Regulating Relationships between Competing Broadcasters

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REGULATING RELATIONSHIPS
BETWEEN COMPETING BROADCASTERS

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ABSTRACT

In response to mounting economic challenges in the media industry, some broadcasters have begun entering into agreements whereby one station agrees to sell advertising, produce programming, or take over certain other functions, of another station in the same market. Though such arrangements, often called local marketing or time brokerage agreements, are not particularly new in the broadcasting field, they have been used with increasing frequency in recent years. The Federal Communications Commission has implemented rules and policies that ensure such agreements are used in a manner consistent with the public interest. Because these agreements involve cooperation among competitors, they also raise antitrust questions, yet antitrust enforcers have been relatively quiet about the practice.

Despite the laissez-faire approach to regulating cooperative agreements, these agreements, and the relationship between competitors that they create, look suspiciously similar to agreements that were once common in the newspaper industry, and which were condemned under the antitrust laws.

This article examines the form and function of cooperative agreements among broadcasters and explores the reasons why such agreements are attractive business propositions for those who enter them; it then describes the regulatory context in which these agreements exist, from both a communications and antitrust law perspective. The article closes with a look back at the antitrust enforcement action brought against joint operating agreements and the subsequent passage of the Newspaper Preservation Act, and sets forth some suggestions for future regulatory treatment of cooperative agreements.

In brief, this article concludes that while cooperative agreements likely offer many procompetitive benefits, both the FCC and antitrust enforcers should take a more active, cooperative role in reviewing and monitoring agreements between competing broadcasters and consider the potentially adverse effects of such arrangements across each potentially affected market, including the market for audience share, the market for advertisers, the market for carriage, and the marketplace of ideas.
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Christopher S. Reed*

I. INTRODUCTION

In September of 2008, Tribune Company (“Tribune”) and Local TV Holdings, LLC (“Local TV”) announced that they had entered into an agreement whereby Local TV would take on certain operating functions of two Tribune stations—KWGN in Denver and KPLR in St. Louis—by combining them with operations at Local TV’s existing properties in those same markets. According to the companies’ joint press release, the agreements “will allow the stations to locate in the same facility, use combined news operations and share certain programming.”

Local TV’s chief executive officer Bobby Lawrence further explained that

[the television industry is on the cusp of change. The internet, mobile, TiVo and alternative distribution channels are growing forms of content distribution. As our audience finds new ways to get content we need to streamline our delivery costs and provide more local programming, news and community information. With Tribune as our partner, we can streamline the back office and news gathering costs, while still giving viewers access to two great and very different stations and content. It is the way of the future, and we are excited to be a part of TV’s evolution.]

Although the agreement between Tribune and Local TV is somewhat unusual in that it involved stations in relatively large television markets,

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2 Id.

the idea of two competing broadcasters entering into cooperative contracts is not a new innovation. Indeed, the idea of time brokerage, a practice that involves one party “buying” or “leasing” airtime on another party’s broadcasting station, dates back nearly to the origins of the medium itself. But as the increasingly competitive media landscape forces broadcasters to confront economic challenges, many broadcasters are entering into various business arrangements with competitors in an attempt to reduce expenditures by creating and leveraging efficiencies and economies of scale and scope.4

Though such agreements vary in terms of form, fundamentally, these agreements involve two or more competing broadcasters combining forces, pooling resources, or otherwise collaborating. It is widely understood that coordination among competitors in a particular market has the potential to raise antitrust concerns, yet neither the Justice Department’s Antitrust Division, nor the Federal Trade Commission—the agencies charged with enforcing the nation’s antitrust laws—have responded to the practice. Similarly, the Federal Communications Commission (“FCC” or the “Commission”)—the agency responsible for licensing and monitoring broadcasters’ use of the public electromagnetic spectrum—has evaluated the issues surrounding such cooperative agreements only occasionally and usually in connection with its statutorily mandated periodic review of its ownership rules.

Despite the laissez-faire approach to regulating cooperative agreements between competing broadcasters, these agreements, and the relationship between competitors that they create, look suspiciously similar to the sort of arrangements that were once quickly becoming commonplace in the newspaper industry dating back to the 1930s. Those agreements typically combined the “back-end” functions of competing newspapers—e.g., printing, distribution, sales—while maintaining separate editorial operations. Newspaper owners argued that such cost sharing was necessary to keep newspapers economically viable and, as such, could continue to provide their communities with separate and independent editorial voices. The Antitrust Division brought suit against the parties to one such joint

4 See, e.g., Nexstar Broadcasting Group, Inc., Annual Report (form 10-K), at 22 (Mar. 31, 2009) (“In some of our markets, we have created duopolies by entering into what we refer to as local service agreements. While these agreements take varying forms, a typical local service agreement is an agreement between two separately owned television stations serving the same market, whereby the owner of one station provides operational assistance to the other station, subject to ultimate editorial and other controls being exercised by the latter station’s owner. By operating or entering into local service agreements with more than one station in a market, we (and the other station) achieve significant operational efficiencies. We also broaden our audience reach and enhance our ability to capture more advertising spending in a given market”).
operating arrangement in 1965 arguing that it unlawfully retrained trade in violation of the antitrust laws. The government won, but while the case was on appeal, newspaper industry heavyweights lobbied Congress to pass the Newspaper Preservation Act which effectively granted qualifying newspapers immunity from antitrust liability for entering into joint operating agreements. Thus, in the newspaper context, there exists both precedent that such agreements are anticompetitive, and a statutory framework that prescribes the circumstances in which such practices are permissible. In broadcasting, no such precedent or framework exists.

This article endeavors to accomplish four principal objectives: Part II examines the form and function of cooperative agreements among broadcasters and explores the reasons why such agreements are attractive business propositions for those who enter them. Parts III and IV describe the regulatory context in which these agreements exist, from a communications and antitrust law perspective, respectively. Finally, part V looks back at the newspaper industry and the conduct that gave rise to the antitrust enforcement action against joint operating agreements, the subsequent passage of the Newspaper Preservation Act, and then sets forth some suggestions for future regulatory treatment of cooperative agreements.

In brief, this paper concludes that while cooperative agreements likely offer many procompetitive benefits, both the FCC and antitrust enforcers should take a more active, cooperative role in reviewing and monitoring agreements between competing broadcasters and consider the potentially adverse effects of such arrangements across each potentially affected market, including the market for audience share, the market for advertisers, the market for carriage, and the marketplace of ideas.

II. COMMON RELATIONSHIPS BETWEEN COMPETING BROADCASTERS

The term “cooperative agreements” is used throughout this article to encompass a broad range of agreements into which broadcasters may enter. As noted earlier, although the nature and scope of these agreements can vary widely, they are fundamentally the same in that they all involve competing broadcasters entering into agreements with each other to provide services, support, or programming.

A. Types of Agreements

There are several types of cooperative agreements in use throughout the industry today:

(1) Local marketing agreements, also often referred to as time brokerage agreements (and referred to in this article simply as “LMAs”), involve a
broadcasting station (the FCC “licensee”) leasing all or substantially all of its airtime to a third party who takes over the programming and operational aspects of the station (the “broker”). Such arrangements typically involve a cash payment back to the licensee for use of its station, making the arrangement akin to a typical commercial lease relationship, whereby a property owner allows a lessee to use a particular piece of property for a prescribed period of time in exchange for periodic payments. FCC regulations provide that regardless of the scope of the agreement between the broker and the licensee, it is the licensee that remains ultimately responsible for the proper, lawful operation of the station.

(2) Joint sales agreements (“JSAs”) are akin to LMAs in that they involve a licensee handing over certain operational functions to a third party broker, but while an LMA involves broad swaths of the licensee’s airtime, a typical JSA simply allows a broker to sell advertising on the licensee’s station in return for a fee paid to the licensee. JSAs are, in a sense, broader than LMAs because they allow the broker to sell all of the licensee’s commercial time; yet, in another sense, they are narrower than LMAs, in that they only permit the broker to sell commercials, rather than program entire portions of the licensee’s broadcast day.

(3) Shared service agreements provide for certain functions to be performed collectively, or by one of the parties to the agreement for the benefit of the other party, so as to reap scale economies and other efficiencies. Typical services contemplated by these agreements include program production (most commonly, one party producing newscasts for the other); co-location of studio, master control, and transmission facilities; grounds keeping, security, and building management services; non-managerial and administrative support services; accounting and finance services; traffic (commercial scheduling) and billing; and similar support

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5 The FCC describes such relationships as “the sale by a licensee of discrete blocks of time to a ‘broker’ that supplies the programming to fill that time and sells commercial spot announcements in it.” 47 C.F.R. § 73.3555 note 2, para. (j).

6 In the LMA context, the lessor is the holder of an FCC license to operate on a particular channel or frequency and the lessee takes over certain programming and operational functions of the station and makes periodic payments back to the lessor.

7 47 C.F.R. § 73.3555 note 2, para. (k).

8 As a practical matter, most modern LMAs contemplate that the broker will program all or substantially all of the time on the brokered station. As one broadcaster noted, “JSAs affect only a limited aspect of station operations, namely sales, and hence JSAs do not raise concerns equivalent to those associated with LMAs.” In the Matter of Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission’s Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission’s Cross-Interest Policy, Report and Order, 14 F.C.C.R. 12559, para. 119 (1999) (citing comments of Paxon Communications Corporation).
services. Recently a specific type of shared service framework, sometimes referred to as a “news sharing” or “content pooling agreement” has become relatively common. These agreements provide for the sharing of footage and other raw material among pool members for their own newscasts and other local productions. Stations believe that such agreements allow them to cover more stories and offer more in-depth coverage than they otherwise could because their newsgathering costs are significantly reduced. A recent trade press article suggests that combining non-programming or non-editorial functions may become more commonplace as stations continue to identify areas ripe for cost cutting and efficiency enhancements. One engineering consultant suggested that an ideal arrangement would establish a “third-party external company [] in each market that would provide services for all aspects of the stations that do not compete.”

(4) Ad hoc cooperative agreements are less formal, sometimes impromptu arrangements that allow stations to cooperate briefly to a specific, mutually desirable end. Most recently, as the United States prepared to transition from analog to digital broadcasting, many stations collaborated on promotional efforts to help educate their communities about the transition and the need to buy a digital converter box for those that did not obtain television signals through cable or satellite transmissions.

B. Historical Development

The origins of time brokerage and other cooperative agreements among competing broadcasters date back to before the passage of the 1934 Communications Act. While the prominence of such arrangements, and

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11 Id.

12 In the Matter of Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming, Policy Statement, 82 F.C.C. 2d 107, para. 3 (1980) [hereinafter 1980 Policy Statement on Part-Time Programming] (“Radio programming has long been marked by the sale of discrete blocks of time to brokers who provide both programming and the commercial messages which support it, and by Commission concern with such practices. In fact, brokered foreign language programs were common in large markets..."
the contemporary LMA and JSA constructs is often attributed to the widespread industry deregulation that occurred in the 1990s, the model of a program supplier leasing time on a broadcasting station—the chief characteristic of a local marketing or time brokerage agreement—is not a particularly new innovation.

The history of LMAs can be described in terms of three key eras, beginning with the use of such agreements as a means by which to make niche programming available to a broader audience, then moving into the use of such agreements as a way to accelerate the benefits of an acquisition pending formal approval by the FCC and antitrust regulators, and finally, their use as the centerpiece of emerging broadcasting business models.

