DEPARTMENT OF JUSTICE

Dynamic Competition in the Newspaper Industry

CHRISTINE A. VARNEY
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for
The Newspaper Association of America

March 21, 2011

The press serves a vital role in our democracy.[1] Its special place is reflected in the First Amendment, which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[2]

The principle that competing news sources best promote a free society dovetails with our antitrust laws, which rest on the "assumption that competition is the best method of allocating resources in a free market."[3] The antitrust laws promote competition, which encourages businesses to lower costs, improve their products, and find ways to serve customers better.[4] The spur of competition is particularly sharp in industries experiencing

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1 I am grateful to Frank Blethen (*The Seattle Times*), Jim Brady (formerly with *The Washington Post*), Nicholas Lemann (Columbia University), Bernie Lunzer (The Newspaper Guild-Communications Workers of America), Michael Porter (Harvard University), Clay Shirky (New York University), Ben Scott (formerly with Free Press), and Paul Starr (Princeton University) for sharing their perspectives on the newspaper industry with me. These remarks do not reflect confidential information obtained in, and are not intended to bear upon, any matter in which the Antitrust Division is presently involved.

2 Associated Press v. United States, 326 U.S. 1, 20 (1945).

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

4 *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.").

technological change, where innovation and fresh ideas become essential to survival in the marketplace.

As it has in earlier eras, dynamic change marks the nation's media industries and, in particular, the newspaper industry. The advent of the Internet has meant increased competition for readers and advertising dollars, and the economic downturn has exacerbated the impact of this competitive stress. These trends, in combination with other factors, have left many newspapers in perilous financial straits, with a few closing and others forced to undertake drastic cost cutting.

The fate of the newspaper industry is not just the parochial concern of industry participants and investors. Newspapers play a special role in furnishing high-quality news to our nation's citizens. Today, newspapers make investments in news gathering unmatched by other media.[5] Many new sources of news and commentary are emerging, and the Internet has enabled the broader dissemination of news and analysis. Still, recent developments have caused a number of observers to fear that, if newspapers are unable to put themselves on stronger financial footing, and continue to cut back their coverage or

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[5] *See, e.g.*, Clay Shirky, Newspapers and Thinking the Unthinkable (Mar. 13, 2009), *available at* http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable/ ("Print media does much of society's heavy journalistic lifting, from flooding the zone—covering every angle of a huge story—to the daily grind of attending the City Council meeting, just in case. This coverage creates benefits even for people who aren't newspaper readers, because the work of print journalists is used by everyone from politicians to district attorneys to talk radio hosts to bloggers.").

shutter their doors, other media outlets will not fill the journalism gap.[6] If true, we as a society must be concerned as this industry struggles to find new business models to compete going forward.

Given the Antitrust Division's involvement with the industry over time, I want to offer some perspective on competition issues in the newspaper industry as the industry negotiates this new economic environment. I will start by revisiting two earlier periods when newspapers were forced to adjust to new challenges—namely, radio and then television—and then turn to recent trends in the industry. Next, I will discuss the Division's important role in preserving competition in the newspaper industry. Finally, I will conclude with an explanation of the Division's method of analyzing mergers and collaborations in the newspaper industry, showing the flexibility that newspaper owners have under the antitrust laws to experiment with new strategies.

Looking forward, the core of my message is that the antitrust laws and the Antitrust Division have a limited—though critical—role to play as the newspaper industry looks for new, procompetitive business models that will allow high-quality journalism to flourish. It

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[6] *See, e.g.*, Steve Coll, Statement at Hearing on the Future of Journalism Before the Subcomm. on Communications, Technology, and the Internet, S. Comm. on Commerce, Science, and Transportation, 111th Cong. 4 (May 6, 2009), *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=0330b270-52b7-4938-9d81-c55318a4194d ("But even the most optimistic practitioners of the new journalistic models tend to accept that a world in which Web-based publishers or aggregators could afford, for example, to simultaneously fund and operate professional journalism bureaus in Baghdad, Kabul, Islamabad, Europe and Asia is simply not foreseeable at present.").

is impossible to predict the direction the industry will take and what a newspaper will look like in the future—if something resembling a newspaper as we know it today even exists in the future. It is not the province of the antitrust laws or the Antitrust Division to protect or preserve existing market structures, to anoint new business models, or to pick winners and losers. Rather, the antitrust laws and the Antitrust Division serve to ensure that parties do not use illegal means to disrupt the competitive process as it works itself out. For those considering new business models to meet to changing market realities, the Antitrust Division continues to welcome opportunities to clarify the requirements of the antitrust laws, as we did in last year's business review letters to the Associated Press and MyWire Inc.

