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# Journalism, Competition, and the Digital Transition

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This article considers the role of competition law and policy in shaping the news industry's digital transition. It begins by examining the shifting landscape for traditional media companies and describing Google's approach to news. The article then addresses arguments that exemptions from the antitrust laws are necessary to facilitate a digital transition by traditional news providers and concludes by considering some of the emerging business models that have been the subject of recent Department of Justice Business Review Letters.

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## I. Introduction

The news industry is undergoing significant changes that present a number of challenges and opportunities. These challenges and opportunities have been driven in part by the proliferation of new technologies that are transforming the way people consume news and, as a consequence, view advertising associated with news content. Today, for example, both the news and the advertising that people view can be tailored specifically to what they are looking for. This simple fact has changed not only how news is delivered but also how users engage with it and how it is monetized.

The challenges facing traditional news providers' business model have triggered debate as to how antitrust and competition policy should apply to ensure the future of journalism. The Federal Trade Commission has been examining these issues in detail as part of a series of workshops it hosted in 2009 and 2010 under the title "How Will Journalism Survive the Internet Age?" The Commission subsequently released a Discussion Draft on "Potential Policy Recommendations to Support the Reinvention of Journalism" that outlined some possible regulatory and legislative solutions to support the news industry during their digital transformation.<sup>1</sup>

This article considers the role of competition law and policy in shaping the news industry's digital transition. It begins by examining the shifting landscape for traditional media companies and describing Google's approach to news. The article then addresses arguments that exemptions from the antitrust laws are necessary to facilitate a digital transition by traditional news providers and concludes by considering some of the emerging business models that have been the subject of recent Department of Justice Business Review Letters.

## II. Charting the Path Forward in a Digital World

### A. CURRENT INDUSTRY CHALLENGES AND HOW BEST TO ADDRESS THEM

The current challenges faced by the news industry are business problems, not legal problems, and can only be addressed effectively with business solutions.<sup>2</sup> Indeed, these challenges, viewed in their historical context, simply reflect another inflection point for an industry that has faced periodic challenges to its business model as technology has evolved. For example, circulation by U.S. households has been on the decline since the early twentieth century; the number of newspapers distributed peaked between 1890 and 1920.<sup>3</sup> Indeed, as Professor Jackaway has observed, with each communications innovation of the last 100 years, we have seen a repetition of the discussion that is taking place today over the future of journalism.<sup>4</sup>

The newspaper business is not immune from the truism that, in order to succeed, a business must respond to the demands of its consumers by delivering products and services that they want. For the news industry to adapt and thrive in the digital world, it must therefore first take into account how the internet has changed its ability to sell consumers a bundle that may be more than the consumer wants or needs. Google calls this the “atomic unit of consumption”—the basic form of content that consumers desire.<sup>5</sup>

In the news field, the structure of the internet has caused the unit of consumption for news to migrate from full newspapers to individual articles. This transition has had profound implications for traditional media companies because newspapers never made much money from news. They instead made money from special-interest sections on topics such as automotive, travel, and home & garden. These sections attract contextually targeted advertising, which is much more effective than non-targeted advertising. Someone reading the automotive section is likely to be more interested in cars than the average consumer, so advertisers will pay a premium to reach those consumers.

Traditionally, the advertising revenue from these special sections has been used to cross-subsidize core news production; in other words, the automotive and real estate sections pay for the Baghdad bureau. Today, internet users go directly to websites like Edmunds, Orbitz, Epicurious, and Amazon to look for products and services in specialized areas. Advertisers follow those eyeballs, which makes

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the traditional cross-subsidization model that newspapers have used far less profitable. That cross-subsidization was possible only because the print format allowed newspapers to capture their audiences and keep them.

The FTC’s Discussion Draft laments that newspapers’ classified advertising revenue has fallen from \$19.6 billion in 2000 to \$6 billion in 2009.<sup>6</sup> This is revenue that has been lost, however, due to a change in the classified advertising business model—a change that reflects increasingly vigorous competition. Indeed, the loss of classified advertising to Craigslist, eBay, and other online advertisers has nothing to do with copying or free-riding, and everything to do with the emergence of a new, more effective, and more efficient product in the marketplace. Government antitrust agencies would ordinarily regard such a situation as a cause for celebration because consumers are getting a better product at a lower price.

