response to such price increases rather than calculating the costs and likelihood of entry. More is required in the analysis of future mergers. The DOJ must consider the possibility that stations not currently airing Spanish-language programming in any geographic market (such as Clear Channel before Univision’s merger with HBC) will begin to do so. Although sunk costs of entry and exit must be examined, at the extreme, all incumbent broadcasters may be potential Spanish-language broadcasters, a conclusion that challenges the market definition itself.

Professor Shelanski argues that “[t]he problem with narrowly defined markets, however, is that they may obscure the dangers of consolidation among firms from different but overlapping markets”³⁶⁶ He observes:

The result could well be a market structure in which a few firms own and exercise editorial control over a broad portfolio of different kinds of media outlets. While narrow market definition would prevent concentration within categories of media outlets, it would not prevent and indeed might facilitate concentration across all types of media.³⁶⁷

Although Professor Shelanski’s analysis is directed at consolidation across categories of media such as cable and over-the-air broadcast, his insights are applicable to the problem with defining a broadcast market by the program’s language.

364. Horizontal Merger Guidelines, *supra* note 52, at 5.

365. The Guidelines also note that:

Probable supply responses that require the entrant to incur significant sunk costs of entry and exit are not part of market measurement, but are included in the analysis of the significance of entry. See Section 3. Entrants that must commit substantial sunk costs are regarded as ‘committed’ 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.

Id. at n.7.

366. Shelanski, *supra* note 1, at 406.

367. *Id.* at 406-07.

The narrow market definition obscures the ability of companies to broadcast in various languages, resulting in the option to draw upon market power in one language, especially the dominant language (English), and use it to successfully gain audience and advertiser share in another language. Professor Grimes commented, “[l]arge, oligopolistic firms can wield power strategically, targeting less powerful rivals, customers, or suppliers.”³⁶⁸ When markets are artificially separated, firms who would have been small players in the large market become large players in the small market. Yet, the big players in the large market can use their “relational power”³⁶⁹ to enter and gain market share in what has been defined as the “small market.” This ability to cross-over should raise questions about whether the markets are separate.

One of Congress’s goals in enacting must-carry rules was to ensure that there were “multiple speakers” in the video marketplace.³⁷⁰ The ability of English-language broadcasters to enter into Spanish-language programming illustrates that characterizing the radio marketplace by the Spanish language is not necessary to ensure competition or diversity—nor does it recognize the reality of a broadcast marketplace that transcends language.

If the HBC/Univision case had proceeded to litigation, the DOJ would have been required to support its no-entry assumption. Similarly in the Clear Channel private equity buyout, the parties settled and did not challenge the Spanish-language radio market definition or entry assumptions because they valued the overall deal more. Agreement to settle meant those assumptions went largely unchallenged. Such assumptions are damaging even at the complaint and settlement stages since they encourage parties to take actions they might not take if the assumptions were subjected to rigorous analysis. Furthermore, they set a precedent for future merger analysis, which is especially harmful if the analysis does not meet antitrust or constitutional standards.

Douglas Melamed observed that parties to a consent decree are likely to only consider the effects of negotiation on their own transaction.³⁷¹ Parties often value their deal more than the remedies the DOJ or FTC may require and agree to settle, enabling the Agencies to obtain relief through settlements that they would not obtain in litigation.³⁷² This process gives

368. Warren S. Grimes, *The Sherman Act’s Unintended Bias Against Lilliputians: Small Players’ Collective Actions Counter to Relational Market Power*, 69 ANTITRUST L.J. 195, 195 (2001).

369. *Id.*

370. Stucke & Grunes, *supra* note 333, at 285.

371. See A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 14 (1995).

372. *Id.*

the Agencies tremendous power to encourage parties to accept their suggested remedies. However, it should not detract from the “fact-intensive” nature of the merger review the DOJ and FTC emphasized in their Commentary on the Merger Guidelines.³⁷³ Nor should it set a precedent for reviews of future transactions, particularly when the First Amendment constraints on the market definition were not articulated or analyzed.