I. Transitions in the Newspaper Industry: Yesterday and Today

I want to start by reviewing how new technologies have impacted the newspaper industry, both in the past and the present. In the last century, newspapers saw some readers and advertisers migrate to radio and then to television, while, in this century, some readers and advertisers have departed for the Internet. In response to both developments, newspapers have made changes in order to maintain their appeal, offering new types of content, adjusting their formats, looking for new sources of revenue, and streamlining their operations, among other strategies. This is how the competitive process should work, with businesses adapting to changes in the marketplace in ways that benefit consumers. I want to offer thumbnails of these periods of transition in the newspaper industry to set the stage for a discussion of how the antitrust laws and the Antitrust Division safeguard this competitive process.

A. Earlier Periods of Dynamic Competition

Today's problems in the newspaper industry have precedent in the 1920s and 1930s, when broadcast radio developed into a national medium that provided an alternative news and advertising platform to the daily newspaper.[7] The emergence of broadcast radio roughly coincided with the Great Depression, leading to a period of declining circulation and advertising revenue for most newspapers.[8] In response, newspapers throughout the country began to differentiate their news product from radio's news product. Many newspapers revamped their formats and content, offering more in-depth reporting of local and national news stories.[9] Newspapers began providing content not available on radio, including comic strips and weekend magazines.[10] By innovating, newspapers were able to compete effectively for subscriber and advertising revenue by addressing reader preferences for certain bundles of information, formatting, and publication cycles.

A response of a different character—one at least potentially raising antitrust concerns—was the "Biltmore Agreement," an unwritten agreement between newspapers and the major radio networks. As described by one historian, the Biltmore Agreement "was a plan by which the broadcasters agreed to cease gathering their own news in

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7 *See* GWENYTH L. JACKAWAY, MEDIA AT WAR: RADIO'S CHALLENGE TO THE NEWSPAPERS, 1924–1939 84 (1995).

8 *Id.* at 85.

9 *Id.* at 61–62.

10 ROGER FIDLER, MEDIAMORPHOSIS: UNDERSTANDING NEW MEDIA 70 (1997).

exchange for a limited bulletin service to be provided by the wire services, with restrictions to prevent these news broadcasts from competing in any way with the newspapers."[11] The parties did not formalize the agreement in writing because they feared antitrust scrutiny.[12] It appears that, at bottom, the Biltmore Agreement constituted a scheme among newspapers and radio stations to limit the ways in which they worked to attract readers and advertisers, a scheme to adjust to new market realities through collusion rather than innovation.

Almost immediately, the agreement broke down because many independent radio stations had not consented to it. New radio news services began to emerge to provide independent radio stations with news, and these services began to capture a larger share of advertising revenues than the newspapers and wire services complying with the agreement. Consequently, two of the larger news services, the United Press and International News Service, broke from the agreement and began to compete with the independent radio news services for the advertising revenues that could be earned by selling news to radio broadcasters.[13] It is the responsibility of antitrust to police such attempts to short circuit the competitive process.

The emergence of television broadcast networks in the 1950s again forced newspapers to change. Style, content, and news coverage evolved in response to changing

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11 JACKAWAY, *supra* note 7, at 27.

12 *Id.*

13 *Id.* at 31.

reader demands.[14] Yet, notwithstanding that change, the growth of television contributed to the demise of many afternoon newspapers as people became accustomed to getting news in the evening in other ways. Specifically, as the former editor of the *Wall Street Journal* has put it, evening papers were "crushed by a phenomenon that can be summed up in two words: Walter Cronkite."[15]

Despite the emergence of television and radio as sources of news and advertising space, newspapers did not become obsolete. Indeed, they thrived from the innovation induced by the challenge of new media options.[16] Some newspapers changed long-held newspaper conventions and formats. For instance, *USA Today* began to use color newsprint and published "short, quick and to the point" stories similar to those featured on television.[17] Other newspapers began emphasizing feature stories and analysis pieces.[18] At the same time, computer systems and other new printing technologies made it possible for many newspapers to streamline their production processes and dramatically reduce

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14 *See* William R. Lindley, *Newspapers in the Twentieth Century, in* HISTORY OF THE MASS MEDIA IN THE UNITED STATES: AN ENCYCLOPEDIA 455–56 (Margaret Blanchard ed., 1998).

15 Paul E. Steiger, *Read All About It: How Newspapers Got into Such a Fix, and Where They Go from Here*, WALL ST. J., Dec. 29, 2007, at A1; *see also* Charles Romeo, Russell Pittman & Norman Familant, *Do Newspaper JOAs Charge Monopoly Advertising Rates?*, 22 REV. INDUS. ORGS. 121, 122 (2003).

16 *See* JACKAWAY, *supra* note 7, at 84–85.