1. A Mechanism to Achieve Programming Diversity

Unlike many of today’s cooperative agreements, early time brokerage agreements did not involve competing broadcasters; rather, they allowed program producers to secure carriage of their programming by buying airtime on broadcasting stations. The FCC first recognized the practice in 1938 when it was called upon to select from among several applicants for a single broadcast license; one applicant was disqualified because he had previously operated a station that relinquished too much of its airtime to a broker.\(^{13}\) Shortly thereafter, the FCC considered a “management contract” between Westinghouse Electric and Manufacturing Company and National Broadcasting Company (“NBC”) whereby NBC would manage and provide programming for Westinghouse’s stations.\(^{14}\) Although Westinghouse retained formal ownership of the stations, NBC was entitled to the revenues derived from its programming.\(^{15}\)

Traditionally, time brokerage was used to provide “specialized programming, including foreign language programming”\(^{16}\) for which the target audience is too limited to support a full schedule of content. Based on a recognition that time brokerage “could foster healthy program competition and enhance diversity of programming by encouraging independently produced programming,” the FCC formally endorsed the practice in 1980, hoping that its action would “foster healthy program

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\(^{14}\) *Id.* at 90-91 (citing In re Westinghouse Elec. & Mfg. Co., *Opinion and Order on Petition to Reconsider and Grant Without Hearing*, 8 F.C.C. 195, 195 (1940)).

\(^{15}\) *Id.*

competition and enhance diversity of programming by encouraging independently produced programming.”

Despite the Commission’s approval of time brokerage, it prohibited competing stations in a particular geographic market from entering into such arrangements. In 1989, noting that the competitive landscape had become more vibrant, the FCC abolished its limitation on time brokerage agreements between competitors. Specifically, the FCC concluded that:

[c]ompetitive conditions require a station that decides to broker its time to another remain alert to the needs of its audience or risk losing some of that audience to a competitor, with a resultant decrease in ratings and revenue. Thus, the amount of choice available to listeners and viewers insures that competition will be vigorous in order for a station to retain its share of the audience.

The FCC continued to relax its enforcement posture throughout the early 1990s, leading to the practice of time brokerage to become more widely accepted. As described by former FCC attorney Stephen Sewell, the new regulatory approach was derived from six rulings from which four common themes emerged:

(1) the amount of time permitted to be brokered was all or nearly all of the brokered stations broadcast week, including news and issue-oriented programming; (2) the area served in common by the two stations was very substantial, often involving encompassment of one station’s service area by the other, and always involving substantial overlap of the stations’ principal-community contours, the strongest field intensity contour used by the [FCC] for administrative purposes; (3) the licensee of the brokered station reduced its staff substantially, usually by eliminating all engineering staff; and (4) all brokered licensees asserted that they would retain ultimate control, and specifically retained the right to cancel or suspend programs and commercials, and to substitute programs they considered to be of greater importance.

The new policies suggest that, although licensees must maintain final control over their programming, the FCC’s new enforcement position effectively allowed brokers to take over all or substantially all of a brokered station’s operations without actually transferring the broadcast license.

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17 Id. at para. 2.
18 In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Altamont, Oregon), Report and Order, 4 F.C.C.R. 2280, para. 7 (1989).
19 Id. at para. 37.
20 Sewell, supra note 13, at 94.
2. Attendant to a License Transfer Transaction

The mid 1990s brought a wave of mergers and industry consolidation fueled largely by the passage of The Telecommunications Act of 1996,21 which, among other things, abolished the limits on the number of stations any one entity could control, and substantially relaxed the limitations on concentration in any particular geographic market. Broadcasters could now own a greater number of stations, nationally, and a greater share of the broadcasting industry in any particular geographic market.

Along with increased merger activity came a change in the way the industry engaged in the practice of time brokerage. Whereas time brokerage agreements had typically been for fairly significant periods of time, in the late 1990s, the broadcasting industry started to witness agreements that lasted for much shorter periods of time, often just a year or less, and were typically attendant to a separate station acquisition transaction. Such transactions can take months to complete because the FCC requires time to review the formal license transfer application. To get around the delay, broadcasters began entering into short-term time brokerage agreements that would allow the acquiring entity to take over certain key functions of the station while the license transfer application was pending approval at the FCC. Although such arrangements were essentially time brokerage agreements, the new practice was given its own name, and the local marketing agreement was born.

Broadcasting industry veteran R. Steven Hicks and his company Capstar, which later became part of Clear Channel,22 are often credited with having invented the new application of time brokerage agreements. As described by journalist Alex Foege:

Clear Channel’s use of LMAs was at the point of entering into a contract to sell a station. The interval between the filing of a sale/license transfer and its final FCC approval (usually four to six months) was a risky operational period for both the buyer and the seller. Since the impending sale of a station was public information during this period, advertising sales often dropped, staff sometimes left, and ratings sometimes faltered. Short-term LMAs provided an opportunity for buyers and sellers to enter into brief management agreements that enabled the buyer to operate the station until the final sale and transfer were approved by the FCC. This type of LMA was generally a year or less in length.23

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22 Diane Mermigas, AMFM Deal Just the Start; Merger with Clear Channel Could Spur Other Radio Deals, ELECTRONIC MEDIA (Oct. 11, 1999) (noting that AMFM, Inc. acquired Capstar Broadcasting in 1999 and subsequently merged with Clear Channel later that year).
23 ALEX FOEGE, RIGHT OF THE DIAL: THE RISE OF CLEAR CHANNEL AND THE FALL OF
3. Centerpiece of a Business Model

LMAs and their close cousins, JSAs, have become widely used in contexts beyond license transfers as well. For some broadcasters, entering into cooperative agreements with competing stations has become a central feature of their business model. Sinclair Broadcast Group, for example, operates 55 stations, 12 of which it operates through a local marketing agreement or an outsourcing agreement. Of the 12 stations that Sinclair operates under a cooperative arrangement with another licensee, 10 are in markets where Sinclair also owns television stations, and of those 10 stations, 6 are owned by Cunningham Broadcasting, “a company owned, not coincidentally, by [the Sinclair CEO]’s mother.” The oddly cozy relationship between the two companies has led some to charge that Sinclair effectively operates Cunningham as a way to circumvent the FCC’s ownership restrictions, particularly because many of the markets in which Sinclair operates Cunningham’s stations, Sinclair would be prohibited from owning additional signals. Indeed, Sinclair has attempted to acquire Cunningham on three occasions, but the FCC has blocked the transaction each time; the FCC has also fined Sinclair for circumventing ownership rules in the past.

Similar charges have been lobbed against Nexstar Broadcasting Group (“Nexstar”). Headquartered in Irving, Texas, Nexstar owns or operates 57 stations, of which 23 are operated pursuant to a “management services agreement,” and one Nexstar station is operated by Newport Television

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25 Baltimore, MD; Nashville, TN; Columbus, OH; Asheville, NC; Birmingham, AL; Dayton, OH; Charleston, WV; Paducah, KY; Cedar Rapids, IA; Charleston, SC. Id.
26 Sinclair Broadcast Group, Inc., Annual Report (Form 10-K), at 5-6 (Mar. 4, 2009).
28 Id.
29 Id.
30 In re Applications for Assignment of License/Transfer of Control of Television Stations, WTTE(TV), Columbus, Ohio, WNUV(TV), Baltimore, Maryland, WRGT(TV), Dayton, Ohio, WTAT(TV), Charleston, South Carolina, WVAH(TV), Charleston, West Virginia, Letter, 19 F.C.C.R. 3897 (2004).
31 In the Matter of Edwin L. Edwards, Sr. (Transferor) and Carolyn C. Smith (Transferee); For Consent to the Transfer of Control of Glencairn, Ltd., Memorandum Opinion and Order and Notice of Apparent Liability, 16 F.C.C.R. 22236, 22251 (2001).
32 Nexstar describes a “management services agreement” as “a contract under which we provide services to a station owned and operated by an independent third party.” Nexstar, Stations, http://www.nexstar.tv/ (click on “Our Stations”) (last visited Dec. 1,
pursuant to an LMA. Of the 23 stations operated under a management services agreement, 16 are in markets where Nexstar also owns stations, and of those 16 stations, 15 are owned by Mission Broadcasting, Inc. ("Mission"). And like Sinclair and Cunningham, Mission and Nexstar have a curiously close relationship. In its annual report, filed with the Securities and Exchange Commission, Nexstar explains that although Mission is “100% owned by an independent third party,” because so many of Mission’s stations are operated under LMAs with Nexstar, and because Nexstar has guaranteed a substantial amount of Mission’s debt, and holds various options to acquire Mission’s stations, generally accepted accounting practices for publicly traded companies require Nexstar to report Mission’s financial performance as if it were a wholly-owned subsidiary of Nexstar.

As with the unconventional Sinclair/Cunningham relationship, the close financial ties between Nexstar and Mission have led to at least one complaint that Mission is merely a holding entity for Nexstar so that it may own multiple stations in markets where it would violate the FCC’s ownership caps if it were to hold the licenses of multiple stations directly.

III. COMMUNICATIONS LAW TREATMENT

As the guardian of the public’s electromagnetic spectrum, the FCC is the primary regulatory body charged with overseeing and licensing radio and television broadcasters. As such, the agency has opined on the practice of cooperative agreements and has, over time, developed polices relating to their implementation, the basic parameters of which are discussed here. Broadly speaking, the FCC considers cooperative agreements through two regulatory paradigms: (1) limits on the number of broadcasting properties that any one person or entity can control; and (2) the application and review process for transfers of broadcast licenses.

This section first describes the overarching policy objectives that underlie the FCC’s analytical framework for ownership issues, and then

2009).

31 WLYH-TV, Harrisburg, Pennsylvania. Id.
32 Wilkes-Barre, PA; Springfield, MO; Rochester, NY; Peoria, IL; Amarillo, TX; Rockford, IL; Monroe, LA; Erie, PA; Joplin, MO; Wichita Falls, TX; Lubbock, TX; Terre Haute, IN; Abeline, TX; Utica, NY; Billings, MT; San Angelo, TX. Id.
35 Fast Track, BROADCASTING & CABLE, Jan. 9, 2006, at 5 (quoting Cable America’s letter to the FCC: “Nexstar and Mission, through a complex web of contracts and operating arrangements, have engaged in a subterfuge that violates federal law”).

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considers the ownership cap and license control considerations.

A. FCC Policy Objectives

The FCC’s authority comes from the Communications Act of 1934 which, broadly, allows the FCC to manage the public spectrum such that it “serves the public interest, convenience, and necessity.”\(^{38}\) In considering the regulatory framework applied to cooperative agreements, it is useful and appropriate to look to the FCC’s ownership guidelines since LMAs and similar agreements effectively give the broker ownership-like control over certain functions of the licensee’s operations.

In 1996, Congress passed the Telecommunications Act\(^ {39}\) which, among other things, changed the limits on the number of stations that any one entity could own or control. It also required the FCC to engage in periodic reviews of those rules to identify how well they accomplish the Commission’s stated policy objectives and whether changes may be necessary to ensure that the rules remain effective.\(^ {40}\)

As described in the Commission’s 2002 biennial review,\(^ {41}\) and reaffirmed in its 2006 review,\(^ {42}\) the FCC seeks to achieve three principal overarching policy objectives through its ownership regulations: diversity, competition, and localism.\(^ {43}\)

1. Diversity

The FCC seeks to promote five types of diversity: (1) viewpoint; (2) program; (3) outlet; (4) source; and (5) minority and female ownership


\(^{40}\) 47 C.F.R. § 202(h) requires the FCC to periodically review its broadcast ownership rules to “determine whether any such rules are necessary in the public interest as a result of competition,” and to modify or repeal those rules which it deems no longer necessary to preserve or advance the public interest. The original Telecommunications Act called for the FCC to perform a biennial review of its ownership rules, but Congress changed the frequency of the review in 2004; the FCC is now required to complete its review of ownership rules every four years. See 2004 Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (2004). The FCC recently began its 2010 review. See Media Bureau Announces Agenda and Participants for Initial Media Ownership Workshops and Seeks Comment on Structuring of 2010 Media Ownership Review Proceeding, Public Notice, FCC DA No. 09-2209 (Oct. 21, 2009).


