DEPARTMENT OF JUSTICE

ANTITRUST ENFORCEMENT IN THE ENTERTAINMENT AND MEDIA INDUSTRIES

Remarks by

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Good afternoon. It is a real pleasure to be here today—especially in Los Angeles, my hometown—and to have the opportunity to talk with you about the types of work we do at the Antitrust Division. I want to thank Irving Azoff and RAC for inviting me here today. I enjoyed a great working relationship with RAC and its pioneers in my previous position as Chief Counsel to the Senate Judiciary Committee on a variety of issues, including copyright protection, artists' rights, and antitrust issues. I look forward to today's discussion and to explaining the role of antitrust enforcement in the entertainment community. I have heard and am aware of some of the concerns artists and other players in the recording industry have expressed, so I hope that this will be helpful for all involved in understanding the sometimes technical and complex area of antitrust law.

I will start by giving you a brief overview of the Division's roles and responsibilities, and then I will describe the basic features of the antitrust laws and some recent cases you may have heard about. I will also briefly discuss the general principles and procedures guiding merger analysis in the United States and—since the media and entertainment industries are truly international in scope—sketch some important aspects of European merger analysis as well. Finally, to put all of this in context, I will tell you about some specific instances in which the antitrust laws have been applied to businesses in the media and entertainment industries.

I. The Antitrust Division's Roles and Statutory Responsibilities

Our primary function at the U.S. Department of Justice's Antitrust Division is criminal and civil enforcement of the federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization. The Division's attorneys investigate possible violations of the antitrust laws, conduct grand jury proceedings, issue and enforce civil investigative demands, and prosecute all litigation that arises out of these civil and criminal investigations.

On occasion, we will also intervene or participate before other federal administrative agencies in proceedings that may implicate the federal antitrust laws or competition policy, including agencies such as the Federal Communications Commission, the Securities and Exchange Commission, and the Federal Reserve Board. We also advocate for procompetitive policies before other branches of government by responding to requests for advice and comments on various issues from Congress, advising the President and components of the Executive Branch on the competitive implications of governmental conduct, and gathering information and developing reports required or requested by Congress or the Attorney General regarding the competitive effects of various federal laws or programs.

When I refer to the federal antitrust laws enforced by the Division, I am referring mainly to Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. First, I will give you a quick overview of these statutes, and then I will discuss each one in a little more detail:

- Section 1 of the Sherman Act outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate trade. This includes agreements among competitors to fix prices, rig bids and allocate customers—the kind of conduct that every corporate executive knows is illegal. Those types of Sherman Act violations usually are punished as criminal felonies. Individual violators can be fined up to $350,000 and sentenced to up to three years in federal prison for each offense. Corporations can be fined up to $10 million for each offense. Under some circumstances, the fines can go even higher.[1]

- Section 2 of the Sherman Act makes it illegal to monopolize any part of interstate commerce. Unlawful monopolization occurs when one firm controls the market for a product or service, and it has obtained that market power, not because its product or service is superior to others, but by suppressing competition with anticompetitive conduct. As I will explain in more detail in a few moments, Section 2 of the Sherman Act is not violated simply when one firm's vigorous competition and lower prices take sales from its less efficient competitors—that is competition working properly.
- Section 7 of the Clayton Act prohibits mergers or acquisitions that are likely to substantially lessen competition. Under the Act, the government challenges those mergers that a careful economic analysis shows are likely to increase prices to consumers. All persons considering a merger or acquisition above a certain size must notify both the Antitrust Division and the Federal Trade Commission. The Act also prohibits other business practices that under certain circumstances may harm competition. As many of you are no doubt aware, the Antitrust Division has reviewed numerous mergers and acquisitions in the entertainment and media industries to assess whether the proposed transaction has the potential to substantially lessen competition and should therefore be blocked. Well,

[1] I should note that legislation is pending before Congress that, if passed, would substantially increase the fines and prison terms for Sherman Act violations.

those are the basic provisions of the antitrust laws. Now, here's a little more detail.