17 *See* WILLIAM R. LINDLEY, 20TH CENTURY AMERICAN NEWSPAPERS: IN CONTENT AND PRODUCTION 45 (1993).

18 *Id.* at 46–47.

costs.[19] These and other changes allowed newspapers to become highly profitable during the 1970s and 1980s.[20]

In short, the newspaper industry has confronted technological advances in previous eras. Through the innovation induced by these challenges, newspapers adjusted and prospered.

B. Today's Challenges

Today, the newspaper industry faces another technological game-changer—the Internet. I know that I do not need to educate you on the changes occurring in media marketplaces, so I will not linger on this topic. However, I hope that a brief review of the challenges facing the newspaper industry will set the stage for a discussion of antitrust enforcement in the industry.

As discussed by many,[21] the advent of the Internet, along with other factors, has undermined the business model of many daily newspapers.[22] In recent decades, most daily

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19 Randy Reddick, *Newspaper Competition*, *in* HISTORY OF THE MASS MEDIA IN THE UNITED STATES: AN ENCYCLOPEDIA 440, 441 (1998).

20 FIDLER, *supra* note 10, at 130.

21 My discussion of the current state of the newspaper industry draws on a wealth of resources, including the reporting of a number of newspapers, data made available by the Newspaper Association of America, and a number of studies by academics, industry experts, and foundations.

22 It bears emphasis that generalizations about the newspaper industry, including the ones made in my remarks, should be read with a degree of caution. There are approximately 1,400 daily newspapers in the United States, and they face different challenges and opportunities.

newspapers have relied primarily on print advertising to support the cost of doing business, with approximately 70 to 80 percent of total revenue coming from a combination of national advertising, local advertising, and classified advertising. Circulation typically has generated most of the balance of daily newspaper revenue, and other revenue sources collectively have provided relatively small additional revenues.

Print advertising revenue, however, is eroding. Some of the decline is attributable to the current economic downturn, but much of it is attributable to a migration of both readers and advertisers to Internet sources. There has been a major shift in classified advertising from newspapers to websites like Craigslist and Monster. Likewise, national and local advertisers increasingly are utilizing the Internet and other options for their advertising needs.

Other factors have exacerbated the impact of the loss of print advertising revenue. Some readers are shifting from paid subscriptions to free online news sources, resulting in declining circulation. Additionally, some newspaper owners labor under heavy debt loads from recent acquisitions.

Online revenue has not offset these losses. Many newspaper owners offer their online content for free, having reasoned that they could attract more readers and thereby sell more advertising. Although online advertising dollars have grown steadily, online advertising rates are just a fraction of print advertising rates for several reasons, including the transient nature of online readership, the multitude of websites offering advertising opportunities, and the huge inventory of potential online advertising space.

These economic woes have had an impact on the production of high-quality journalism. Publishers have laid off reporters and other employees, closed domestic and foreign news bureaus, and cut back other expenditures. Some newspapers have sought bankruptcy protection, and still others have closed their doors. This has led some commentators to worry that these developments will lead to a deleterious reduction in the production of the high-quality journalism so important to our civic life.

We still see positive prospects for the industry. Demand for news remains strong, and significant demand from advertisers remains. Newspaper owners are experimenting with new business models and strategies, and commentators are proposing others. For example, publishers are proposing or implementing a variety of models for charging for access to online content, working to license their content for distribution on e-readers, cell phones, and other devices, exploring ways to monetize their online content better and to make online advertising more effective, cutting costs by outsourcing routine business functions, and partnering with other newspapers or emerging nonprofits to generate content. The breadth of these strategies is a testament to the vision and creativity of industry leaders, as well as to the seriousness of the challenges facing the industry.

Additionally, although many newspapers have scaled back their investments in journalism, new forms of news gathering and publishing have emerged, including start-up online news organizations and nonprofit organizations dedicated to investigatory reporting. For example, ProPublica, a nonprofit newsroom, published 138 investigatory stories in 2009, which were offered to traditional news publications free of charge. In 2010, one of its stories was awarded a Pulitzer Prize for investigatory reporting. Additionally, in a

number of localities, projects devoted to local reporting have arisen, for example, the *Voice of San Diego*, a nonprofit online news source focusing on issues impacting the San Diego region, and *MinnPost*, a nonprofit journalism enterprise covering local issues in the Minneapolis/St. Paul area. These efforts have filled some of the gaps in local news reporting that were left by downsized newspaper newsrooms.

II. The Antitrust Division's Protection of Competition in the Newspaper Industry

We at the Antitrust Division cannot predict which of these strategies, if any, will succeed in the crucible of the marketplace. We are agnostic about the particular business models that will prevail, trusting in the competitive process. I can say with confidence, however, the antitrust laws and the Division's enforcement efforts will not hamstring publishers' efforts to implement procompetitive strategies. In fact, in this period of transition, vigilant antitrust enforcement is imperative to ensure that anticompetitive conduct does not tip the market in a particular direction. In the balance of my remarks, I will discuss the importance of antitrust enforcement in the newspaper industry and illustrate the latitude that newspapers have under the antitrust laws to adapt to changing marketplace dynamics.