\(^{43}\) Id., at para. 9; 2002 Order, supra note 41, at para. 17.
Viewpoint diversity, is based on the premise that “a diverse and robust marketplace of ideas is the foundation of our democracy” and that communications policy should aim to maximize the number of voices in the media marketplace.\textsuperscript{45} The Commission takes the position that viewpoint diversity is best measured by looking to news, information, and public affairs programming, as opposed to entertainment programming, because “it relates most directly to the Commission’s core policy objective of facilitating robust democratic discourse in the media.”\textsuperscript{46}

Similar to viewpoint diversity, program diversity refers to diversity among specific formats or genres of programming. In television, this might include a consideration of the balance among dramas, comedies, reality programming, and the like, while in radio, it includes a consideration of various music formats, such as top-40, rock, jazz, news, and so forth.\textsuperscript{47} The FCC has concluded that this type of diversity “is best achieved by reliance on competition among delivery systems rather than by government regulation.”\textsuperscript{48} That is, the FCC believes that competition between satellite, cable, and traditional broadcasting stations in the television realm, and competition between AM, FM, HD,\textsuperscript{49} satellite, and online broadcasting in the radio realm, will foster a rich and diverse programming landscape.

Outlet diversity refers to the multiplicity of independent owners in a particular market. The FCC has traditionally considered outlet diversity a means towards achieving viewpoint and program diversity on the theory that the more independent owners in a market, the more likely those owners

\textsuperscript{44}2002 Order, supra note 41, at para. 18.
\textsuperscript{45}Id. at para. 19.
\textsuperscript{46}Id. at para. 32.
\textsuperscript{47}Id. at para. 36.
\textsuperscript{48}Id. at para. 37.
\textsuperscript{49}“HD Radio” is the trade name associated with the FCC-approved standard for digital radio transmission, known more formally as “in-band on-channel” or “IBOC.” Stations transmitting IBOC signals have the capability of delivering multiple programming streams to listeners called “multicasts,” thereby increasing the number of stations available to listeners. Considering HD multicasts poses special challenges for regulators. See HD Digital Radio, \textit{How does it work?}, http://www.hdradio.com/how_does_hd_digital_radio_work.php (last visited Dec. 3, 2009). To hear the HD signals, listeners must have a special HD-equipped receiver, which are not nearly as prolific as standard AM or FM receivers, meaning that only a portion of the market can hear the additional stations. Moreover, not all stations broadcast HD multicasts, but many intend to in the near future. Although the FCC has yet to specifically consider multicasting in the context of its ownership reviews, given the increased proliferation of stations using IBOC since its last ownership review, it would be unsurprising if multicasting makes an appearance during the 2010 review. “HD Radio” is a registered trademark of iBiquity Digital Corporation.
will present competing viewpoints and programming to the community.\textsuperscript{50} Since outlet diversity is susceptible to regulation using objective criteria—
the number of stations any one owner controls—“[r]egulating the ownership of outlets to achieve [other diversity objectives] is far preferable to attempting to engineer outcomes directly” because the FCC need not make subjective judgments about program content and the diversity thereof.\textsuperscript{51}

Source diversity is similar to outlet diversity in that it refers to diversity in programming suppliers, but, unlike viewpoint, program, and outlet diversity, which focus on the downstream supply chain—that is, from broadcasters to audiences—source diversity focuses on the upstream supply of programming—from producers and distributors to broadcasters.\textsuperscript{52} The FCC has found that promoting diversity on the upstream side of the supply chain fosters diversity on the downstream side, which ultimately benefits viewers and listeners.\textsuperscript{53} Most of the FCC’s efforts in source diversity have been in the television industry, where its rules once restricted networks from programming certain hours of the day, requiring local stations to program those hours locally or buy programming from syndicators;\textsuperscript{54} and prevented networks from having a financial interest in program producers.\textsuperscript{55} Both rules were subsequently abolished.\textsuperscript{56}

Although the FCC acknowledges that source diversity was once an important policy objective, it concedes that due, in part, to technological changes and the proliferation of new media distribution channels, “[t]he record before [it] does not support a conclusion that source diversity should be an objective of [its] broadcast ownership rules.”\textsuperscript{57}

Finally, minority and female ownership diversity, which has historically been an important FCC policy objective,\textsuperscript{58} remains a key concern for the Commission.

2. Competition

The second of the FCC’s stated objectives for ownership policy is competition, which, as the FCC notes, has been a “basic tenet of

\begin{itemize}
  \item \textsuperscript{50} \textit{2002 Order, supra} note 41, at para. 38.
  \item \textit{Id.} at para. 39.
  \item \textit{Id.} at para. 42.
  \item \textit{Id.}
  \item \textit{In re Review of the Prime Time Access Rule, Report and Order, 11 F.C.C.R. 546 (1995)} (repealing the FCC’s “prime time access rule”).
  \item \textit{See supra} notes 54-55.
  \item \textit{2002 Order, supra} note 41, at para. 43
  \item \textit{Id.} at para. 46.
\end{itemize}
communications communications policy” since the government first began regulating communications. Some critics have argued that competition enforcement is best left in the hands of the antitrust regulators, but the FCC has taken the position that promoting economic competition serves to advance its “separate policy goal of protecting competition in the marketplace of ideas." Specifically, the FCC has recognized that antitrust enforcers typically focus only on price competition and, as such, are traditionally concerned with its impact on advertising markets, whereas the FCC’s inquiry is consistent with its statutory mandate, on the public interest, and the ability of its licensees to serve the needs of their communities. Put simply, while antitrust regulators are concerned with consolidation’s impact on advertisers, the FCC is concerned with its impact on the public. Recognizing that, in many cases, traditional antitrust principles may serve to achieve both economic and viewpoint competition, the FCC notes that in other cases, particularly those in smaller markets with fewer media outlets, stiff adherence to them “would unreasonably threaten viewpoint diversity even if they would not, under standard antitrust theory, result in competitive harms.”

Unlike antitrust enforcement of media transactions, which has traditionally focused on competitive effects in the advertising market, the FCC’s analysis of competition has recognized that the economic models for broadcasters are changing, and that traditional media entities—radio and television stations—are today facing intense competition by other services that, in addition to advertising revenues, receive payments directly from consumers, such as cable, satellite, and broadband services (collectively

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59 Id. at para. 54.
60 2006 Order, supra note 42, at note 451 (noting Fox’s argument that the FCC’s prohibition on one entity controlling multiple broadcast networks was unnecessary because “antitrust review can address the Commission’s concerns”); 2002 Order, supra note 41, at para. 210 (“Most commenters proposing elimination of the [local television ownership] rule believe that antitrust authorities will protect against any public interest harms that may result from combined ownership of multiple television stations in a market”).
61 2002 Order, supra note 41, at para. 58.
63 Id. at para. 65 (quoting Fed. Radio Comm’n, Second Ann. Rpt. 169-70 (1928)) (footnote omitted). Antitrust regulators typically take the position that promoting advertiser welfare is consistent with the public interest because the increased costs of broadcast advertising attributable to a particular transaction or agreement likely would be passed along to consumers in the form of higher prices charged by the advertiser. See Stucke & Grunes, infra note 123, at 275 n. 117.
64 Id. at para. 59.
65 See generally, Raycom Competitive Impact Statement, infra note 121; Bain Competitive Impact Statement, infra note 121.
“multichannel video programming distributors” or “MPVDs”). Moreover, unlike broadcasters, whose programming is a public good, MVPDs and the channels they carry can “extract direct payments from viewers based partly on viewers’ strength of preference for different programming” through constructing “tiers” of related channels; consumers pay different prices based on the tiers to which they subscribe. In recognition of the changing competitive landscape, the FCC concluded that, when analyzing markets comprised of both free over-the-air broadcasters as well as subscription services, its analysis is properly founded not only on audience share but also on advertising markets.

3. Localism

Like competition, localism, and ensuring that local broadcasters respond to the needs of their communities, has historically been a focus of communications regulation. Indeed, the Communications Act of 1934 directs the FCC to “make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”

To measure localism, the Commission relies “on two measures: the selection of programming responsive to local needs and interests, and local news quantity and quality."

B. Local Ownership Rules

Taking into account the broad policy objectives described above, the FCC has constructed a series of bright-line rules pertaining to various media ownership combinations. For example, the FCC’s newspaper cross-ownership rules place certain restrictions on a single entity owning newspaper properties along with certain broadcasting outlets, while another rule prohibits one entity from owning two broadcasting networks. Of particular significance to this paper are the limitations on the number of radio or television stations that a single owner can control in a particular market. This section first describes the current ownership limitations and

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66 2002 Order, supra note 41, at para. 61.
67 Id. at para. 62-63.
68 Id. at para. 64.
69 Id. at para. 74.
71 2002 Order, supra note 41, at para. 77.
72 47 C.F.R. § 73.3555(d).
73 Id. at § 73.3555(e).
then considers how, and to what extent, stations operated under LMAs and TBAs, or stations between which there exists a JSA, are counted towards those limitations.

1. Current Numerical Limits

The current ownership limits for radio are best summarized in chart form:

<table>
<thead>
<tr>
<th>Total Number of Stations in the Market</th>
<th>Upper Limit on Stations Any One Person or Entity Can Control</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
</tr>
<tr>
<td>45 or more</td>
<td>8</td>
</tr>
<tr>
<td>30-44</td>
<td>7</td>
</tr>
<tr>
<td>15-29</td>
<td>6</td>
</tr>
<tr>
<td>14 or Fewer</td>
<td>5</td>
</tr>
</tbody>
</table>

Unlike radio, with the numerical limits displayed above, dual ownership of television stations within the same market is generally prohibited unless the stations’ primary signals do not overlap, or if (1) not more than one of the jointly-owned stations is ranked among the top four stations in the market, as determined by Nielsen Media Research; and (2) there are at least eight remaining independently-owned stations in the market.78

The FCC’s radio-television cross-ownership rule provides that one entity may control or own up to two commercial television stations, provided that such ownership does not violate the local television ownership rule, as described above, and only one commercial radio station, unless, after a proposed acquisition, there would remain a specified number of “independently owned media voices” in the market.79

74 In counting the number of stations in a particular market, the FCC includes all full-power AM, FM, commercial, and noncommercial stations. 47 C.F.R. § 73.3555(a)(1)(i).
75 47 C.F.R. § 73.3555(a)(1).
76 “Service” refers to AM and FM.
77 Notwithstanding the numerical limits, “no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the [stations] in such market unless the combination of stations comprises not more than one AM and one FM station. 47 C.F.R. § 73.3555(a)(1)(iv).
78 47 C.F.R. § 73.3555(b).
79 Id. at § 73.3555(c)(2). 47 C.F.R. § 73.3555(c)(3) provides a formula by which to determine the number of media voices in the market. In brief, the formula considers the number of broadcast stations, newspapers, and cable systems that are generally available to consumers within the DMA or FCC-designed community of license.
If at least 20 independently owned media voices would remain after a proposed acquisition, then a single entity or person may control no more than: (1) two commercial television stations and six commercial radio stations; or (2) one commercial television station and seven commercial radio stations.\(^80\) If at least 10 independently owned media voices would remain after a proposed transaction, then a single entity or person may control no more than two commercial television stations and four commercial radio stations.\(^81\)

The cross-ownership rule is applied in addition to the local radio and television ownership rules—that is, the configurations set forth in the cross-ownership rule are permitted only to the extent that the owner or controlling entity would not run afoul of the radio and television ownership rules set forth above.