II. Agreements in Restraint of Trade

Section 1 of the Sherman Act declares that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations" is illegal.[2] So, by its terms, Section 1 applies only to offenses involving two or more independent actors who reach an "agreement"—it does not cover single-firm conduct or what we sometimes call "unilateral" conduct. It is important to keep in mind, however, that an "agreement" for the purposes of Section 1 can be as formal as a written contract, as informal as a tacit "understanding," or something in between.

Certain types of agreements that are clearly anticompetitive (such as price-fixing between horizontal competitors, bid-rigging, and market allocations) are deemed *per se* illegal. Those types of agreements are held to violate Section 1 regardless of the reasonableness of the restraint involved and without any inquiry into its effect on competition. Agreements that do not fall within those *per se* categories are judged under the "Rule of Reason" standard, which involves a more detailed and factually intensive analysis of the reasonableness of the restraint in question including its potential effect and any justifications. The threshold question—whether a given agreement should be characterized as a type of agreement that is *per se* illegal, and condemned without further inquiry, or should be judged under the Rule of Reason—is often one of the more difficult questions in Section 1 analysis.

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[2] 15 U.S.C. § 1.

Some recent cases that the Division brought under Section 1 of the Sherman Act include:

(1) *United States v. The MathWorks, Inc.*[3] In this case, the Antitrust Division challenged an agreement between MathWorks and Wind River, two head-to-head competitors in the design software field. Competition between these two firms had resulted in significant technical improvements and price reductions for consumers. Then they entered into a collaboration agreement regarding the sale and development of software. The agreement gave MathWorks control over the prices, marketing, support, and future development of the Wind River software and required Wind River to stop its own development and marketing. Shortly after the agreement, MathWorks announced that it would undertake no further development of the Wind River products. We reached a settlement with MathWorks under which a trustee was appointed to sell the Wind River assets. Those assets were successfully sold to National Instruments.

(2) *United States v. Village Voice Media, LLC*.[4] In this case, two publishers of alternative newsweeklies, apparently tired of competing with each other in Cleveland and Los Angeles—two cities in which their operations overlapped and where their profits had been “pinched”—simply swapped markets: each agreed to withdraw from a market, effectively guaranteeing the other publisher a monopoly in that market. They papered the agreement as though it were a merger, one paid the other $2 million, and the other paid $11 million. But it was not a merger in

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[3] 2003-1 Trade Cases ¶ 73,984 (E.D. Va. 2002).

[4] 2003-1 Trade Cases ¶ 74,061 (E.D. Ohio 2003).

any sense. The agreements provided for no meaningful integration of assets, such as logos, articles, or staff. Instead, when they reached their agreement, one publisher immediately shut down its operation in Cleveland, while the other shut down its operation in Los Angeles. We reached a settlement with the publishers that required each to sell the critical assets of the former publication to an entrant capable of restoring the lost competition.

III. Monopolization Offenses

As I mentioned before, Section 2 of the Sherman Act is the statute that governs single-firm conduct. Specifically, the statute provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of trade or commerce . . . shall be guilty of a felony."[5]

The offenses most commonly prosecuted under Section 2 are monopolization and attempted monopolization.[6] The elements of monopolization are (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a result of superior product, business acumen, or historic accident.[7] "Monopoly power" means the power to control prices or exclude competitors. Proof of attempted monopolization requires (1) anticompetitive or exclusionary conduct (2) that

[5] 15 U.S.C. § 2.

[6] The offense of conspiracy to monopolize is generally pursued less often than monopolization or attempted monopolization. That may be because proof of a conspiracy to monopolize requires a showing of concerted action, and plaintiffs tend to pursue such claims under Section 1 of the Sherman Act. *See* Lawrence A. Sullivan and Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* § 3.7, pp. 136-37 (2000).