A. The Antitrust Division's Enforcement Efforts

The Antitrust Division has a long history of enforcing the antitrust laws in the newspaper sector. Stated in general terms, the antitrust laws bar conduct that restrains competition and harms consumers by raising prices, restricting output, or reducing innovation. Among the conduct proscribed by the antitrust laws are agreements that restrain trade, mergers that pose a likelihood of competitive harm, and anticompetitive,

unilateral acts that create or maintain a monopoly. A review of a few Antitrust Division cases in the newspaper industry, both historic and recent, will, I hope, illuminate important principles of law and illustrate the benefits of the antitrust laws for consumers and for the industry and economy as a whole.

Associated Press v. United States[23] confirmed the principle that newspapers, like other businesses, may not unreasonably restrain trade. In that case, the Department of Justice challenged Associated Press (or AP) by-laws restricting members from selling news to non-members and granting members the power to block non-member competitors from AP membership. The Supreme Court rejected the argument that newspapers are entitled to a "different and more favorable kind of trial procedure than all other persons covered by the [Sherman] Act,"[24] explaining that "[t]he First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."[25] Newspapers, the Court found, are subject to the same legal standards as are other businesses: "All are alike covered by the Sherman Act."[26] The Court went on to find that the relevant by-laws were "on their face . . . restraints of trade"

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[23] 326 U.S. 1 (1945).

[24] *Id.* at 6.

[25] *Id.* at 20.

[26] *Id.* at 7.

that had "hindered and restrained the sale of interstate news to non-members who competed with members."[27]

The impact of radio on the media marketplace was at the center of another important Supreme Court decision, *Lorain Journal Co. v. United States*.[28] Between 1933 and 1948, the *Journal* newspaper held a monopoly over "the mass dissemination of news and advertising, both of a local and national character," in Lorain, Ohio.[29] In 1948, that monopoly was threatened when the FCC licensed a new radio station in the Lorain area to broadcast music, news, and advertising. In response to this new entry, the *Journal* refused to accept advertisements from any Lorain business that also advertised on the radio station.

The Court found that the newspaper's conduct was an illegal attempt to monopolize under Section 2 of the Sherman Act. "Because of the Journal's complete daily newspaper monopoly of local advertising in Lorain and its practically indispensable coverage of 99% of the Lorain families," the Court found, the newspaper's conduct forced "numerous advertisers to refrain" from advertising on the radio.[30] The Court determined that this conduct "reduced the number of customers available" to the radio station, "strengthened

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27 *Id.* at 13.

28 342 U.S. 143 (1951).

29 *Id.* at 147.

30 *Id.* at 149–50.

the Journal's monopoly in that field," and "tended to destroy and eliminate" the radio station altogether.[31]

I have spoken before about the importance of *Lorain Journal* as precedent respecting Section 2 of the Sherman Act.[32] The decision is also noteworthy because it marks antitrust's sensitivity toward competitive dynamics between newspapers and other media.

A third Division action reaching the Supreme Court concerned a joint operating agreement (or JOA) between newspapers in the same geographic area. The first JOA was formed in 1933, and, over the next 30 years, 27 additional JOAs were formed across the United States.[33] Although JOA terms vary, they generally allow newspapers to reduce costs through joint publishing and distribution operations. On the other hand, JOAs also raise significant competitive concerns since they can enable cartel-like pricing of newspaper advertisements and subscriptions.

In 1965, the Division challenged a JOA between the only daily newspapers in Tucson, Arizona. The JOA included provisions to set subscription and advertising rates jointly, to pool profits from the papers' joint operations, and to preclude the owner of

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31 *Id.* at 150.

32 Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era, Address Before the U.S. Chamber of Commerce 9–11 (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245711.pdf.

33 JOHN C. BUSTERNA & ROBERT G. PICARD, JOINT OPERATING AGREEMENTS: THE NEWSPAPER PRESERVATION ACT AND ITS APPLICATION 2–3 (1993).

either paper from competing with the joint entity. In *Citizen Publishing Co. v. United States*, the Supreme Court agreed with the Antitrust Division that the JOA was a per se violation of the Sherman Act.[34]

A year after the *Citizen Publishing* decision, Congress responded by passing the Newspaper Preservation Act (or NPA), which permits otherwise prohibited collective pricing in an effort to preserve editorial diversity.[35] The statute allows newspapers competing in the same geographic market to form JOAs that collectively set circulation and advertising rates if, among other things, they preserve separate editorial boards.[36] The NPA extended antitrust immunity to certain JOAs that had been formed before its passage. For new JOAs, Congress provided that a newspaper "in probable danger of financial failure" is eligible to enter into a JOA with a competing newspaper.[37]

To this day, we continue to maintain our vigilance in the newspaper industry. Just last year, we settled litigation against two JOA newspapers in Charleston, West Virginia.[38]

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34 394 U.S. 131, 135 (1969).