2. Attribution

Generally, the FCC’s attribution rules “seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.”\(^82\) The FCC began attributing radio LMAs and TBAs in 1992, in response to the simultaneous relaxation of ownership rules.\(^83\)

In considering the issue, the FCC recognized that joint ventures among broadcasters—even those operating in the same market—may have advantageous or procompetitive effects, but cautioned that such agreements among competitors may “undermine [the FCC’s] continuing interest in broadcast competition and diversity.”\(^84\) Accordingly, the Commission elected to count brokered stations against the broker’s ownership limit if the broker provides more than 15 percent of the station’s hourly broadcast hours.\(^85\) “In short,” said the FCC, “we will not permit a local station to substantially broker a station in its market which it could not own under our

\(^80\) 47 C.F.R. § 73.3555(c)(2)(i).
\(^81\) Id. at § 73.3555(c)(2)(ii).
\(^84\) Id. at para 64.
\(^85\) Id. at 65.
In 1995, the FCC revisited its attribution rules, but declined to reconsider its position on radio TBAs. Shortly thereafter, the Telecommunications Act of 1996 was passed into law which prompted the Commission to consider whether to adopt an attribution policy for television TBAs that echoed its radio TBA attribution policy. In 1999, after a lengthy fact-finding and public comment period, the FCC decided to require attribution just as it had done for radio, attributing television TBAs to brokers that provide more than 15 percent of a station’s programming.

The FCC’s current attribution rule provides that a radio or television station operated pursuant to an LMA or TBA is attributable to the broker if it provides the brokered station with “more than 15 percent” of its programming. Similarly, the attribution rule provides that a broker who sells more than 15 percent of the commercial availabilities on a radio station pursuant to a JSA must count that station toward its ownership limit.

The following chart summarizes the current attribution rules:

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86 Id.
89 The FCC went beyond its usual solicitation of comments and sought “certain factual information regarding the terms and characteristics of [television TBAs].” Specifically, the Commission asked for information pertaining to the identity of each station involved in a TBA, the name and rank of the market affected, the degree to which the stations’ signals overlap, commencement and termination dates for the TBA, the percentage of each brokered stations’ time that is programmed by the broker, network affiliation, audience share, and a statement of “efficiencies or public interest benefits” realized as a result of the TBA. Commission Seeks Further Information Regarding Television LMAs, Public Notice, 12 F.C.C.R. 8211 (1997).
90 1999 Attribution Order, supra note 82 at para. 83.
91 47 C.F.R. § 73.3555, note 2(j)(1)-(2).
92 Id. at § 73.3555, note 2(k)(1).
Note, however, that unlike the LMA/TBA attribution provisions, which apply to both radio and television stations, the attribution provision for JSAs applies only to radio stations, leaving television stations to enter into agreements to jointly sell airtime without any impact under the FCC’s attribution rules.

In 2004, the FCC sought comment on its rules and policies concerning television JSAs, asking, essentially, whether it should treat television JSAs as it treats radio JSAs. In its notice, the FCC recognized that a JSA arrangement between two stations wherein the licensee receives a fixed payment regardless of advertising sales or audience share, essentially “transfers all market risk from the licensee to the broker.” Moreover, the FCC expressed concerns that joint advertising sales may adversely affect competition, since two market participants can jointly make pricing and output decisions.

As of this writing, the rulemaking remains open, and television JSAs remain unattributable.

C. Transfer of Control

The other principal area of FCC oversight in connection with cooperative agreements concerns the prohibition on transferring control of an FCC license to another party without the Commission’s consent. 47 U.S.C. § 310(d) provides, in pertinent part:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the

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93 Id. at § 73.3555, note 2(k).
95 Id. at para. 13.
96 Id. at para. 15.
public interest, convenience, and necessity will be served thereby.

Thus, a cooperative agreement may be unlawful if the agreement amounts to a *de facto* transfer of control over a particular station. As evidenced by the earlier discussion of the nature and scope of the most commonly utilized cooperative agreements, most such agreements give the broker at least some degree of authority over the station; the question, then, is to what degree may a licensee delegate certain operational functions to a broker without being deemed to have abdicated its control in violation of § 310(d). Or, put differently, how much control must a licensee transfer to the broker to be liable for engaging in a *de facto* transfer of control without the Commission’s consent.

In 1995, Michael E. Lewyn undertook a comprehensive review of the FCC’s decisions concerning time brokerage agreements and summarized the factors the FCC considers in determining whether a particular agreement runs afoul of § 310(d). Lewyn concluded that the Commission’s “likes and dislikes” fall into four broad categories: (1) finances; (2) personnel; (3) programming; and (4) other station management issues. He explained that “a licensee may delegate day-to-day control over [each of these four] areas, as long as the licensee continues to set policies guiding station operations.” As Lewyn observed—and it remains true today—the FCC has no bright-line rules as to what constitutes an excessive transfer of control in connection with a cooperative agreement. Although stations are required to include a certification statement in all attributable cooperative agreements that the licensee shall maintain ultimate control over the station, the FCC has offered little guidance, aside from its adjudications, on what constitutes acceptable delegation of control.

As a practical matter, most licensees retain ultimate financial control


98 *Id.* at 14.

99 *Id.* at 45.

100 Note 2(j)(3) to 47 C.F.R. § 73.3555 provides:

> every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee, . . . of the brokered station verifying it maintains ultimate control over the station’s facilities, including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with [applicable FCC rules].”

Note 2(k)(2) provides a substantively identical provision for joint sales agreements.
over their station by maintaining the station’s coffers and extracting a periodic fee from the broker for use of the station’s frequency; similarly, most licensees maintain ultimate control over their station’s programming by including contractual provisions in the agreement that give the licensee unfettered veto power over programming that, in its sole judgment, is contrary to the public interest, convenience, or necessity. 102 Most licensees also eliminate a substantial portion of their workforce, retaining only those staffers necessary to perform the station’s core management functions; the station’s administrative and operational functions are typically performed by the broker’s staff. Finally, licensees typically substantially shrink the size of their physical plant, collocating most operational functions of the station in the broker’s facility.

IV. ANTITRUST TREATMENT

Although competition is one of the FCC’s stated policy objectives, as discussed previously, it has noted that its examination of competition issues is largely a proxy for the Commission’s other, less readily measured, objectives such as viewpoint and program diversity. 103 Indeed, the Commission has recognized that even if it approves an LMA, the Justice Department may still object on antitrust grounds, 104 and the Antitrust Division has recognized that some cooperative agreements may raise antitrust issues. 105

102 See, e.g., Local Marketing Agreement by and among Community Television of Colorado, LLC and KWGN, Inc., Oct. 6, 2008, para 5.2 (copy of redacted version obtained from the FCC Reference Information Center) (“Notwithstanding any contrary provision contained in this Agreement, and consistent with Licensee’s obligations pursuant to the Communications Laws, Licensee shall have the right, without any liability or obligation to Programmer, to delete any material contained in any programming or commercial matter furnished by Programmer for broadcast over the Station that Licensee determines in good faith is unsuitable for broadcast or the broadcast of which Licensee believes in good faith would be contrary to the public interest. Licensee shall have the right, without any liability or obligation to Programmer, to broadcast Licensee’s own programming in place of such deleted material”).

103 See supra Part III.A.

104 Letter from Roy J. Stewart, Chief, Mass Media Bureau, Fed. Commc’n Comm’n to J. Dominic Monahan, Esq., 6 F.C.C.R. 1867 (Apr. 4, 1991) (“while we may approve a time brokerage agreement, the Justice Department may determine that the enforcement of antitrust laws is necessary to remedy an anticompetitive arrangement that may occur as a result of the implementation of a time brokerage agreement”).

A. Competitive Issues in Agreements Between Broadcasters

Because the cooperative agreements discussed in this paper involve agreements between or among competitors, there exists the possibility that such arrangements may restrain or foreclose competition in various aspects of the parties’ businesses. Free competition is the cornerstone of a market-based economy, the goal of which is to promote consumer welfare by enhancing efficiencies in the use and allocation of scarce resources, the development of new and improved products and services, and the development of new techniques and organizational principles that put economic resources to better use. Put simply, competition aims to ensure that resources are properly allocated within a marketplace so as to maximize welfare.

Competition in the broadcasting industry takes place on several levels. Broadcasters compete among themselves for audiences, through the distribution of programming, and for advertisers, who seek to reach those audiences with their messages. The greater the audience, the more a broadcaster can charge for its advertising time. Thus, a rational broadcaster will seek to garner the greatest possible share of audience through the production or acquisition of programming that it believes is of interest to the community it serves. As a result, broadcasters collectively have an incentive to produce a diverse array of programming that targets a broad spectrum of interests. Competition for viewers and advertisers thus leads to diverse programming options that ultimately benefit consumers.

When competing broadcasters merge or enter into an agreement to combine or share certain functions, there exists the potential that some degree of competition will be restrained or foreclosed entirely. For example, a station that enters into a joint sales agreement with a competitor may reduce or eliminate the competition for viewers and advertisers that takes place between those two stations, potentially resulting in higher advertising rates, which, in turn, could mean higher prices to consumers for the goods or services offered by the advertiser. Similarly, a station that enters into a shared service agreement whereby one station agrees to produce another station’s local newscasts could result in lower quality news content because the two stations’ news departments no longer have to compete to be the first to cover a breaking news story, to offer greater breadth of stories, or to offer more in-depth coverage of those stories that are covered.

Agreements that combine the sales and programming functions of at least two entities—namely time brokerage and local marketing agreements—offer the most risk because they may restrain or foreclose
competition in both content and advertising domains, and are, arguably, equivalent to a merger of the two broadcasters. Because the station personnel responsible for producing unique programming, or acquiring content from third-party distributors, perform that function for both stations, the competition that once existed between the two stations—to produce the highest-quality programming or to acquire the most popular shows—is reduced.

B. The Antitrust Laws

Section 1 of the Sherman Act proscribes “[e]very contract, combination . . . or conspiracy, in restraint of trade.” Despite the Act’s sweeping language, the Supreme Court has made clear that only “unreasonable” restraints—that is, those restraints with weightier anticompetitive than procompetitive effects—are illegal. The reasonableness of most restraints is judged under the flexible “rule of reason” standard, which calls upon the factfinder to consider the circumstances surrounding a particular practice, including the business context in which the restraint arises; the history, nature, and effect of the restraint; and whether the parties involved in the restraint have market power.

The first step of a rule of reason analysis is to define the relevant markets in which the competitive effects may be realized. A relevant market definition has two components: (1) geographic dimension; and (2) a product dimension. A geographic market is generally defined as an “area of effective competition” and is “not subject to definition by metes and bounds,” but rather, “it is the locale in which consumers of a product or service can turn for alternative sources of supply.” With respect to the product market dimension, the key inquiry is “whether the products at issue

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106 The merger-like qualities of cooperative agreements suggest that an antitrust merger analysis may be appropriate. Despite the apparent functional equivalency between a merger and a typical cooperative agreement, the principal antitrust statute that proscribes anticompetitive mergers appears inapposite. Section 7 of the Clayton Act, 15 U.S.C. § 18, is limited to transactions that involve the acquisition of “stock or other share capital.” As cooperative agreements are generally structured using a fee-for-service model, as discussed in part II.A., supra, they do not fall within the scope of the merger statute.