[7] *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

is undertaken with the specific intent to monopolize a relevant market and (3) which has a dangerous probability of success.[8]

I want to emphasize that one of the fundamental principles underlying all Section 2 analysis is that the mere possession of monopoly power does not violate Section 2. Instead, the statute applies only to monopolies that are acquired or maintained by virtue of a firm's unreasonably exclusionary conduct. A related principle is that a monopolist has no general obligation to aid its competitors. So you need both status (having a monopoly or a dangerous probability of gaining a monopoly) <u>and</u> exclusionary conduct in order to violate Section 2. This is important because we do not want the antitrust laws to punish firms for competing vigorously and achieving market success as a result of their efforts. Vigorous competition is not enough to establish the requisite exclusionary conduct; dominant firm must employ strategies that reinforce or protect its monopoly position.

A case providing a classic example of "exclusionary conduct" under Section 2 is *Lorain Journal Co. v. United States*.[9] The defendant was the publisher of *The Lorain Journal*, a daily newspaper in Loraine, Ohio. The court found that the publisher had a substantial monopoly in Lorain of the mass dissemination of local and national news and advertising. Faced with competition from a new local radio station, the publisher adopted a plan to eliminate the threat of competition from the station. Under this plan, the publisher refused to accept local advertisements in the *Journal* from any advertiser who advertised or who the defendants believed to be about to advertise on the new radio station. The court also expressly found that

[8] *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447 (1993).

[9] 342 U.S. 143 (1951).

the purpose and intent of this plan was to destroy the rival radio broadcasting station. The Supreme Court held that the publisher's conduct in refusing to accept advertisements from customers that advertised on radio stations that competed with the newspaper for advertising revenues constituted attempted monopolization under Section 2.

The Division's case against Microsoft, which I am sure you have all heard of, is another example of a Section 2 case. There, the trial court's finding of monopolization was upheld on appeal and resulted in a consent decree.[10]

We at the Antitrust Division have been attempting to promote greater clarity with respect to the standards governing single-firm conduct. Our recent participation as *amicus curiae* before the Supreme Court in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* illustrates this effort. In *Trinko*, our position was that the essential facilities doctrine and the theory of monopoly leveraging do not provide a stand-alone basis for finding that a competitor has an obligation under Section 2 to assist its rivals. As with other Section 2 cases, there must be a showing that the challenged firm's conduct is exclusionary or predatory. In this context, we argued, this meant that Section 2 required a showing that a competitor's refusal to assist its rival did not make economic sense except as an effort to diminish competition.[*]

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[10] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[*] *Note:* After this speech was delivered, the Supreme Court decided *Trinko*. Although the Court did not adopt a specific standard for Section 2 liability, the Court's discussion of its prior refusal-to-deal precedents stressed particular facts that would suggest a Section 2 violation under the Antitrust Division's proposed standard. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 879-80 (2004).

IV. Merger Analysis

A. General Principles of Merger Analysis

Irving had also asked me to discuss merger enforcement here and abroad. As I mentioned, one of the Antitrust Division's responsibilities is to investigate proposed mergers and acquisitions to determine whether they violate Sections 1 or 2 of the Sherman Act (described above), or Section 7 of the Clayton Act. Under Section 7, mergers are prohibited if their effect "may be substantially to lessen competition or tend to create a monopoly."[11] The Antitrust Division shares its merger review responsibilities with the Federal Trade Commission. But both agencies do not investigate the same merger. If both agencies wish to investigate the same merger, we use a "clearance" process based on expertise in the products at issue to work out which agency will review it. The two federal agencies do apply the same standards for merger analysis, but may differ on points of procedure due to differences in organization.

Our approach to merger enforcement is premised on the idea that competition should be preserved because consumers benefit from it through lower prices and better products, services, and innovation. Even though we consider historic performance in an industry, our main focus in a merger investigation is to determine the likely competitive effects of the merger in the future. In investigating mergers, we recognize that most mergers are competitively neutral or even beneficial for competition and consumers and should be reviewed quickly and allowed to proceed. This may be because they create synergies, improve or create new products, and/or lower costs. Of course, some mergers do create or increase market power, and thereby reduce

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[11] 15 U.S.C. § 18.

competition and total economic welfare. Our job is to screen out the relatively few bad mergers and clear the many good ones. Only a very small percentage of all mergers are challenged each year by the Division—well over 90 percent of the transaction notifications received by the Division are quickly cleared without any action.

