



Department of Justice

STATEMENT

OF

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BEFORE THE

**SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND
THE INTERNET
COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION
UNITED STATES SENATE**

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“THE FUTURE OF JOURNALISM”

PRESENTED

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I appreciate the opportunity to submit a written statement to the Committee on behalf of the Department of Justice, to discuss the future of journalism, the challenges facing the newspapers, and the important role of antitrust in protecting and preserving competition during these troubled times.

I was recently appointed as Deputy Assistant Attorney General for Economics in the Antitrust Division; I previously held this same position during 1995-1996. I have been a Professor of Business and Economics at the Haas School of Business at the University of California at Berkeley since 1990.

I am an economist who has been studying competition, antitrust, and competitive strategy, for over thirty years. One strand of my research and applied work has focused on the antitrust treatment of mergers between competitors. Another strand has focused on the competitive strategies of firms in markets that have been transformed by information technology. As the title of this session indicates, with the advent of new technologies and the proliferation of online content, the newspaper business is entering a new age.

During the course of our nation's history, newspapers have been considered the keystone to the proper functioning of our democracy. An informed electorate helps to ensure a responsive government of the people, by the people, and for the people. However, over the years the newspaper industry has not been static; rather, it has faced various pressures from new technologies and changing tastes. Within my lifetime, it was common for many communities to have at least two daily newspapers: a morning paper and an afternoon paper. With changes in American lifestyles and the ways in which information is shared and transmitted, afternoon

papers generally were eclipsed by morning papers. In response, seeking to preserve independent voices in the community, Congress passed the Newspaper Preservation Act in 1970, which I will discuss below.

Today, newspapers are once again facing significant pressures, most notably from the current sharp recession on top of the challenge posed by the Internet. Newspapers are experiencing a painful and ongoing decline in circulation and advertising revenues. According to the Newspaper Association of America, weekday newspaper circulation declined from 55.2 million in 2002 to 50.7 million in 2007, an 8% drop, and this was before the onset of the current recession. Similarly, total print advertising decreased from \$44.9 billion in 2003 to \$34.7 billion in 2008, a 23% decline. Newspaper revenues from classified advertising has been declining much faster, dropping from \$15.8 billion in 2003 to \$10.0 billion in 2008, a 37% decline. For many newspapers, declining revenues have been accompanied by heavy debt incurred by owners of newspapers before the current economic challenges. As a result, the continued viability of many newspapers has been put in serious doubt.

How does antitrust enter into this rather gloomy picture? While newspapers have served as a keystone to democracy, for over a century sound competition policy has been the cornerstone of our Nation's economic foundation. Vigorous antitrust enforcement promotes and protects a robust free-market economy, thus harnessing the power of competition to pressure businesses to lower their costs, improve their products, and generally find ways to better serve consumers in order to stay in business. Ensuring that anticompetitive agreements, exclusionary conduct, and

mergers do not distort market outcomes has helped American consumers obtain more innovative and high-quality goods and services at lower prices. For this reason, antitrust enforcement has rightly enjoyed substantial bipartisan support through the years, and this support has in turn greatly enhanced the effectiveness of antitrust enforcement.

Antitrust is critical to ensure that the public obtains the full benefits of competition. This is especially true in industries experiencing technological change, where competition spurs innovation, including innovative business strategies and business models. In the newspaper industry, major changes are taking place in terms of the creation and distribution of content and in terms of the business models adopted by those who incur the costs necessary to create content, especially content that is relatively costly to provide, such as investigative journalism. A wide-ranging and healthy debate is taking place about the future of the newspaper industry, with different participants adopting different strategies for survival and success. Among the many possibilities being considered are new revenue models for traditional newspapers, user-supplied online content including blogs, open-source approaches like wikis, crowd-sourcing, and non-profit news organizations. This is the essence of the competitive process that the Division is dedicated to protecting.

Congress passed the Newspaper Preservation Act in 1970. 15 U.S.C. § 1801. The opening sentence of the NPA articulates the “public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States.” The NPA exempts from antitrust liability certain types of joint newspaper operations, so long as two or more newspapers (owned or

controlled by two or more owners) remain in a given locale, and so long as these newspapers maintain separate staffs and independent editorial policies. 15 U.S.C. §§ 1802-1803. However, the NPA does not grant an unlimited antitrust exemption. It expressly states that antitrust immunity shall not apply to any joint operating arrangement (“JOA”) or party thereto “[e]xcept as provided in this chapter” and it specifically enumerates those activities on which JOA newspapers are permitted to collaborate. 15 U.S.C. § 1803 (c). Thus, for example, there is nothing in the text or the legislative history of the NPA suggesting that Congress intended to immunize the acquisition by one JOA partner of the other partner’s newspaper. Indeed, that would be directly contrary to Congress’s goal of ensuring independent and competitive editorial and reportorial voices.