111 Id.

REGULATING COMPETING BROADCASTERS

are ‘reasonably interchangeable by consumers for the same purposes’ taking into account their ‘price, use and qualities.'”\textsuperscript{113} In essence, the relevant market question aims to determine where consumers may turn if prices rise.\textsuperscript{114} Once the relevant markets have been determined, one can endeavor to balance the competitive effects within the relevant markets to determine whether the anticompetitive aspects of a particular transaction or business arrangement are outweighed by its procompetitive benefits.

Some restraints have been found to be consistently so “manifestly anticompetitive” and without “any redeeming value” that they are deemed \textit{per se} illegal, without any balancing of competitive effects required.\textsuperscript{115} Among those restraints that are typically considered \textit{per se} violations, are agreements among competitors to jointly set prices, output levels, or other material terms of trade.\textsuperscript{116}

\textbf{A. Applying Antitrust Law to Cooperative Agreements}

As noted, the Antitrust Division has recognized that cooperative agreements between broadcasters may raise antitrust issues.\textsuperscript{117} Indeed, the very notion of an agreement between competitors in a particular market—particularly agreements that relate to the sale of those competitors’ principal product—draws suspicion. An agreement which simply provides for the joint selling of advertising time, or jointly making decisions about advertising sales or programming, without any provisions that may reasonably generate procompetitive efficiencies, may be properly viewed as a \textit{per se} violation of the antitrust laws.\textsuperscript{118} But because of the long history of broadcasters entering into cooperative agreements along with the FCC’s recognition that such arrangements, at least historically, have the potential to advance the public interest,\textsuperscript{119} it is likely that most such agreements are properly analyzed under the rule of reason.

1. Candidate Markets

A rule-of-reason analysis requires a balancing of the anticompetitive effects and the procompetitive benefits in the relevant antitrust markets.

\textsuperscript{113} \textit{Kinter, et. al., supra} note 110 (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956)).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Leegin Creative Leather Prods., Inc. v. PSKS, Inc.}, 551 U.S. 877, 886 (2007).
\textsuperscript{117} \textit{See Fullerton, supra} note 105.
\textsuperscript{118} \textit{NCAA v. Bd. of Regents of Univ. of Okla.}, 468 U.S. 85, 100 (1984).
\textsuperscript{119} \textit{See part II.B.1., supra.}
The first step in a rule-of-reason analysis is, thus, to define the relevant markets.\footnote{Kitner et al., supra note 110.}

a. Geographic Markets

In the context of the broadcasting industry, the Antitrust Division has typically alleged geographic market definitions that are consistent with the market definitions prescribed by the dominant audience measurement services—Arbitron for radio and Nielsen for television.\footnote{See Competitive Impact Statement at 4-5, United States v. Raycom Media, Inc., Civil No. 08-01510, (D.D.C. Aug. 28, 2008), available at http://www.usdoj.gov/atr/cases/f236600/236618.htm [hereinafter Raycom Competitive Impact Statement] (using a “DMA” to define a television station’s geographic market); Competitive Impact Statement at 7-8, United States v. Bain Capital, LLC, Civil No. 08-00245 (D.D.C. Feb. 13, 2008), available at http://www.usdoj.gov/atr/cases/f230100/230166.htm [hereinafter Bain Competitive Impact Statement] (using Arbitron’s “Metro Survey Area” to define geographic markets in the radio industry).} Because these geographic market constructs are based on the premise that they are roughly coextensive with the coverage areas of the broadcasting stations operating within them, it is reasonable to assume that market participants within each market—either Arbitron’s MSA or Nielsen’s DMA—are limited to the available options in that market when selecting a broadcaster. Any anticompetitive harm associated with an agreement between competing broadcasters would, thus, be confined to a particular MSA or DMA. Accordingly, using such market definitions as geographic markets in the context of an antitrust analysis is appropriate.

b. Product Markets

Broadcasters operate within several distinct “markets.” Fundamentally, broadcasting is characterized as a two-sided market, with audiences on one side, and advertisers on the other.\footnote{See Paul Seabright & Helen Weeds, Competition and market power in broadcasting: where are the rents?, in The Economic Regulation of Broadcasting Markets: Evolving Technology and Challenges for Policy 47, 62 (Paul Seabright & Jürgen von Hagen eds., 2007) (“Advertiser-funded broadcasting is one example of what economists describe as a two-sided market. A broadcaster shows attractive programmes to build an audience; access to this audience is sold to advertisers, thus generating revenues out of which broadcasts funded. The two sides of the market – viewers and advertisers – are interdependent and the broadcaster must get both sides on board”).} Ancillary to these core markets are two subsidiary markets: (1) the market for viewpoints, sometimes characterized
as the “marketplace of ideas”;\textsuperscript{123} and (2) the market for carriage. Each of these candidate markets is discussed below:

(1) \textit{Audiences}. Perhaps the most visible competitive setting for broadcasters is in the quest for audience share. Radio and television stations spend tremendous resources on creative marketing campaigns designed to increase the number of people, and the amount of time those people spend, consuming their programming. But to most broadcasters, merely achieving a sizeable audience is of little value; to generate revenue, broadcasters sell airtime to advertisers that seek to convey messages to the broadcasters’ audiences. Broadcasters, in a sense, “create” audiences and then “sell” them, for brief periods of time, through the sale of advertising.\textsuperscript{124} Thus, for the vast majority of broadcasters, audiences are not an end, but rather a means to an end: the sale of advertising.\textsuperscript{125} Broadcasters, then, traditionally choose formats and programming aimed at attracting a certain demographic—traditionally characterized by age and gender—that is believed to be of interest to particular advertisers.\textsuperscript{126}

Additionally, broadcast audiences typically do not pay for access to content. Unlike cable networks and other forms of pay media, where viewers pay a fee for access, broadcasters’ signals are made available free, over the air, to anyone with a radio or television. There is, thus, no trade or commerce between a broadcaster and its audience.

Since the audience is, then, merely a mechanism to attract advertisers, and because there is generally no commercial transaction between broadcasters and their audiences, it is unsurprising that the Antitrust Division has never alleged a market for audiences, in favor of other, more


\textsuperscript{125} The exception being noncommercial broadcasters which aim not to sell advertising, but rather, to disseminate information to the public and give the public a voice. See, e.g., CPB: Goals and Objectives, \textit{available at} http://www.cpb.org/aboutcpb/goals/goalsandobjectives/ (last visited Aug. 20, 2009) (“The fundamental purpose of public service media is to provide programs and services that inform, enlighten, and enrich the public”).

\textsuperscript{126} See Harold L. Vogel, \textit{Entertainment Industry Economics: A Guide for Financial Analysis} 173-74 (5th Ed. 2001) (“Strictly speaking, commercial broadcasters sell time that is used for dissemination of advertising messages. In actuality, though, what is sold is access to the thoughts and emotions of people in the audience. Companies selling beer prefer to buy time on sports-events programs, whereas toy and cereal manufacturers prefer time on children’s shows”).
commercially relevant markets.

(2) Advertisers. The market for advertising is the primary market that the Antitrust Division has alleged in enforcement actions against broadcasters.\(^{127}\) In its most recent television case, the Antitrust Division noted that many advertisers find local television broadcasting to be a unique advertising medium, distinct from other forms of local advertising, such as the Internet, radio, newspapers, and local out-of-home advertising (billboards, bus benches, etc); it also recognized that local advertising on cable television is not a reasonable substitute for local broadcast television advertising because cable networks, even in aggregate, fail to deliver a comparable audience.\(^{128}\)

The Antitrust Division alleged that because local broadcast television advertising serves unique needs, if the price of such advertising were to increase, although a few advertisers might defect to other forms of promotion, an insufficient number would defect so as to make the price increase unprofitable.\(^{129}\) The sale of local television advertising is, therefore, a relevant antitrust product market.

Similarly, in the radio industry, the Antitrust Division has alleged that local radio serves unique needs and many advertisers find it the most cost-effective medium by which to reach their target audiences. Like television, radio is sufficiently unique that although some advertisers might switch to alternative marketing methods when faced with a price increase, the majority would stay with radio, making a price increase profitable.\(^{130}\) The sale of local radio advertising is, therefore, a relevant antitrust product market.

Local advertising on radio and television are desirable antitrust markets


\(^{128}\) Raycom Complaint, supra note 127, at paras. 9-10.

\(^{129}\) Raycom Competitive Impact Statement, supra note 121, at 4-5.

\(^{130}\) Bain Complaint, supra note 127, at para. 18.
not only because they are supported by empirical evidence, but also because the effects of a transaction in that market are readily susceptible to objective measurement. One can, for instance, observe prices of advertising in a particular market both pre- and post-transaction and compare the two to identify the potential effects.

(3) Ideas and Viewpoints. Some have suggested that antitrust regulators should consider the existence of a marketplace of ideas when reviewing broadcast-industry transactions. Although the Antitrust Division has never alleged such a market, former government attorneys Maurice Stucke and Allen Grunes called for the recognition of such a market,\textsuperscript{131} explaining that the legislative history of the antitrust laws and significant antitrust precedent support the notion of considering non-price competition in antitrust analysis.\textsuperscript{132} They argue that including the marketplace of ideas in media antitrust analyses is important because competition in the media business extends beyond price, since in most instances, consumers do not bear the burden of paying for programming directly.\textsuperscript{133}

Stucke and Grunes identified several concerns that might undermine the value of including the marketplace of ideas in conventional antitrust analyses.\textsuperscript{134} In particular, they note that traditional antitrust constructs—market shares, concentration indices, and the like—are not well suited to analyzing non-price competition. Moreover, they note that larger media outlets may naturally tend towards diversification, and enjoy greater resources to put towards newsgathering, local program production, and to support protracted litigation in support of their reportorial functions—\textit{e.g.}, First Amendment challenges, Freedom of Information Act requests.\textsuperscript{135}

Although a free exchange of viewpoints is essential to a free and open democracy, traditional antitrust constructs and metrics may be ill suited to ensuring that the marketplace of ideas remains competitive. As the FCC

\textsuperscript{131} Grunes & Stucke, supra note 123, at 257-58 (“We propose that the federal antitrust agencies not confine their analyses to the merger’s impact on advertising rates. Instead, the agencies should look beyond a media merger’s impact on advertising rates and services and consider its impact on nonprice competition, which includes the marketplace of ideas”).

\textsuperscript{132} \textit{Id.} at 273-74.

\textsuperscript{133} \textit{See id.} 279 (“It is well accepted, and a matter of everyday experience, that price is not the sole measure of competition. Companies can and often do, compete on other dimensions such as quality, service, and innovation. This is of particular importance in the Internet, broadcast television, and radio industries, where the competition extends beyond advertising prices”). Stucke and Grunes also argue that the Horizontal Merger Guidelines, the underpinnings of the analytical framework of most merger investigations, are ill suited to handle the media marketplace, where all of the offerings are strongly branded and highly differentiated. \textit{Id.} at 282-83.

\textsuperscript{134} \textit{Id.} at 275.

\textsuperscript{135} \textit{See} Stucke & Grunes, \textit{supra} note 123, at 278.
has recognized,\textsuperscript{136} and Grunes and Stucke highlighted,\textsuperscript{137} measuring competition in the marketplace of ideas is challenging, and susceptible to criticism since defining viewpoints and ideas, and identifying diversity among them, requires a subjective, rather than objective, analysis. The FCC’s approach then, of regulating source and program diversity as a means to achieve viewpoint diversity, appears to be a sound approach; perhaps antitrust issues are best handled similarly: by ensuring competition in the other relevant markets, competition in the marketplace of ideas will follow.