35 Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified as amended at 15 U.S.C. §§ 1801–04). At the time, the Antitrust Division opposed the NPA's passage. *See* Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 NW. U. L. REV. 115, 122 (2010).

36 15 U.S.C. § 1802(2).

37 15 U.S.C. §§ 1802(5) & 1803(b).

38 Motion in Support of Entry of Final Judgment, United States v. Daily Gazette Co., 2010-2 Trade Cas. ¶ 77,105 (S.D. W. Va. 2007) (No. 2:07-0329), *available at* http://www.justice.gov/atr/cases/f259100/259105.pdf.

In this lawsuit, we alleged that the owners of the two newspapers violated the antitrust laws when they merged and took steps to shut down one of the papers in the JOA, the *Daily Mail*.[39] Before the Division stepped in, the parties had embarked on their plan by terminating newsroom staff at the *Daily Mail*, cutting the *Daily Mail*'s budget substantially, and reducing the *Daily Mail*'s promotions, among other things. Their actions harmed readers and advertisers in Charleston, resulting in, among other consequences, a reduction in the amount and quality of original content generated by the *Daily Mail*, the elimination of discounts, a reduction in the distribution area of the *Daily Mail*, and lower household penetration for advertisers in the *Daily Mail*. Had the plan succeeded, readers would have been deprived of a choice of daily newspapers and likely would have paid higher prices for a newspaper with less content and lower quality.[40] The Division's lawsuit halted this plan, and, today, the residents of Charleston can choose between two newspapers with independent editorial voices.

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[39] Complaint, United States v. Daily Gazette Co., 2010-2 Trade Cas. ¶ 77,105 (S.D. W. Va. 2007) (No. 2:07-0329), *available at* http://www.justice.gov/atr/cases/f223400/223469.pdf.

[40] Competitive Impact Statement at 9–12, United States v. Daily Gazette Co., 2010-2 Trade Cas. ¶ 77,105 (S.D. W. Va. 2007) (No. 2:07-0329), *available at* http://www.justice.gov/atr/cases/f254300/254310.pdf.

B. An Antitrust Perspective on New Newspaper Business Strategies

As you likely are aware, some have called for an extension of antitrust immunity for news organizations.[41] These well-intentioned, but ultimately misguided, attempts to permit otherwise illegal behavior correctly have not been adopted. As I have stated previously, new legislative exemptions for specific industries should be avoided absent a clear and compelling reason why such an exemption is in the public interest, despite an obvious loss in consumer welfare.[42] Vigorous competition on the merits, protected by the antitrust laws, best serves the interests of consumers. I agree with the Antitrust Modernization Commission's conclusion that departures from this maxim of our free enterprise system should be rare because they tend to benefit a small minority of economic actors at the expense of consumers in the form of higher prices, reduced output, lower quality, and reduced innovation.[43]

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41 *See, e.g.*, Tim Rutten, *Setting the Price of a Free Press*, L.A. TIMES, Aug. 22, 2009, at A27; Bruce W. Sanford & Bruce D. Brown, *Laws That Could Save Journalism*, WASH. POST, May 16, 2009, at A15.

42 Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, Antitrust Immunities, Remarks as Prepared for the American Antitrust Institute's 11th Annual Conference 1–2 (June 24, 2010), *available at* http://www.justice.gov/atr/public/speeches/262745.pdf; *cf.* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed." (citations omitted)).

43 ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 335 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/chapter4.pdf.

The changes in consumer and advertiser trends that have convulsed the industry are not caused by antitrust enforcement, and limiting antitrust enforcement will not reverse those changes. Indeed, as I mentioned above, the industry currently enjoys an exemption from the antitrust laws through the NPA, yet many newspaper owners still face significant difficulties. In fact, that exemption may well have contributed to industry sluggishness in making difficult but necessary choices forced by changing market dynamics.[44] Any new exemption from the antitrust laws seems particularly inappropriate at this point—industry dynamism should be given a full opportunity to play out in the marketplace before any antitrust exemption is even considered.