In reviewing mergers, the Antitrust Division applies Section 7 of the Clayton Act, which prohibits the acquisition of stock or assets “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” Section 7 reflects the Congressional judgment that merger enforcement should be able to arrest anticompetitive transactions in their incipiency, to forestall the harm that would otherwise ensue but be difficult to undo. Thus, merger enforcement standards are forward looking and, while we often consider historic performance in an industry, the primary focus is to determine the likely future competitive effects of a proposed merger.

The Division, and the Federal Trade Commission, with which we share merger enforcement authority generally, have jointly developed Merger Guidelines

that describe the inquiry the agencies will follow in analyzing mergers. “The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.” Merger Guidelines 0.1.

There are a variety of issues the Division grapples with in analyzing the facts of any newspaper merger. For example, besides the two local daily newspapers seeking to merge, there may be a national daily newspaper and a local community weekly available in a particular community. The Division needs to collect and examine the facts to determine whether these offerings are sufficiently competitive with each other, both for advertisers and readers. If a significant number of readers highly value yesterday’s sports scores, for example, a community weekly is not likely to be considered a viable competitive option for a daily for these readers. At the same time, if many readers highly value information regarding local issues, such as a local school board vote or policy, a national daily is not likely to be considered a viable competitive option for those readers. We ask similar questions with regard to advertisers.

We also take into account the fact that newspapers generally receive revenues from both subscribers and advertisers. Since advertisers are willing to pay more to appear in a newspaper with more readers, newspapers, like other media, have an additional incentive to attract subscribers. If advertising revenues decline, newspapers may have an incentive to raise their subscription prices. Competition with another newspaper can prevent such increases of subscription prices, especially as regards traditional readers who are in the habit of reading a local daily newspaper, to the benefit of the reading public.

Ultimately, following Section 7 and our Guidelines, our analysis of a proposed merger of two local daily newspapers will depend upon the extent to which subscribers and advertisers would shift to other media in response to a price increase. Measuring substitution patterns of this type requires a detailed, fact-intensive inquiry. As technology advances, and as demographics shift, that inquiry could lead to a different result in the future than it would have in the past, in a given locale. Newspapers are hardly unique in this respect. Technological change and shifting consumer preferences over a period of decades have altered the competitive landscape in other media as well; for example, in video programming, some consumers have shifted over time from broadcast television to basic and pay cable television as well as direct broadcast satellite.

In past newspaper merger investigations, the Division has performed a factual analysis to determine whether other media outlets, such as radio, television, and new media, are in the same relevant market as local daily newspapers. In those past investigations, we have found sufficiently strong competition among local daily newspapers to define these products as a relevant market. These conclusions are perfectly consistent with the observation that newspapers have been losing subscription and advertising revenues to other media. A relevant market consists of products that could profitably be monopolized; some degree of competition across market boundaries is the norm. But changes in technology, and in consumer preferences for their sources for news and entertainment, may well make it possible that the facts surrounding a particular future merger or acquisition involving two local newspapers could lead us to conclude that consumers' preferences are such

that other media outlets provide a sufficient competitive constraint to alleviate concerns raised by that merger.

Even if we find that local daily newspapers form a relevant antitrust market, that conclusion certainly does not end the analysis. Before concluding that a merger between the two remaining local daily newspapers in a given community should be enjoined, we still need to investigate further to determine if the merger will significantly harm competition. The Division is in general receptive to the argument that a proposed merger generates sufficient synergies to benefit consumers, notwithstanding the resulting loss of competition. That receptivity certainly applies to newspaper mergers.

Especially in today's economic environment, we may be faced with the contention that the newspaper being acquired is a failing firm and thus the merger should be allowed to proceed. In that case, we would analyze the extent to which the assets of the weaker local newspaper, including reporting staff, innovative features, or other valuable attributes of the paper, would exit the market if not acquired by the stronger local newspaper, or whether they could go to other competitors, or support a new competitor.

The Division has considerable experience evaluating claims by merging parties that one of them qualifies for the failing firm defense. Strict requirements must be met for that defense to be invoked, and rightly so. For a free market economy to work to harness the power of competition, rivals must not be able to short-circuit the competitive process, to the detriment of consumers, unless the alternative is imminent exit, which would also involve a loss of competition.

Unfortunately, this type of “tough love” may come into play with increasing frequency during the current economic challenges, simply because we are likely to see an uptick in the number of mergers in which the acquiring firm asserts that the acquired firm (or division) is failing.

Newspapers play a vital role in our society. The Antitrust Division continues to work to protect competition in the newspaper industry. We believe that antitrust analysis is forward-looking and flexible enough to take into consideration the economic and technological pressures facing newspapers as we continue to make market-by-market and case-by-case factual determinations pursuant to the antitrust laws. Vigorous antitrust enforcement will guarantee that this important industry will be as competitive as possible, and that American consumers will have available to them more, rather than fewer, options for getting news and information.