(4) \textit{Carriage.} The fourth candidate market is relevant only in the television industry and exists only because of the Byzantine regulatory framework in which the television industries operate. Although an in-depth discussion is well beyond the scope of this article, it is necessary to note that the Cable Television Consumer Protection and Competition Act of 1992 (the “Cable Act”),\textsuperscript{138} granted television stations a property right in their transmissions. With respect to carriage of television signals on cable systems, the Cable Act provides broadcasters with two options: (1) “must carry” by which cable operators are required to carry the signal, but the television station is entitled to no compensation; and (2) “retransmission consent” by which the cable operator and television station negotiate the terms of carriage,\textsuperscript{139} usually involving some sort of compensation to the broadcaster. Each broadcaster is entitled to make the selection triennially, but once it has chosen it cannot change its mind for the duration of the three-year period.\textsuperscript{140}

As a practical matter, most broadcasters opt for retransmission consent and, every three years,\textsuperscript{141} enter into negotiations with cable operators.

\textsuperscript{136} 2002 Order, supra note 41, at para. 39.
\textsuperscript{137} Stucke & Grunes, supra note 123, at 276-77.
\textsuperscript{139} Laurence H. Winer, \textit{The Red Lion of Cable, and Beyond?} – Turner Broadcasting v. FCC, 15 CARDOZO ARTS & ENT. L.J. 1, 21 (1997).
\textsuperscript{140} 47 U.S.C. § 325(b)(3)(B).
\textsuperscript{141} Sometimes less frequently. Many of the large television groups negotiate long-term contracts with major cable systems to avoid the transaction costs associated with renegotiating the arrangement on a relatively frequent basis. Thus, although the stations have a statutory right to renegotiate every three years, they give up that right, at least as to certain cable operators, by virtue of a privately negotiated agreement for a longer term than that provided by statute. \textit{See, e.g.}, John Hane, Attorney, Pillsbury Winthrop Shaw Pittman, LLP, TVNewsDay Webinar, Retrans Agreements: What the Other Side Knows...That You May Not, http://www.pillsburylaw.com/index.cfm?pageid=36&itemid=6182 (Feb. 2009) (noting that “[c]able, satellite and IPTV companies are engineering their agreements for a five-year horizon”); John M. Higgins, \textit{TV Grudge Match Reignites; Stations and
Traditionally most broadcasters have received in-kind consideration from cable operators, in the form of commercial time on other channels, but recently, broadcasters have begun demanding cash payments, similar to the way cable networks are compensated.\textsuperscript{142}

The transition to a cash-based retransmission market has been tumultuous.\textsuperscript{143} Cable operators argue that they add value to the television station by expanding its signal reach and exposing the station to more viewers that, in turn, allow the broadcaster to generate increased advertising revenue. Broadcasters, however, see their programming as intrinsically valuable and believe they should be compensated in a manner consistent with other programming providers.\textsuperscript{144} As a result of this changing dynamic, the industry has recently witnessed a number of contentious battles between television groups and cable operators; sometimes these battles result in “blackouts”—where certain local television stations are dropped from a cable operator’s lineup until the two sides can reach an agreement.\textsuperscript{145}


\textsuperscript{145} See, e.g., Linda Moss, \textit{LIN TV CEO: We’re Getting Cash from Time Warner Cable; Retransmission-Consent Deal Yields Cash for Station Group}, MultiChannel News, Oct. 30, 2008, http://www.multichannel.com/article/80934-LIN_TV CEO_We_re_Getting_Cash_From_Time_Warner_Cable.php (noting that a month-long dispute between LIN and Time Warner Cable “left LIN TV stations black [not carried by Time Warner’s cable systems] in 11 markets”); John Eggerton, \textit{Meredith, Cable One at Retrans Impasse in Phoenix}, \textit{Broadcasting & Cable}, Dec. 30, 2008, http://www.broadcastingcable.com/article/161356-Meredith_Cable_One_at_Retrans_Impasse_in_Phoenix.php (noting that if Meredith and Cable One were unable to reach an agreement, that Cable One was “contractually obligated to drop the signal” of Meredith’s television stations from its cable lineup).
The Antitrust Division has recognized the existence of a market for retransmission rights on one occasion. In *United States v. Texas Television, Inc.*, the government alleged that several television stations in the Corpus Christi, Texas television market had increased the cost of retransmission rights and restrained competition among broadcasters for cable carriage in the market by illegally colluding during negotiations with cable operators.\(^{146}\) The Antitrust Division settled the case; each of the defendant television stations agreed to negotiate independently with cable operators in the future.\(^{147}\)

The Antitrust Division’s characterization of a retransmission rights market has some facial appeal since broadcasters and cable operators do regularly negotiate for such rights and routinely attempt to obtain more favorable terms for such arrangements, including cash compensation.\(^{148}\) But, whether television stations compete for carriage on cable systems, as alleged in *Texas Television*, is less clear. The relative infrequency of station blackouts—and the relatively short duration of blackouts when they do occur\(^{149}\)—suggests the existence of a “must buy” relationship between local broadcasters and cable systems. As a practical matter, television stations that are not available on the local cable systems are unable to effectively compete with those that are, because of the expanded coverage—in terms of household reach—that cable offers. Similarly, cable operators require each of the local television stations in order to effectively compete for subscribers, due largely to the uniqueness of each station’s programming.\(^{150}\)

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\(^{150}\) Indeed, several of the widely publicized blackouts that occurred as a result of a breakdown in retransmission consent negotiations have involved high-profile sports programming as the “pressure point.” For example, since only one network, and thus, in most markets, only one station, has rights to broadcast the Super Bowl, a cable operator
Thus, while television stations located within the same geographic market certainly compete in certain dimensions, when it comes to carriage by local cable operators, it appears that stations are more appropriately viewed as complements, rather than substitutes, and cannot be said to compete in the market for carriage by multichannel video programming distributors. Accordingly, to the extent that an agreement between competing television stations involves retransmission consent arrangements of those two stations, there are unlikely to be any demonstrable adverse competitive effects.

2. Theories of Liability

To the extent cooperative agreements between otherwise competing broadcasters provide for little more than joint setting of prices or terms for advertising, or joint scheduling of programming, they are likely properly deemed per se violations of the antitrust laws, because on their face, the arrangements appear to generate no efficiencies and thus have no precompetitive benefits. Indeed, the Texas Television case discussed above, although not explicit in the court filings, appears to have been construed by the Antitrust Division as a per se violation because it involved clear price-and term-fixing behavior among alleged competitors.

In practice, the great majority of cooperative agreements between that is forced to drop that station from its lineup risks losing customers to competing programming suppliers—namely satellite and broadband services. Likewise, the television station may lose out on the revenues generated by such high profile programming as a result of the viewers who would have watched but for the fact that the station’s signal was unavailable to cable viewers. See P.J. Bednarski, Wiley: Smooth Shift to DTV: Former FCC Chair Foresees ‘More Regulation’ Under Obama, MULTICHANNEL NEWS, Dec. 8, 2009, at 20 (discussing how some stations might use “holding back the Super Bowl from a cable operator to extract an agreement”); Ted Hearn, NAB Fights Quiet Period; Says Consumers Won’t Confuse DTV, Retransmission Consent, MULTICHANNEL NEWS, Sept. 15, 2008, at 30 (“[s]ome of the previous retransmission consent disputes have ended just days before the Super Bowl”).

At least one cable company disagrees. Mediacom Communications Corporation recently filed a complaint with the FCC alleging that Sinclair Broadcast Group, Inc. violated FCC rules by jointly negotiating retransmission rights on its own behalf as well as on behalf of its LMA partners. Complaint, Mediacom Commc’ns Corp. v. Sinclair Broad. Group, Inc., CSR-8233-C (Oct. 22, 2009). In support of Mediacom’s position, the American Cable Association argued that joint negotiation practices in the retransmission rights market are anticompetitive, explaining “through LMAs and other transactions, broadcasters leverage their already significant market power by gaining effective control over multiple stations in a single DMA . . . [s]uch agreements set the price for retransmission consent for one broadcaster and its direct horizontal competitor.” Comments of the Am. Cable Ass’n, Mediacom Commc’ns Corp. v. Sinclair Broad. Group, Inc., CSR-8233-C (Nov. 18, 2009). The FCC has yet to rule on Mediacom’s complaint.
competing broadcasters are part of complex arrangements that provide for much more than merely jointly selling advertising or acquiring programming. As described in part II, supra, most deals provide for collocating certain aspects of each stations’ operations, combining certain operational functions, and related enhancements that appear to generate significant cost savings and other procompetitive benefits. Accordingly, a typical cooperative agreement is likely to be subjected to a rule of reason analysis.

Applying the rule of reason to a typical time brokerage or local marketing agreement requires a review of the procompetitive benefits of such agreements alongside the potential anticompetitive effects. Such agreements are tantamount to a merger of the stations’ operational aspects, and while the licensee technically retains ultimate control over the content of its station’s broadcasts to remain compliant with FCC directives, as a practical matter, most brokers receive de facto control over the day-to-day operation of the brokered station, including control over sales and programming. Accordingly, the competition that took place between the licensee’s station and the broker’s station—for both programming and advertisers—is reduced, which may result in higher prices for advertising and less diversity in programming.

In considering the likelihood of a price increase, regulators must consider the degree to which audiences of each station are reasonably substitutable to advertisers, or, put differently, whether advertisers could reasonably buy around the stations that are parties to the cooperative agreement. Diversity of programming may also suffer because broadcasters whose content is jointly acquired and scheduled are less likely to compete directly against one another. Two jointly programmed radio stations, for example, are unlikely to offer formats that target the same demographic for fear of cannibalizing each other’s audience share. Similarly, jointly owned television stations are unlikely to schedule programs that target similar demographics—e.g., two daytime talk shows that target a similar audience—against one another for the same reason. The result is less programming for audiences in the targeted demographic, and fewer opportunities for advertisers to reach that demographic with their advertising, leading to higher prices for advertising time.

But, in another sense, this counterprogramming dynamic can be said to increase diversity, since it requires broadcasters to fill airtime with content that is of interest to different audiences than it may have otherwise chosen, or adjust the content of its local programming to attract a distinct audience.

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152 *Leegin*, 551 U.S. at 885-86.
the population, but effectively reduces the number of programming options targeted to particular audiences. This dynamic illustrates the policy challenges associated with enforcing laws and regulations that affect programming diversity; it also underscores how traditional antitrust doctrine—built upon traditional notions of price, output, and quality, and based largely on physical commodities and hard goods—is ill suited for considering programming diversity.

In the context of local news programming, competing broadcasters operating under a cooperative agreement will often shift local news programming to different time slots, so that the two stations are not competing head-to-head during prime news viewing hours. One the other hand, such conduct may be viewed as procompetitive because it effectively increases the net quantity of news programming available to viewers by adding newscasts to time slots that were previously filled with other programming; on the other hand, the quality of the news reporting and editorial zeal of both stations’ news content may be compromised.

Because most stations that operate under cooperative agreements combine local news functions, including newsgathering and production, it is conceivable that there may be less vigorous competition for story acquisition and development—in other words, the incentive to “scoop” the competition may be dampened, since two of the competitors are cooperating. Of course, as with programming diversity, assessing the quality of local news programming or the effectiveness of newsgathering is an entirely subjective inquiry and not reasonably susceptible to traditional antitrust analysis.