## B. GOOGLE NEWS

As traditional media companies face increasing competition from online news sources and aggregators alike, some commentators have raised questions about Google News. The goal of Google News has always been to offer users the abili-

ty to search and access varied perspectives on a story in order to help them better understand current events.

To that end, Google indexes more than 50,000 sources in dozens of languages from around the world. News events of the day are identified and ranked by computer algorithms that reflect the publishing activity—the collective news judgment—of news organizations. Individual articles are then automatically selected and ranked based on factors such as freshness, location, relevance, and diversity of content, without regard to political viewpoint or ideology. Google News shows only a headline and sometimes a “snippet”—just enough for someone to decide if they’re interested in reading the story. Clicking on the link takes them directly to the publisher’s website. They do so at a rate of about one billion times a month from Google News alone.

Publishers have easy-to-use tools at their disposal to communicate instructions about whether they want search engines to index their sites, and Google’s policy is to respect those instructions. For example, using what is called the Robots Exclusion Protocol (“REP”) (which has been the de facto industry standard across the web for over 15 years), a site administrator who wishes to remove her website from Google’s index can easily do so using a “robots.txt” file. To remove sites or prevent search engines from crawling parts of a site, a webmaster may:

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- **Use a “robots.txt” file to designate the content not to be indexed.** A robots.txt file enables site owners to restrict access to a website by search engine robots that crawl the web. A website owner can choose to block some pages or the entire site from Google’s web crawler by using a robots.txt file. If a website owner uses a robots.txt file to restrict access, Google will not crawl or index the content of pages blocked by the robots.txt file. However, Google may still index the website’s URL, if Googlebot finds those URLs on other pages on the web. As described below, Google will remove the website from its index if a noindex meta tag is present.<sup>7</sup>
- **Use a “noindex” meta tag.** When the Google crawler finds a website with a noindex meta tag on a page, Google will completely drop that page from its search results, even if other pages link to it. If the site is currently in Google’s index, Google will remove it the next time the crawler crawls the site. The meta tag allows the website owner to control access completely, on a page by-page basis.<sup>8</sup>

Through the use of the robots.txt file and the noindex meta tag, website owners are able to prevent their sites—or specific content on their sites—from being

indexed by Google's crawler. The control that a website owner has over the indexing of its content can be quite granular. Review sites can, for example, use robots.txt to control the number of reviews that Google can index while keeping individual destination pages in Google search results.

Notwithstanding the existence of these tools, some publishers have complained that excluding their content from Google News might have a negative effect on their natural search rankings. Such a complaint was recently investigated by the Italian Competition Authority, which ultimately found no infringement on behalf of Google. In addition, the Italian Competition Authority acknowledged that inclusion in Google News drives traffic to news publishers' sites and that this increased visibility has the potential to increase the revenues news publishers can obtain from online advertising. The authority also confirmed that the presence of publishers' content in Google News had no impact on the ranking of news publishers' sites in Google's natural search results.

The French Competition Authority similarly looked at news publisher complaints and concluded that Google had already taken steps to assuage their concerns. In addition, the French Authority noted that pay-walls and new devices offered news publishers new ways of monetizing content and that Google was actively participating in discussions with publishers regarding new revenue models.<sup>9</sup>

### III. Antitrust Exemptions for News Organizations Will Harm Consumer Welfare

Rather than embrace the varied innovative revenue stream options possible through strategic partnerships, some traditional news publishers have seized on the concept of seeking blanket antitrust exemptions for collusive pricing behavior among newspapers as a path out of their difficulties. The FTC's Discussion Draft offered two antitrust exemption proposals: the first would allow news organizations to agree jointly to erect pay walls protecting their online content, and the second would allow news organizations to agree jointly on a mechanism requiring "news aggregators and others" to pay for the use of online content.<sup>10</sup> These proposals amount to the same thing: allowing news organizations to coordinate on payment schemes, rather than compete fairly and innovate apace. Adopting either of these antitrust exemptions would be a mistake, both as a matter of law and public policy.