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[44] *Cf.* Stucke & Grunes, *supra* note 35, at 123 ("It is hard to characterize the NPA as a success in terms of aiding smaller newspapers, preventing abuse, or significantly improving newspaper quality."). It is worth noting that some commentators have questioned the efficacy of the NPA. Courts have commented on the NPA's "inartful drafting," Reilly v. Hearst Corp. 107 F. Supp. 2d 1192, 1203 (N.D. Cal. 2000); *see also* Mich. Citizens for an Indep. Press. v. Thornburgh, 868 F.2d 1285, 1291 (D.C. Cir. 1989) ("The exact meaning of the linguistically imprecise phrase 'probable danger of financial failure' is not apparent from the statute or the legislative history."); Newspaper Guild v. Levi, 539 F.2d 755, 761 (D.C. Cir. 1976) ("Careful draftsmanship would have undoubtedly produced a provision whose language less ambiguously indicates the intended result."), and the NPA has proven difficult for courts and litigants to administer, John S. Martel & Victor J. Haydel, *Judicial Application of the Newspaper Preservation Act: Will Congressional Intent Be Relegated to the Back Pages*, 1984 B.Y.U. L. REV. 123, 125–26 (1984) ("Despite the apparent simplicity of the NPA's language, the task of deciding what it means and of applying the Act's criteria to specific situations has not been easily accomplished."). Additionally, some have pointed out that the NPA appears to be only a temporary expedient, extending the lives of troubled papers but ultimately not staving off failure. Over the years, many JOAs have dissolved, usually resulting in one daily newspaper remaining in a specific geographic area, LEONARD DOWNIE JR. & MICHAEL SCHUDSON, THE RECONSTRUCTION OF AMERICAN JOURNALISM 74 (2009), and, today, only a handful of JOAs remain.

It is possible that the calls for further immunity were prompted, in part, by the misperception that the antitrust laws hamstring newspapers as they attempt to meet new challenges in the marketplace.[45] To the contrary, courts and enforcers applying the antitrust laws undertake a flexible and nuanced inquiry that accounts for both the potential competitive harms and benefits of the conduct at issue and that considers recent and future industry developments, ensuring that conclusions reflect current market reality. The analysis does not rest on rigid categories or past conclusions, but rather involves a fact-intensive study of the conduct under scrutiny to determine whether it threatens harm to competition and consumers. Conduct that does no more than bring new products or services to market or help businesses operate more efficiently does not concern the antitrust laws. I hope that, after an explanation of our methods of analysis, you will appreciate that the antitrust laws pose no barriers to innovative, procompetitive strategies that newspaper owners devise.

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[45] *See, e.g.*, James M. Moroney III, Testimony at Hearing on the Future of Journalism Before the Subcomm. on Communications, Technology, and the Internet, S. Comm. on Commerce, Science, and Transportation, 111th Cong. 7 (May 6, 2009) ("Congress should provide critical assistance to newspapers by acting quickly on legislation that would provide newspapers with a limited antitrust exemption to experiment with innovative content distribution and cost savings arrangements."); *Save the News: We're Not Looking for a Bailout or a Handout. Just a Hand.*, HOUS. CHRON., May 11, 2009, at B9 (agreeing that Congress should grant newspapers "a limited antitrust exemption that would allow them to share ideas and investigate collaborative new business models").

1. Mergers

I will first discuss potential newspaper mergers. In broad terms, the Division seeks to identify and challenge competitively harmful mergers—that is, mergers that create, enhance, or entrench market power or facilitate its exercise—while avoiding unnecessary interference with mergers that are competitively benign or neutral.[46]

Normally, a crucial step in the Division's analysis of a proposed merger is defining the relevant markets—an antitrust term of art—and determining whether the merging parties compete in any of those markets. Generally, a market is a group of products such that a hypothetical firm that was the only seller of those products in a geographical area could profitably impose a small but significant and non-transitory increase in price.[47] Defining a market can be particularly difficult in two-sided markets, an economic term describing a situation where a firm's results in one market influence its results in another market. Newspapers, for instance, compete for both advertisements and readers. The number of readers who subscribe to a newspaper directly affects the amount advertisers are willing pay to advertise in the newspaper. Similarly, a robust set of advertisements attracts readers who value the information set forth in those advertisements.[48]

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46 *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.0 (rev. ed. 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

47 *See generally id.* § 4.0.

48 *See* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 610 (1953) ("But every newspaper is a dual trader in separate though interdependent markets; it sells

(footnote continued on next page)

When faced with a proposed merger of two or more newspapers, the Division collects and examines the facts to determine whether local daily newspapers, national daily newspapers, community newspapers, radio stations, television stations, or Internet sources belong in the same market on either side. In past investigations, the Division has concluded that non-newspaper media do not sufficiently constrain the pricing of newspaper advertisements, the pricing of newspaper subscriptions, or newspapers' investments in news and editorial content, and thus are not in the same market.[49] That conclusion is perfectly consistent with the observation that newspapers have been losing subscription and advertising revenues to other media, as some degree of competition across market boundaries is the norm. Whether changes in technology and consumer preferences may lead to the conclusion that a relevant market should include sales of advertisements (or content) by both newspapers and other media remains something that should be analyzed on a case-by-case basis.[50]

(footnote continued from previous page)

the paper's news and advertising content to its readers; in effect that readership is in turn sold to buyers of advertising space.").