154 In Denver, for example, shortly after Local TV’s KDVR joined forces with Tribune’s KWGN, see supra pt. I, programmers moved KWGN’s longstanding 9:00 p.m. newscast to 7:00 p.m., likely to avoid the head-to-head competition with KDVR’s 9:00 p.m. newscast. Joanne Ostrow, What the Deuce is Channel 2 Up To? 7 O’Clock News, THE DENVER POST, Mar. 31, 2009, http://www.denverpost.com/television/ci_12031878. Denver broadcast critic Joanne Ostrow noted that “[b]y pulling the plug on the struggling 9 p.m. Channel 2 newscast, the merged stations also make more news viewers available for Channel 31’s 9 p.m. newscast which is, incidentally, quite the moneymaker.” Id. Similarly, Barrington Broadcasting Group and Granite Broadcasting Group recently entered into an arrangement regarding their respective stations in Syracuse, New York and Peoria, Illinois. See Granite, Barrington in Joint Sales Deals, TVNEWSCHECK, Mar. 2, 2009, http://www.tvnewscheck.com/articles/2009/03/02/daily.11. The companies noted that “[o]ne of the chief advantages of operating these stations under the agreements . . . will be the ability to offer local and national news, as well as programming of community interest in new and varied time periods, giving viewers greater opportunity to watch at their convenience.” Id.

155 Moreover, the programming displaced by the additional local news was, presumably, watched by somebody. Whether society is better off with additional news content or the displaced programming is a policy question that cannot be readily answered by traditional economic or antitrust principles.
A rule-of-reason analysis of a cooperative agreement, then, requires an antitrust regulator to consider the claimed procompetitive benefits, typically in the form of quantifiable cost efficiencies garnered from combining certain functions, against the potential anticompetitive harm which, in the context of higher advertising rates, is measurable, but largely speculative; and in the context of programming diversity and news quality, entirely incalculable.

Current antitrust doctrine relies heavily on traditional quantitative methods for analyzing the competitive effects of a transaction: market shares based on sales figures, market concentration, and the predicted effects of price increases in particular markets. Courts have historically required some degree of quantitative evidence in order to find a particular business arrangement to be anticompetitive. Given that many of the competitive effects of cooperative agreements among competing broadcasters may not be reasonably identified using traditional quantitative techniques, it is likely that the Antitrust Division, will face an uphill battle in challenging all but the most egregious of cooperative agreements, such as those that involve major competitive forces in a particular market, or those that warrant *per se* treatment.

V. BACK TO THE FUTURE: REGULATING COOPERATIVE AGREEMENTS

It is worth noting that the cooperative agreements among broadcasters bear a striking resemblance, in terms of function at least, to the joint operating agreements into which competing newspapers sometimes entered dating back as far as the 1930s. In the case of newspapers, a Supreme Court decision followed by an act of Congress governs the manner by which competing newspapers are allowed to collude on certain aspects of their operations. Comparatively, agreements among competing broadcasters remain relatively unregulated, save for application of standard antitrust and communication law precepts discussed previously.

This section looks back at the circumstances surrounding the Justice Department’s enforcement action in the newspaper industry and the statutory construct that arose as a result; it then examines how the Justice Department and the FCC might approach cooperative agreements in the future.

A. Citizen Publishing & the Newspaper Preservation Act

The first joint newspaper operating agreement dates back to 1933 when the *Albuquerque Journal* and *The Albuquerque Tribune* entered into an agreement to combine their non-editorial functions, but continued to publish
two separate, editorially independent, newspapers.\textsuperscript{156} Throughout the ensuing decades, joint operating agreements emerged between competing daily newspapers in nearly twenty cities.\textsuperscript{157} The Antitrust Division investigated the practice and eventually brought suit against the owners of the \textit{Tucson Citizen} (the “Citizen”) and the \textit{Arizona Daily Star} (the “Star”) alleging that the joint operating agreement between the two papers violated the antitrust laws.\textsuperscript{158} The challenged agreement provided for a joint venture that combined all of the business and operational functions of the two newspapers.\textsuperscript{159} Although the news and editorial operations remained independent, advertising and circulation sales were handled by a joint venture in which both newspapers were partners.\textsuperscript{160}

The government alleged that the agreement constituted a contract in restraint of trade, in violation of Section 1 of the Sherman Act, and that it gave the parties a monopoly over the daily local newspaper market in violation of Section 2 of the Sherman Act.\textsuperscript{161} Finding that the contract terms were \textit{per se} unlawful, the court granted the government’s motion for summary judgment on the Section 1 claim.\textsuperscript{162} After a trial on the remaining two counts, the court concluded that the agreement gave the parties an unlawful monopoly over the daily newspaper business in Tucson.\textsuperscript{163}

The Supreme Court ultimately affirmed the district court’s decision.\textsuperscript{164} In its opinion, the Supreme Court described the contract as violating the antitrust laws in three principal ways: (1) price fixing, because the price of each newspaper, and the advertising that appeared in them, was set by the joint venture; (2) profit pooling, since the profits of each paper flowed to the joint venture and were, in turn, split evenly between the partners; and (3) market control, as the agreement between the two papers prohibited stakeholders in the joint venture from engaging in any other business in the geographic area.\textsuperscript{165}

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\textsuperscript{156} \textit{JOHN C. BUSTENA \& ROBERT G. PICARD, THE NEWSPAPER PRESERVATION ACT \& ITS APPLICATION} 2 (Ablex Publishing 1993).
\textsuperscript{157} El Paso, TX; Nashville, TN; Evansville, IN; Tucson, AZ; Tulsa, OK; Chattanooga, TN; Birmingham, AL; Ft. Wayne, ID; Lincoln, NE; Salt Lake City, UT; Shreveport, LA; Knoxville, TN; Charleston, WV; St. Louis, MO; Pittsburgh, PA; Honolulu, HI; San Francisco, CA; and Miami, FL. \textit{Id.} at 2-3.
\textsuperscript{159} \textit{Citizen Publ’g}, 394 U.S. at 133-34.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.} at 134.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Citizen Publ’g}, 280 F. Supp. at 993. The court also found that the \textit{Citizen}’s acquisition of \textit{Star} stock violated Section 7 of the Clayton Act. \textit{Id.}
\textsuperscript{164} \textit{Citizen Publ’g}, 394 U.S. at 140.
\textsuperscript{165} \textit{Id.} at 134.
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Notably, the Court specifically explained that nothing in the antitrust laws prohibited the two papers from combining certain operations; the law simply commanded that the two papers remained independent competitors and that the agreement between them eliminate the price fixing, market control, and profit pooling provisions. The district court had noted that “[t]he printing and distribution of Star and Citizen through the joint use of substantially the same mechanical equipment does not depend upon the continuation of the price fixing, profit pooling, and market allocation agreements.” Thus, although the court held that the particular arrangement between the two Tucson newspapers was illegal, nothing in the court’s decision prevented newspaper owners from entering into agreements to combine back-office functions like printing and distribution, so long as the newspapers’ editorial and sales operations remain independent.

While the Citizen Publishing case wound its way through the courts, the newspaper industry rallied Congress to create an exception to the antitrust law that would essentially permit certain qualifying, competing daily newspapers to eliminate competition in all but their editorial operations. The result of those legislative efforts came in 1970 as the Newspaper Preservation Act (the “NPA”), which was aimed at maintaining an editorially independent and competitive newspaper industry by preserving newspapers that are in financial distress by allowing them to enter into joint operating agreements (“JOAs”) upon approval of the Attorney General, effectively providing such arrangements with immunity from antitrust scrutiny. The Act also immunized those JOAs that were in existence prior to the Act’s passage.

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166 Id. at 135.
167 Citizen Publ’g, 280 F. Supp. at 992.
168 Id. at 992-93 (“the restoration of competition to the daily newspaper business in Tucson requires that Star and Citizen have separate advertising departments and circulation departments”).
170 Id. at § 1802(2) defines a JOA as:

[any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspapers owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: Provided, That there is no merger, combination, or amalgamation of the editorial or reportorial staffs, and that editorial policies be independently determined.
171 Id. at § 1803.
In effect, the NPA overturned *Citizen Publishing* by permitting competing newspapers to combine all but their editorial and reportorial functions, including those functions that, under *Citizen Publishing*, would have been illegal to combine. The NPA reflects Congress’s determination that the potential anticompetitive effects of allowing profit sharing and the joint setting of prices for advertising and subscriptions are outweighed by the social benefits of maintaining two competing editorial voices.\textsuperscript{172}

\textbf{B. The Future Role of the Justice Department}

Although Congress ultimately concluded that the risk of losing editorial competition outweighed the potential anticompetitive effects of collusion in certain newspaper markets, it remains true that prior to the NPA, the agreement between the two Tucson newspapers violated the antitrust laws.

Despite the apparent similarities between joint operating agreements in newspapers and the agreements into which many broadcasters enter, the Antitrust Division has taken virtually no enforcement action stemming from cooperative agreements among competitors. Although the Antitrust Division has occasionally weighed in on proposed mergers of broadcasting firms and, in some cases, required divestitures in order to permit certain transactions to consummate,\textsuperscript{173} mere agreements between broadcasters, even if they mimic the effects of an ownership transfer, have escaped scrutiny.

Although early uses of cooperative agreements, such as the time brokerage agreements used by producers of foreign language

\textsuperscript{172} Despite the Act’s laudable policy objectives, critics of the NPA have long complained that the Act was unnecessary to achieve them. Since the efficiency-enhancing aspects of jointly operating back-office functions of competing newspapers were allowable, even after *Citizen Publishing*, the ruling “could have been viewed as a great opportunity for competing newspapers throughout the country to immediately form cost-sharing joint operations even (or especially) while both newspapers were financially healthy and profitable.” BUSTERNA ET AL., supra note 156, at 35. Some JOA scholars have opined that the true intent of the newspaper lobbyists who championed the NPA had little to do with newspaper preservation, but rather, was principally aimed at achieving monopoly pricing for advertising and subscriptions. One Senator described the NPA as “a millionaire-crybabies-publishers’ bill.” Jason A. Martin, *Reversing the Erosion of Editorial Diversity: How the Newspaper Preservation Act Has Failed and What Can Be Done*, 13 COMM. L. & POL’Y 63, 75 (2008) (quoting 116 Cong. Rec. 2009, 2009 (1970)).

programming, were unlikely to raise competitive concerns, the purpose and scope of cooperative agreements has evolved over time. Whereas such agreements were once used for specific programs or blocks of time, broadcasters today regularly use time brokerage and local marketing agreements as a way to capture effective control of a competing broadcaster without the regulatory scrutiny that an outright license transfer would invite, under both FCC regulations and the antitrust laws. Some critics of the practice have asserted that certain broadcasters have used cooperative agreements to circumvent the FCC’s ownership limits.

News sharing and shared service agreements, while dealing with narrower aspects of the brokered station’s operations, have become relatively commonplace, and raise significant questions about the quantity, quality, and diversity of local programming, including news and public affairs programs. Moreover, such agreements were once largely unique to smaller markets, where the size of the potential audience rendered unfavorable the economics of operating multiple separate news operations, and where the volume of commerce transacted in the advertising market was sufficiently small that they likely would escape serious scrutiny by the Antitrust Division. Today, such content pooling and sharing agreements are appearing in some of the largest markets in the country. As the media industry continues to fragment, and revenues from advertising continue to drop, there exists a strong likelihood that the use of cooperative agreements will become even more widespread.