Our overall approach to mergers is also guided by the principle that antitrust laws protect competition, not competitors. We do not pick “winners” and “losers” in the marketplace, but instead seek to safeguard competitive markets in the belief that they will best promote the efficient allocation of resources in the economy. Preserving competition in the marketplace does not, however, mean taking action to ensure that a given market has a static number of equally matched players. Nor do we use the antitrust laws to help a complaining firm by blocking an efficient merger that allows the merged firm to lower prices. It is well-established law that the antitrust laws do not protect competitors from mergers that will make the merged firm more efficient, even if the competitors fear that they may as a result be forced from the market. In sum, we strive to enforce the antitrust laws in a way that protects the competitive process, because vigorous competition is the one sure way to keep costs and prices low and encourage firms to innovate.

Finally, we are constantly striving to be flexible and forward-looking in our approach to merger analysis. Our approach must be as flexible and dynamic as the industries that we oversee and must constantly adapt to changes in technology and economy. Among other things, we must bear in mind that, in some markets, competition may be driven more by innovation than by price.

B. The Merger Review Procedure: The HSR Act

I should also say a few words about the merger review procedure. In many mergers, our analysis is aided by the parties' compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).[12] The primary purpose of this statutory scheme is to provide the US antitrust agencies with the opportunity to review mergers and acquisitions before they occur—providing the agencies with both the time and information necessary to conduct a meaningful antitrust review.

The HSR process begins when the parties to a proposed transaction notify the Antitrust Division and FTC of the transaction, complete a form giving details about the companies and transaction, provide certain documents concerning the transaction, and refrain from closing the transaction until a specific waiting period has expired. Where notification is required, the transaction may not legally be completed until notification and a 30-day waiting period has expired (only 15 days is required in the case of a cash tender offer or a bankruptcy filing). After a quick (but careful) substantive review of an HSR filing, the Antitrust Division's staff will determine whether the proposed transaction raises questions of potential competitive harm. During this preliminary inquiry, the staff contacts the parties, customers, competitors and other relevant parties to evaluate whether there are likely competitive concerns in any relevant markets. Division economists are important members of the investigative team throughout the merger review process.

[12] *See* 15 U.S.C. § 18a.

If the staff concludes that a transaction might raise competitive problems and more information is needed to evaluate it, the Division can (prior to the expiration of the HSR waiting period) issue a request for additional information. This "Second Request" prevents the merging parties from consummating the transaction for an additional period of time—usually 30 days—from the time they provide requested information. A formal Second Request is the principal means for compelling the production of documents and information from the parties during a merger investigation and ordinarily includes requests for detailed information on relevant products, facilities, competition and entry.

In the period between the issuance of the Second Request and compliance by the parties, which can range from a few weeks to a few months, the staff conducts a thorough investigation to determine whether the transaction is anticompetitive and should be challenged in court. A full Second Request investigation typically will include issuing compulsory requests to third parties for information necessary to compute market shares and documents to assess the relevant markets, taking depositions and obtaining statements for use in court, retaining and working with experts, conducting legal research, reviewing documents produced in response to the Second Request, and ensuring the preparation of economic and other evidence on the competitive effects of the transaction. Our merger investigations operate under strict confidentiality rules. Competitors do not have access to party submissions, and industry interviews are confidential unless otherwise agreed.

During an investigation, there are frequent internal consultations to discuss the case plan, case theory, and progress of the investigation. The parties will also have substantial contact with the investigative staff and Division decision-makers. Unless the parties have committed not to close the transaction as part of a timing agreement, we must make a decision on whether to challenge the transaction and seek preliminary relief before the end of the appropriate waiting period—just 30 days after party compliance with a Second Request.

