FORUM

Consolidation Raises Antitrust Issues

By MATTHEW L. CANTOR & JEFFREY I. SHINDER

As the media industry continues to consolidate via both horizontal and vertical acquisitions, the proper definition of programming "markets" for antitrust purposes is becoming a threshold question.

In fact, this question can determine a merger's fate: if programming markets are defined narrowly, antitrust authorities are more likely to raise antitrust issues. Conversely, if these markets are defined broadly, antitrust concerns are less likely to arise.

Consider the following hypothetical: The Walt Disney Co., which owns the ABC Family Channel and The Disney Channel, chooses to purchase The Cartoon Network (owned by AOL Time Warner) and Nickelodeon (owned by Viacom Inc.), leaving one major competitor in the business of cable programming targeted towards kids.

To determine whether it is likely that the merger would substantially lessen competition, the antitrust authorities must first "define" the scope of the antitrust market in which these players compete. Would the relevant market include all television — cable or over-the-air broadcast — programs? Would it only include cable programming? Would it include all television programming targeted at kids or only cable kids programming?

In other words, do the merging entities only complete with themselves or do they compete with, for example, USA Network or NBC?

These questions are resolved by determining how consumers would respond to a "small, but significant and nontransitory" price increase. With programming, this issue must be analyzed from the standpoint of two categories of consumers: advertisers and multichannel-video programming distributors (MVPDs).

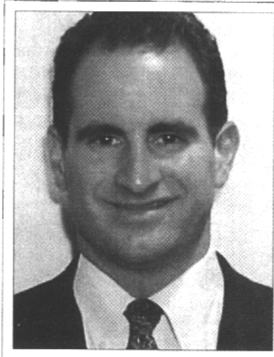
For advertisers, the central question is whether they would render a hypothetical small, but significant and nontransitory price increase by the merged entity unprofitable by substituting in sufficient quantities to other television networks. If they did, those networks should be included in the relevant market and the merger would be unlikely to offend the antitrust laws.

If, on the other hand, a price increase could be profitably imposed by the merged entity because alternative television outlets are not acceptable substitutes for advertisers, antitrust authorities might conclude that the merger is likely to create market power and, thus, is illegal. A similar analysis would be undertaken to determine whether MVPDs would suffer price hikes for programming supply as a result of the merger.

Back to the hypothetical. If authorities determined that advertisers consider all television programs as substitutes for the children's programming provided by the relevant channels, then the market must include all television programs and it would be unlikely that a merged Disney/Cartoon Network/Nickelodeon would have the ability to exercise market power.

If, however, authorities conclude that a sufficient number of advertisers would choose to pay the small, but significant, non-transitory price increase rather than switch to alternative television programs, authorities may conclude that the merged entity might acquire market power as a result of the transaction.

If this conclusion is reached, authorities may seek to enjoin the transaction. Accordingly, it is important for media companies to understand how television-programming markets have historically been defined to assess the antitrust risks of a particular media acquisition.



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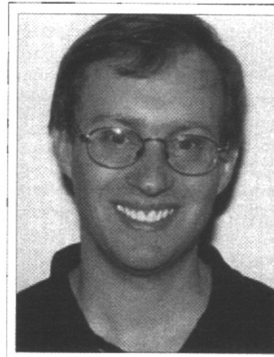

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JUDICIAL DETERMINATIONS

When the Supreme Court declined to review a case involving the National Football League, Chief Justice William Rehnquist stated that NFL games compete with other sports and other forms of entertainment in a general entertainment market.

Thus, it would follow that, if a broad general entertainment market exists, then a general entertainment programming market — which could include programming that appealed to all demographics — would exist and it would be very difficult to enjoin mergers of firms who supply specific-genre programming.

The question of whether markets for specific-genre programming exist has been tackled, specifically in the sports programming context. In 1984 case titled *National Collegiate Athletic Association v. Board of Regents*, the Supreme Court declined to find that a lower court ruling that held that there was a separate market for college football broadcasts was clearly erroneous.

There, the lower court emphasized that college football telecasts generate an audience "uniquely" attractive to advertisers.

Since that time, however, several lower courts have mused that a separate market for specific sports programming, such as baseball-, football- or college football-only programming, does not exist.

For example, appellate Judge Frank Easterbrook, in considering whether National Basketball Association telecasts constituted the boundaries of a relevant programming market, distinguished the Supreme Court's statement about the existence of a market for college football telecasts. He pointed out, for example, that advertisers view NBA telecasts with other forms of programming.

Further, with respect to whether markets exist for the distribution of programming relating to a specific team as opposed to a specific sport (such as college football), a federal district court declined to accept such a market. The court held that it is a "legal impossibility" for baseball team broadcasts to be a relevant product market. Thus, while the NCAA decision cannot be ignored, it is apparent that more recent judicial determinations have frowned upon accepting a market for programming dedicated to a specific sport.

ANTITRUST ENFORCERS

During the Clinton Administration, antitrust enforcers had considered the viability of specific programming-by-genre markets. The merger between Time Warner Inc. and Turner Broadcasting Inc., for example, was cleared only after conditions were placed requiring the merged entity to carry a programming competitor on its cable "pipes."

There, the Federal Trade Commission was concerned that nascent competition to Cable News Network (a Turner property) would be crippled if at least one other cable news network was denied access to Time Warner's cable subscribers.

Although not judicial precedent, this approach implied that the FTC considered cable news programming to be a relevant market. Further, while the Federal Communications Commission has signaled a readiness to accept broader programming markets in certain circumstances, antitrust authorities appear to be taking the opposite course. For example, the FCC recently revised its television station ownership rules, apparently because it believes that television and cable programming compete for spot advertising — and thus are in the same market.

The FCC's new ownership rule allows for a particular entity to own two television stations in the same "designated market area" so long as there remain eight independent voices in that market. Also as long as both of those stations are not among the top four in that market.

Based on this amendment, a number of transactions have been cleared that have created markets where one ownership group owns two television stations.

However, as a condition of the acquisition of Chris-Craft Industries Inc. by certain Fox television entities (which gave Fox control of two stations in New York, Los Angeles and Phoenix), the Antitrust Division required that the entities enter into a consent decree requiring the divestiture of a second station that was to be purchased in the Salt Lake City area — a divestiture that the above-referenced FCC rule also mandated.

In the complaint filed in the consent decree proceedings, the Antitrust Division alleged the existence of a market for television broadcast spot advertising — separate and apart from cable television spot advertising. Of course, this allegation conflicts with the FCC's position on this issue.

Whether the FCC's or Antitrust Division's view will prevail on this issue will hopefully be determined soon. From our perspective, it appears that advertisers consider cable programming to be a substitute for, at least some if not most, television programming.

It is critical for programming suppliers and distributors to understand precedents regarding programming market definition. By understanding these precedents and attempting to determine whether programmers have market power, programmers and distributors will better understand the antitrust implications of certain acquisition strategies and certain business practices.

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