In view of the changing nature of cooperative agreements between broadcasters, and the increased frequency with which such agreements are being used as a central component of some broadcasters’ business models, the Antitrust Division should become more active in policing these agreements by aggressively examining the practice generally, as well as investigating the circumstances surrounding particular agreements that appear to be facially problematic. While many cooperative arrangements between broadcasters likely generate significant procompetitive benefits that ultimately benefit consumers—through improved programming, news, and lower costs to advertisers—it is possible that, just as in the Citizen Publishing case, the procompetitive aspects of the arrangement are tied together with anticompetitive provisions that are simply unnecessary to effectuate the procompetitive aspects of the agreement. In those cases, the Antitrust Division should take the steps necessary to excise the problematic aspects of the agreements.

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174 See supra Part II.B.
C. The Role of the FCC

Unlike the Antitrust Division, the FCC is uniquely situated to consider the noneconomic aspects of cooperative agreements between competing broadcasters. Indeed, the FCC’s broad statutory mandate is to ensure that broadcasters operate consistent with the public interest, and the Commission has a long history of, and a fair amount of established precedent on, doing just that. But like the Antitrust Division, the FCC’s history of reviewing cooperative agreements is limited. Although such agreements must be filed with the FCC in many circumstances, the process is largely ministerial, and it is uncommon for the Commission to disapprove of a particular agreement on the basis that it impugns the public interest.

The FCC should heighten its review of cooperative agreements between broadcasters and consider such agreements through the same analytical lenses that it considers license transfers and other ownership issues today. Although the FCC and the Antitrust Division should continue to separately investigate transactions, the two agencies should cooperate to facilitate such reviews.

Of course, various confidentiality statutes and regulations would likely prevent the FCC from sharing certain confidential information disclosed to the agency by its licensees, but since most licensee filings end up in publicly accessible files, the FCC could easily share the public, redacted versions of such agreements with the Justice Department; in the event that the Antitrust Division determined that a particular transaction warranted further investigation, it could seek a copy of the full, confidential agreement.

175 The effectiveness of the FCC’s ownership regulation regime is regularly a subject of considerable debate. Public interest advocates often argue that the FCC’s ownership regulations do little to advance or protect the public interest, and that enforcement of those regulations is often done halfheartedly. See, e.g., Michael J. Copps, Commissioner, Federal Communications Commission, Remarks Delivered at the FCC Media Bureau Ownership Workshop: Scholars’ Panel (Nov. 2, 2009); Andrew Jay Schwartzman, President & CEO, Media Access Project, Remarks Delivered at the FCC Media Bureau Ownership Workshop: Public Interest Panel (Nov. 3, 2009). Industry participants, on the other hand, argue that the ownership regulations are unnecessary to ensure the FCC’s public interest objectives, particularly in today’s new media economy where legacy media properties are facing fierce competition from online sources and user-created content. See, e.g., David J. Barrett, President & CEO, Hearst Television, Inc., Remarks Delivered at the FCC Media Bureau Ownership Workshop: Industry Panel (Nov. 4, 2009); Jane E. Mago, Executive Vice President & General Counsel, National Association of Broadcasters, Remarks Delivered at the FCC Media Bureau Ownership Workshop: Industry Panel (Nov. 4, 2009). The purpose of this discussion is not to assess the merits of the FCC’s ownership regime, but rather, simply to suggest that the FCC should begin to consider cooperative agreements more actively and to do so in a manner consistent with the FCC’s ownership regulations.

The FCC has recently demonstrated renewed interest in cooperative agreements, recently issuing a request for additional information about a arrangement between stations in Honolulu.\footnote{178}{Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, Fed Commc’n Comm’n to Jonathan D. Blake, Esq., attorney for Raycom Media, Inc., and John Griffith Johnson, Jr., attorney for HITV License Subsidiary, Inc., 1-2 (Nov. 10, 2009) (copy obtained from the FCC Reference Information Center) [hereinafter FCC Hawaii Letter].} That arrangement provided that Raycom, which owns television stations KHNL, an NBC affiliate, and KFVE, a MyNetworkTV affiliate, to effectively take control over the programming and operational aspects of CBS-affiliated KGMB, owned by MCG Capital.\footnote{179}{See Michael Malone, Raycom to Manage Honolulu CBS: Market “Cannot Support” Five Separate Stations, BROADCASTING & CABLE, Aug. 18, 2009, http://www.broadcastingcable.com/article/327954-Raycom_to_Manage_Honolulu_CBS.php.} Although the FCC had received redacted versions of the relevant agreements—a shared service agreement, studio lease, and management services contract—in response to a prior request,\footnote{180}{FCC Hawaii Letter, supra note 178, at 1.} the Commission’s subsequent letter sought un-redacted versions of certain schedules and ancillary agreements.\footnote{181}{Id. at 1-2.} The FCC also sought “further clarification of certain provisions” and called upon the parties to explain the nature of the relationship among them and, significantly, to explain why the relationship is not attributable under applicable Commission rules.\footnote{182}{Id. at 2.} As discussed previously, if the authority bestowed by the agreements gives Raycom excessive control over KGMB, the station may become attributable, for ownership purposes, to Raycom, and would then likely violate the FCC’s ownership regulations.\footnote{183}{Based on 2008 revenue figures, KGMB is the third ranked station in the market; KHNL is fourth. If KGMB were attributable to Raycom, it would be deemed to control two of the top four stations in the market, thereby violating the FCC’s ownership caps. Honolulu, Hawaii, INVESTING IN TELEVISION MARKET REPORT (BIA Advisory Services 2009) (providing revenue shares); see supra Part. 0.B. (discussing the “two-of-the-top-four” rule).} Arrangements such as the one in Hawaii may have antitrust implications as well.
D. The Impact of the New Media Economy

Many industry participants have argued that the increasing use of cooperative agreements and the development of new forms of such agreements, such as the news and content sharing arrangements are due largely to the economic climate of the industry.\textsuperscript{184} The legacy media audience has become increasingly fragmented, as viewers and listeners turn to alternative—usually Internet-based—sources for content. As a result, audiences are spread over more media options, giving a smaller share of the total audience to each media outlet; the reduction in audience share has led to a sharp decline in advertising revenues that, for most legacy media entities, is the core source of their operating income.

Cooperative agreements among competing broadcasters are, say some broadcasters, the only way the industry can remain viable. Some stations simply cannot sustain an independent news department, for example, so they enter into a shared services agreement whereby one station, usually an economically stronger station, agrees to produce newscasts for the economically weaker station. Supporters of the practice argue that such an arrangement achieves two positive outcomes: (1) it allows stations to reduce costs by leveraging valuable efficiencies; and (2) it enhances the stations’ output, by allowing them to offer more hours of local news programming per day, on a combined basis, than either station could or would have done on its own. This argument presupposes, of course, that two stations collectively producing news content is better than one station doing it independently, and whether that supposition is true is both entirely subjective, and likely best left to the legislative branch.

Given the economic climate of broadcasting, many industry players have called upon regulators to ease ownership restrictions and, implicitly, by extension, ease scrutiny of cooperative agreements that mimic certain effects of ownership transfers.\textsuperscript{185} They argue, among other things, that the same market forces that have led to a decline in advertiser revenues also have given audiences an unprecedented number of options for content. The legacy media must compete with countless new media options and that the merger of two legacy media properties—either through a traditional ownership transfer or through a cooperative agreement that essentially simulates such a transfer—is competitively insignificant when considered against all of the other options available to audiences. Put simply, some


\textsuperscript{185} See, e.g., Barrett, supra note 175; Mago, supra note 175.
broadcasters argue that regulators need not concern themselves with legacy media because of its fading relevance in light of industry changes and technological advances.

But as many of the new, allegedly competitive distribution models are still nascent, it remains unclear whether, and to what degree, new media options are, or may become, true substitutes for legacy media. Some suggest that new media simply complement legacy media, and that the increased availability of content online does little to curtail the anticompetitive effects of media consolidation. Moreover, many of the so-called “new” media sources are comprised simply of repurposed content from legacy sources. For example, some of the most popular online sources for news are web sites run by newspapers, such as nytimes.com, television networks, such as cnn.com, or local broadcasters, such as myfoxdc.com, the web site of Washington, D.C.’s Fox-affiliated television station. So, while the legacy media as a distribution platform may well be faltering, it is clear that content development and distribution functions of many legacy media organizations remain very much a part of the new media landscape, at least for now.

While the idea that the legacy media’s waning significance justifies a relaxation of the regulatory environment in which it operates does have some facial appeal, the fact that legacy media operations are now moving much of their content output to nontraditional platforms suggests that regulators should, if anything, increase their scrutiny of media transactions because of their impact on a rapidly developing industry. Moreover, because many of the new media technologies largely fall outside of the FCC’s jurisdiction, the role of the Antitrust Division takes on an increased importance in the new media economy.

VI. CONCLUSION

Both the FCC and the Antitrust Division currently possess the statutory authority and the analytical tools necessary to properly analyze the competitive effects of cooperative agreements among competing broadcasters; yet, historically, neither agency has been particularly active in investigating such arrangements. While each agency considers outright ownership transfers pursuant to their respective statutory mandates, neither agency appears to have fully appreciated the fact that many cooperative agreements result in relationships that mimic the effects an ownership transfer. As cooperative agreements become increasingly common in the rapidly changing media marketplace, and as the number of players appears to shrink, both regulatory agencies must take a renewed look at the competitive effects of such transactions: the FCC focusing on the audience
side of the market, while the Antitrust Division focuses on the advertiser side.

The type of heightened scrutiny demonstrated by the FCC in the Honolulu matter discussed previously typifies precisely the sort of review that regulators should be undertaking as cooperative arrangements among competing broadcasters become more commonplace. Such investigations likely pose little additional burden on the parties since they already provide copies of relevant deal documents to the FCC as required by various filing rules; it would require little additional effort or expense to also require that the parties file an un-redacted version with both the FCC and the Antitrust Division.

Even if, after an appropriate investigation, the vast majority of cooperative agreements are deemed to be procompetitive, or, at least, not anticompetitive, or contrary to the public interest, the existence of a renewed interest on behalf of antitrust regulators will serve as an effective monitor on broadcasters’ conduct, to ensure that their cooperative agreements go only as far as necessary to generate procompetitive efficiencies while still maintaining a robust, diverse and competitive local media marketplace. And as the regulatory agencies become more familiar with the nature and scope of such arrangements, and build a body of institutional knowledge about such arrangements, they will become better positioned to quickly assess the potential effects—both positive and negative—of particular structures or practices, which will, ultimately, increase the speed and effectiveness of the review process.

There is little doubt that the media industry has changed since time brokerage agreements were first used more than seventy years ago, and there is little doubt that in many circumstances, the use of cooperative agreements may be an valuable way to combine resources, leverage efficiencies, to deliver high-quality programming to audiences and effective delivery platforms for advertisers. And there is likely some truth to the broadcasting industry’s cry that such arrangements are, in some cases, necessary to render the industry viable. Although many stations remain quite viable, many are struggling, facing increased competition from new media sources, fragmented audiences, and sharply declining advertising revenues. For those stations, the use of a cooperative agreement may generate the ultimate procompetitive benefit: the continued existence of a market participant.

Cooperative agreements between competing broadcasters represent a form of innovation, and through proper application, such arrangements may help broadcasters capture efficiencies and improve performance. If used responsibly, cooperative agreements are not necessarily inconsistent with broadcasters’ obligations to serve the public interest. Thus, when used
appropriately, such arrangements can be virtuous; but if left unchecked, there exists the potential that some broadcasters may use cooperative agreements nefariously, to avoid ownership limitations, or other regulatory restrictions aimed at maintaining the integrity of the public’s spectrum. Neither the FCC nor the Antitrust Division should take the position that such agreements are either per se lawful or unlawful, but rather, they most analyze such arrangements on a case-by-case basis to ensure that broadcasters properly service their communities and advance the public interest as they have done for decades.