If we decide to block an anticompetitive merger, we must file suit in federal court and persuade a federal judge that the proposed transaction violates the Clayton Act (or Sherman Act). As a general matter, we tend primarily to challenge horizontal mergers when they eliminate a competitor and may thereby enable the merged firm to restrict output and raise prices. Similarly, we examine vertical mergers to see if they eliminate a key supplier or customer when doing so may give the merged firm the ability and incentive to raise its rivals' costs, again allowing them to restrict output and raise price.

C. Substantive Merger Review: The Guidelines Approach

Our substantive approach to horizontal merger analysis is described generally in the *Horizontal Merger Guidelines*, which were issued jointly by the Department and the Federal Trade Commission and are available on the Antitrust Division's website.[13] The Guidelines give us a coherent and predictable framework for analyzing mergers. Our review focuses on whether the merger would create or enhance market power, or facilitate its exercise. Market power is the power profitably to maintain prices above competitive levels, or to reduce output, product quality, service, or innovation.

First, we define economically meaningful markets, along relevant product and geographic lines, assign market shares, and assess whether the merger would increase

[13] U.S. Dept. of Justice & Federal Trade Comm'n, 1992 Horizontal Merger Guidelines (rev. 1997), available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

concentration significantly. To define a market, we look at whether there are substitutes for the products of the merging firms. We then assess whether anticompetitive effects are likely, given these concentration levels and other market characteristics. As the *Horizontal Merger Guidelines* explain, we look for two types of anticompetitive effects: "unilateral effects"—*i.e,* whether the merger would permit the newly combined entity unilaterally to raise prices; and "coordinated effects"—*i.e,* whether the merger would encourage or facilitate explicit or tacit collusion by multiple sellers. Finally, we assess whether new entry would constrain price increases; whether there are efficiency gains associated with the merger; and (in the rare cases where this is an issue) whether, but for the merger, either party to the transaction would be likely to fail.

As a final note, there has been a consistent trend in merger analysis over the last thirty years toward an increasing focus on economics, efficiency and consumer welfare. By remaining sufficiently flexible to incorporate the latest in economic thinking into our analysis, we have now refined our enforcement policies to the point where we are better able than ever to target transactions and practices that the antitrust laws are meant to address. Increased use of economic thinking has transformed federal merger analysis from a purely structural exercise and enabled us better to assess the competitive consequences of proposed mergers by employing the best available economic techniques and evidence.

V. European Merger Review

Because businesses in the entertainment and media industries often have a significant presence in Europe, it was suggested that it would be useful for me to give you a brief sketch of the contours of European merger review and identify some of the key ways in which the substantive merger review standards in Europe might differ from those applied by the Antitrust Division. I should note that the European Commission is currently in the process of reforming its merger regulations and we anticipate that the changes will go into effect by May of 2004.

1. Jurisdiction: The EU Merger Control Regulation

Merger review in the EU is conducted under the EU's Merger Control Regulation ("MCR"), which went into effect in September 1990.[14] The MCR's objective was to ensure that mergers would be reviewed either by the EU or by one or more national antitrust authorities, but never at both the EU and national level. Thus a "one-stop shop" for merger review was created: any transaction that exceeds thresholds defining a "Community dimension" is reviewable only by the European Commission, and not by national authorities. A concentration that does not meet the thresholds may be reviewed by one or more member states.

The European Commission has jurisdiction over a merger if two thresholds are met. First, the combined annual worldwide turnover (sales) of the parties must exceed 5 billion euros (currently (February 2004) the euro is worth about $1.27). Second, each of the parties must have an annual turnover within the EU of 250 million euros.

In November 2003, the EU Council adopted amendments to the MCR that would permit parties whose transaction does not meet the thresholds, but who are required to file in three or more member states, to request that the Commission take sole jurisdiction of the merger.[15] These amendments will take effect on May 1, 2004, when ten new member states join the EU (for a

[14] Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, Official Journal L 395, 30/12/1989, pp. 1-12.

[15] Council Regulation (EEC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29/1/2004, pp. 1-22.

total of 25).[**] Note that there is no requirement under the MCR that the parties have assets or production facilities in the EU, as was demonstrated in the Commission's review of and order regarding the Boeing/McDonnell Douglas merger.