[49] *Cf.* Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1156–57 (W.D. Ark. 1995), *aff'd* 139 F.3d 1180 (8th Cir. 1998) (explaining that the "weight of case authority confirms the court's almost intuitively correct definition of the [product] market" as local daily newspapers and collecting cases).

[50] *Cf.* Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180, 1184 (8th Cir. 1998) ("We also recognize that trial records could be made in a case of this sort that would persuade the fact-finder the product market is in fact broader than just local daily newspapers.").

If the merging parties participate in a concentrated market, and the merger would increase the level of concentration in that market significantly, the merger potentially raises competitive concerns and often warrants scrutiny.[51] In our analysis, we consider evidence that the new entity would generate merger-specific efficiencies offsetting any potential harm posed by the increase in concentration.[52] For instance, in our statement addressing our decision to close an investigation of one fairly recent newspaper acquisition, the Division explained that any potential harm from the transaction was limited and offset by "large cost savings" anticipated from "combining . . . production and delivery systems."[53]

Finally, in assessing mergers, the Division does not seek to force competition where it is not possible. As I mentioned above, the NPA allows a newspaper "in probable danger of financial failure" to enter into a JOA with a competing newspaper.[54] In addition, parties can defend a merger, in the newspaper industry or in any other industry, on the ground that one of the merging parties is failing. In evaluating a failing-firm defense in the newspaper industry, the Division would determine whether the assets of the weaker

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51 *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 46, § 5.3.

52 *See generally id.* § 10.

53 U.S. Dep't of Justice, Antitrust Div., Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of MediaNews Group Inc.'s Acquisition of the Contra Costa Times and San Jose Mercury News, at 2 (July 31, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/217465.pdf.

54 15 U.S.C. §§ 1802(5) & 1803(b).

newspaper, including its reportorial staff and innovative features, would exit the market if they were not acquired by the stronger newspaper.[55] Importantly, both the NPA and the failing-firm defense are consistent with a policy of competition. Both attempt, from the standpoint of consumers and the general welfare, to make the best of the situation where a newspaper cannot survive on its own, either by preserving that newspaper's independent editorial voice or by keeping its assets in the marketplace.[56] Appropriately, these provisions are applied strictly and narrowly, so that the competitive process unfolds everywhere economic realities allow.

Briefly, I will mention a different kind of merger that is, appropriately in the view of the Department of Justice, disfavored under the Federal Communications Commission's cross-ownership rule. In general, the rule prohibits a TV or radio station owner from owning a daily newspaper in the same community, although the bar does not apply if the FCC finds that the "public interest, convenience, and necessity would be served" by cross-ownership.[57] The rule serves to promote a diversity of viewpoints for our democracy.[58]

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55 *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 46, at § 11; Carl Shapiro, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Competition Policy in Distressed Industries, Address Before the ABA Antitrust Symposium on Competition as Public Policy 20–22 (May 13, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245857.pdf.

56 *See, e.g.*, Hawaii ex rel. Anzai v. Gannett Pac. Corp., 99 F. Supp. 2d 1241, 1248–49 (D. Haw. 1999); Romeo, Pittman & Familant, *supra* note 15, at 123–25.

57 47 C.F.R. § 73.3555(d).

2. Newspaper Collaborations

Next, I will discuss potential non-merger collaborations among newspapers. In general, the antitrust laws afford companies considerable freedom to work with other companies, proscribing only conduct that harms competition and consumers. The courts and the Antitrust Division undertake a flexible, multi-factor inquiry into a joint venture's overall competitive effect, asking whether the venture threatens competitive harm, whether it promises competitive benefits, and whether the benefits offset the harms.[59] Collaborations that enable newspapers to cut costs, improve service, or offer new or better content, all else equal, do not raise competition issues.

A couple of recent business review letters illustrate the Division's agile approach to newspaper collaborations. Firms that are uncertain about the legality of proposed conduct can request a business review from the Antitrust Division. Upon receiving a request, the Division reviews the proposed conduct and may issue a letter stating its enforcement

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(footnote continued from previous page)

[58] *See* 2006 Quadrennial Regulatory Review – Review of the Commissions, 23 F.C.C.R. 2010, 2038–39 (Feb. 4, 2008) (finding that the cross-ownership rule is "necessary to guard against an elevated risk of harm to the range and breadth of viewpoints that may be available to the public" (internal quotation marks omitted)).