V. CONCLUSION

The merger review process has yet to identify or publicly analyze whether defining a radio market by the program’s language is subject to constitutional scrutiny as a content-based or content-neutral distinction. Yet, merger analysis must respect the constitutional rights of broadcasters and listeners. Additionally, assumptions cannot substitute for analysis, particularly where the DOJ’s assumption that no broadcaster would change formats to compete in other languages is contrary to the evidence and thus challenges the DOJ’s market conception.

The speech rights at stake for audiences are demonstrated in the reasons for using Spanish-language media. Audiences listen to and watch Spanish-language radio and television not simply because of their language preference or ability. Nor do they tune-in merely for the cultural, entertainment and sports programming. Rather, they are also attracted to such media for news and public affairs programming tailored to the interests of Latinos in the United States, including news about Latin America. English-language programming also attracts many Latinos, while pushing away others by its stereotyping or relative lack of inclusion of Latino characters and stories. The net result is that audiences choose Spanish-language or English-language media for its content. This tight nexus between content and language indicates that defining a radio market by language is a content-based regulation, mandating strict scrutiny to ensure that the means are narrowly tailored to a compelling state interest. The vital role of Spanish-language media in providing targeted and distinct news and public affairs information underscores the need to balance the government’s purported interest in defining the radio market by language with its burdens on speech.

For broadcasters, language is a competitive tool within the arsenal of consolidated media companies. The ability of Clear Channel and others to

373. See Merger Guidelines Commentary, *supra* note 199, at 3.

use their capital from English- and Spanish-language programming across markets and languages emphasizes the lack of structural barriers between the alleged “markets.” English-language broadcasting Goliaths can enter and quickly take a dominant position in Spanish-language formats. The market entry data challenges the DOJ’s underlying assumption that no competitor would change its programming to compete in the Spanish-language (and bilingual) market. This dynamic entry by large, incumbent, traditionally English-language competitors should also challenge the concept of separate Spanish- and English-language markets. It suggests that the market structures are not separated, but dynamic and integrated.

The DOJ’s faulty language-based market definition has shifted power to large, incumbent English-language broadcasters who can bring their economies of scale from the larger English-language station clusters to compete in Spanish. If the transaction falls within the thresholds requiring antitrust approval, those specializing in Spanish may be limited in their options to expand. Under that narrow market definition, Spanish-language broadcasters subject to antitrust approval with more than nominal share in a geographic market may be limited in their ability to expand by being allowed to acquire only stations which currently broadcast in English or languages other than Spanish. However, English-formatted stations will likely be more expensive than stations broadcasting in Spanish because the advertising industry pays more for English-speaking than Spanish-speaking audiences.³⁷⁴ This process creates a competitive advantage for English-language broadcasters. It also discourages specialization in Spanish-language programming within a local market, depriving the population of distinctive programming it may wish to hear.

While designed to prevent undue concentration “within” the alleged “Spanish-language” broadcast market as defined by the DOJ, the First Amendment rights at stake require a reexamination of the concept that media markets are rigidly separated by language. The publicly available evidence of advertiser and audience substitution between Spanish and English-language media, coupled with broadcasters airing programming and selling advertising packages that cross languages, call into question whether the government can meet its burden of proving that the markets are separated by language. Such proof is a predicate to demonstrating that the government has a compelling or substantial state interest in that distinction. The disincentives the market definition creates to broadcast in Spanish or other minority languages raise concerns about the burdens of this distinction on the speech rights of audiences and broadcasters. Our collective interests in democratic debate and access to information through the media, as well as in the promotion of fair competition, compel

374. See Napoli, *supra* note 167, at 171-72.

examination of the threats to First Amendment freedoms created by an antitrust market definition based on language that erects false language and market barriers.