2. EU Merger Control Procedure

Firms usually try to structure their transaction so that it falls within the jurisdiction of the EU. They prefer dealing with the Commission rather than with a series of individual member state authorities, and they also prefer the certainty of the strict MCR deadlines. One month after a complete notification is filed, the Commission must decide either to clear the merger or to "initiate proceedings" by going to the second stage (Phase II), in which case a final decision must be reached within an additional four month period that cannot be extended. The merger is automatically cleared if the Commission fails to act within the specified timeframes.

The November 2003 amendments to the MCR added some flexibility to the deadlines: the Phase II investigation period is extended by three weeks where parties to the merger submit proposed remedies. In addition, in more complex cases, either the parties or the Commission (with the parties' consent) will be able to request that the Phase II time period be extended by four weeks.

As soon as a notification is made, the Commission publishes a notice in the EU's Official Journal. Third parties that wish to be heard may notify the Commission and submit written comments. The Commission may also invite them to participate in the oral hearing.

[**] *Note:* These new amendments did go into effect on May 1, 2004, after this speech was delivered.

Commission decisions are reviewable in the EU courts—the Court of First Instance and the European Court of Justice.

3. Substantive Merger Review Standards

Finally, a few words about substantive merger review standards in the EU. The MCR presently prohibits a concentration "which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it."[16] After much debate the EU Council amended this standard, effective May 1, 2004, so as to capture mergers not resulting in dominance.

Rather than adopt the substantial lessening of competition standard (the standard we use under Section 7 of the Clayton Act), the Council opted for a "significant impediment to effective competition" (SIEC) test.[17] Under this test it will no longer be necessary to establish "dominance" as a pre-condition to blocking a deal or requiring a remedy: dominance will merely be an example of where there may be an "SIEC." We do not yet know how this new standard differs from the standard applied by the Antitrust Division under Section 7. It seems to be closer to our standard than the old pure "dominance" test, but we will need to see how the EC applies the new standard in practice.

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[16] Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, Article 2(3), Official Journal L 395 , 30/12/1989.

[17] Council Regulation (EEC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Article 3(3), Official Journal L 24, 29/1/2004.

Recently, the EC adopted new horizontal merger guidelines, which will go into effect in May 2004.[18] We provided numerous comments to the EC during their drafting process and the new guidelines bring US and EU merger analysis closer together.

4. The ICN and Multi-jurisdictional Merger Review Convergence

I should also say a few words about our international efforts in working with other competition authorities around the world toward convergence on merger review principles and procedures.

In today's global economy, mergers are frequently reported to competition authorities in multiple jurisdictions. Indeed, nearly 70 jurisdictions have adopted merger notification regimes of some kind. However, there are some costs to merger notification that become amplified in the multi-jurisdictional context. There are costs in determining where to notify, costs in notifying and providing information, and costs in increased uncertainty for and possible delay of the transaction. Given that the vast majority of transactions are either procompetitive or competitively neutral, it is important that merger notification and review schemes not impose unnecessary costs or bureaucratic roadblocks to efficient, procompetitive mergers.

[18] "Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings," Official Journal C 31, 5/2/2004, pp. 5-18.

In 2001, the Antitrust Division and FTC helped found the International Competition Network, or ICN, to address such divergence of antitrust practices. The ICN members now number over 80 antitrust agencies from around the world.[19]

One important focus of the International Competition Network's work is to make merger review processes around the world more efficient and effective, while at the same time reducing delay and the investigative burden on merging firms. The ICN created a Merger Working Group, with a subgroup devoted to studying merger review procedures. The mandate of the Notification and Procedures subgroup is to examine the procedural aspects of merger notifications, including issues of jurisdiction, the scope of the merger filing, and the timing of merger reviews. The subgroup's work is to promote sound and principled convergence on procedural standards to help minimize the cost, complexity, and uncertainty involved in the merger review process. The Notification and Procedures subgroup, with substantial input from the private sector, has created and promulgated a set of Recommended Practices for merger notification and review that guide agencies' policies and procedures.