[59] *See generally* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

intentions.[60] This process allows firms to "avoid possibly costly litigation with the Justice Department and the business problems that arise when a company is involved in antitrust litigation with the government."[61] Let me stress that we at the Antitrust Division are open to meeting with newspapers considering new strategies and new ways to compete, either through business reviews or otherwise.

Last year, the Division issued a business review letter with respect to a proposal by MyWire Inc. to develop and operate an Internet subscription news aggregation service called the Global News Service.[62] The Global News Service plans to aggregate and index news content from hundreds of major and local daily newspapers, television networks and stations, radio networks and stations, and magazines throughout the United States, creating a preferred content provider network. The network would provide a "related-item" content block that participating publishers would add to their websites and that would link to other preferred content provider stories on related topics. By clicking these hyperlinks,

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60 *See generally* 28 C.F.R. § 50.6. A few caveats are in order. The Division considers requests only with respect to proposed business conduct, not ongoing business conduct. 28 C.F.R. § 50.6(2). At its discretion, the Division may refuse to consider a request, 28 C.F.R. § 50.6(3), and, after a review, may decline to pass on the request or may take any other action it considers appropriate, 28 C.F.R. § 50.6(8). Finally, a business review letter states only the enforcement intention of the Division as of the letter's date, and the Division remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest. 28 C.F.R. § 50.6(9).

61 Green v. Kleindienst, 378 F. Supp. 1397, 1399 (D.D.C. 1974).

62 Letter from Christina A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, to Charles E. Biggio, Esq. (Feb. 24, 2010), *available at* http://www.justice.gov/atr/public/busreview/255624.pdf.

consumers would be able to browse among related free and fee-based material from different publishers' websites.

In its business review letter, the Division announced that it had no present intention of challenging MyWire's proposal because, among other things, (1) MyWire's content agreements with participating publishers would be nonexclusive and would allow publishers to join competing online news aggregation services; and (2) MyWire would operate independently of participating publishers by setting its own consumer subscription rates for access to all publishers' fee-based content within the MyWire network. The Global News Service would benefit consumers by allowing them to access a broad network of related content without having to conduct separate online searches. Publishers also would benefit not only from increased traffic to their websites, but also from their share of the subscription revenues based upon consumer usage as well.

Last April, the Division issued a business review letter stating that the Division had no present intention of challenging a proposal by the Associated Press to develop and operate a voluntary news registry to facilitate the licensing and Internet distribution of news content created by the AP, its members, and other news originators.[63] The registry is now operating and consists of a centralized digital database containing news content from multiple content owners. It allows content owners to register and list individual items of

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[63] Letter from Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, to William J. Baer, Esq. (Mar. 31, 2010), *available at* http://www.justice.gov/atr/public/busreview/257318.pdf.

news content that are coded in a standardized format, specify the uses others may make of that content, and detail the terms on which such content may be licensed.

The Division determined that the development and operation of the registry was not likely to reduce competition among news content owners because, among other things, content owners would be free to select which content to include or not include in the registry; content owners would be allowed to offer registered news content outside of the registry without restriction, including joining competing Internet registry services; and the registry would be open, on nondiscriminatory terms, to all owners and users of Internet news content. Moreover, the registry may provide procompetitive benefits by reducing transaction costs since content users could access the registry to determine quickly the licensing and use terms applicable to a specific content owner or to individual items of registered content. Additionally, the registry is able to digitally track and measure Internet use because registered news content is coded in a standardized digital format, thus providing content owners with valuable information, not currently available, about how their content is being used on the Internet. In short, the registry offers the promise of a new, efficient way for licensing and tracking news content over the Internet.

These business review letters illustrate the latitude publishers have as they meet the demands of the twenty-first century media marketplace. Collaborations that do not restrain

competition unnecessarily pass muster under the antitrust laws, particularly if those collaborations promise efficiencies or other benefits.

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As James Madison instructed, "To the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression."[64] A free and independent press is just as central to our democracy today, and will be as important tomorrow, as it was in Madison's time. Preserving that independence is of crucial importance, underscoring government's need to act carefully as the industry finds its own ways to adapt to changing technologies and citizen needs.

I am committed to helping the industry find proconsumer economic models that preserve newspapers' crucial civic functions, and the Antitrust Division looks forward to playing its proper role as the industry reinvigorates itself. The antitrust laws are flexible and adaptive, and do not stand in the way of procompetitive solutions to the challenges facing the newspaper industry. At the same time, it is important to note that government needs to tread lightly when dealing with newspapers because a news industry free from government management is important to our democracy.

Thank you for the opportunity to address you today.

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64 James Madison, *Report on the Resolutions, in* VI THE WRITINGS OF JAMES MADISON 389 (Galliard Hunt, ed., 1906).