VI. Antitrust Enforcement In The Entertainment And Media Industries

To put all of this in context, I thought it might be useful to give you some specific instances in which the antitrust laws have been applied to businesses in various sectors of the media and entertainment industries.

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[19] *See* http://www.internationalcompetitionnetwork.org/. For an introduction to the ICN panel on Guiding Principles and Recommended Practices for merger notification and review, *see* Charles A. James, Guiding Principles And Recommended Practices For Merger Notification And Review, before the International Competition Network (September 29, 2002), available at http://www.usdoj.gov/ atr/public/speeches/200286.htm.

A. Major Motion Pictures/Exhibition

As many of you know, the Department of Justice has a long and extensive history of antitrust oversight in the major motion pictures and movie theater industry. One of the first significant cases was *United States v. Paramount*,[20] which was originally filed by the Department in 1938. The ensuing litigation established the existence of an industry-wide conspiracy composed of the eight distributors who at the time accounted for most of the motion pictures produced and distributed in the United States. The conspirators were found to have achieved monopoly power in the market for first-run motion pictures and to have illegally exploited that power through horizontal and vertical admission price-fixing and other arrangements designed to ensure the conspiracy's continuance by maintaining its power in the exhibition market. Those defendants that owned theaters were required to divest their theater holdings, and all defendants had to observe certain requirements in the licensing of films to exhibitors.

In recent years the Division has examined a number of mergers and acquisitions involving movie theater chains, and has also investigated various collaborative activities involving the major motion picture studios, including joint ventures and online distribution of movies over the Internet.

B. Music

Our involvement in the music business has a similar ancestry. For over 50 years the Division has been responsible for overseeing consent decrees regulating the conduct of the major performing rights organizations, ASCAP and BMI. These decrees limit the activities of ASCAP and BMI with regard to the licensing of performance rights in musical compositions, and have

[20] 334 U.S. 131 (1948).

been modified several times in the past. The DOJ has also conducted numerous investigations involving the music industry in recent years, including an investigation of the major labels' digital music ventures.

C. Radio

We have also been active in radio. Passage of the 1996 Telecommunications Act and relaxation of FCC's local radio station ownership rules led to a significant wave of station group consolidations during last few years. We have reviewed numerous matters involving mergers of large radio station groups and challenged those transactions where necessary to protect competition in local radio advertising markets.

Also, you should know that the Division has traditionally taken the position that radio advertising constitutes a separate product market from other forms of media advertising (*i.e.*, TV advertising). Examples include Clear Channel's acquisition of AMFM, Inc., in which the Division required substantial divestitures in multiple markets in order to resolve our competitive concerns, and our recent challenge to Univision's proposed acquisition of HBC, which involved advertising on Spanish language radio stations.

D. Broadcast Television

In the last several years, the Division has examined numerous transactions involving broadcast stations. These have included not only TV station acquisitions such as Capital Cities/ABC (1996), Viacom/CBS (2000) and News Corp./Chris-Craft (2001) but also transactions involving Local Marketing Agreements, where one station does programming for another, and Joint Sales Agreements, where one station sells advertising for another.

As a final note, I would add that media mergers do get somewhat more public attention than other mergers because media is regarded as important to the functioning of a democracy. As a result, there has also been a fair amount of discussion of whether media deals should get a higher, or at least different, level of antitrust scrutiny. The Antitrust Division's approach to merger analysis in the media and entertainment industries generally utilizes the same framework we use to review mergers and other forms of strategic alliances in other, non-media industries. We typically review mergers and acquisitions after receiving a HSR filing and analyze the potential anticompetitive consequences of each such transaction based on its own unique facts and merits.

VII. Conclusion

In conclusion, I hope my remarks today and our discussion have given you a better grasp of what we do at the Antitrust Division and how it can impact you as members of the entertainment and media industries or as consumers. I also hope that I leave you with the impression that the Antitrust Division is working hard to enforce the antitrust laws in a principled way that protects the competitive process and promotes the efficient allocation of resources in our economy.

Again, thank you for inviting me here today.