Historically, antitrust exemptions have been disfavored by government enforcement agencies and courts alike. Referencing the Sports Broadcasting Act of 1961, which offered antitrust exemption to certain NFL activities, Judge Easterbrook criticized such acts as "special interest legislation, a single-industry exception to a law [namely, the Sherman Act] designed for the protection of the public ... recognition that special interest legislation enshrines results, rather than principles, is why courts read exceptions to the antitrust laws narrowly, with

beady eyes and green eyeshades.”<sup>11</sup> The Supreme Court in *Associated Press v. United States* made it clear that newspapers should be subject to the same legal standards as other businesses: “All are alike covered by the Sherman Act.”<sup>12</sup> In fact, the Supreme Court explicitly rejected the argument that “newspapers are entitled to a different and more favorable kind of trial procedure than all other persons covered by the Sherman Act.”<sup>13</sup>

Previous iterations of antitrust exemptions in the newspaper industry have been, at best, ineffective and, at worst, actively harmful to consumers, by increasing advertising and circulation prices while enriching corporations who were not the intended beneficiaries of the legislation.<sup>14</sup> For example, the Newspaper Preservation Act (“NPA”), which was passed in 1970 allowed newspapers to form a joint operating agreement (“JOA”) that collectively set circulation advertising rates if, among other things, they maintained separate editorial boards.<sup>15</sup> The NPA offered antitrust immunity to certain JOAs that had been formed before its passage, as well as allowing JOAs for newspapers that were in probable danger of financial failure.<sup>16</sup> The NPA ultimately favored large news organizations, putting smaller, emerging media companies at a distinct competitive disadvantage. Furthermore, the creation of these shared monopolies simply increased entry barriers, creating a further diminution of competition. The primary result of creating immunity from liability for jointly setting prices has been and would simply be high prices for consumers.

Perhaps the clearest repudiation of antitrust exemption policies was delivered in the Commission-authorized statement of Alden F. Abbott, the FTC’s then associate director for policy and coordination in connection with the Antitrust Modernization Commission’s consideration of statutory exemptions and immunities:

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“Basic economic theory teaches that an unregulated competitive market generally leads to the economically efficient level of output. In contrast, a restraint that effectively raises price above the competitive level (or, equivalently, reduces output below the competitive level) generally will result in consumers purchasing less of the product or service, and firms producing less, at the higher price, than would be the case under competitive conditions. Consequently, such a restraint results in a decrease in economic welfare. Further, it is well accepted that competition itself is an engine that drives economic efficiency. Therefore, logic suggests that antitrust exemptions may well handicap the economic progress of industries they are intended to protect. Individual firms may enjoy the benefits of antitrust exemptions, but

consumers and the economy bear the harm—and the sheltered sector is rendered less efficient overall.”<sup>17</sup>

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Abbott continues, explaining that even industries that currently enjoy antitrust exemptions do not need them to grant amnesty to “efficient, socially useful forms of conduct,” because such conduct should pass the antitrust test of reasonableness.<sup>18</sup>

News organizations, rather than seeking immunity for anticompetitive behavior, should instead work within the antitrust framework to establish payment schemes that allow them to benefit from their online content without engaging in price-fixing. As Christine A. Varney, the current Assistant Attorney General for the DOJ’s Antitrust Division recently noted: “Any new exemption from the antitrust laws seems particularly inappropriate at this point—industry dynamism should be given a full opportunity to play out in the marketplace before any antitrust exemption is even considered.”<sup>19</sup>

## IV. Antitrust Does Not Impede Innovative Business Models

Traditional media companies need not fear antitrust laws if their proposed collaborations are, in fact, designed to yield pro-competitive user benefits. The antitrust laws do not seek to constrain newspapers from finding creative solutions to the challenges that competition from online sources brings. As the FTC and DOJ’s Guidelines on Competitor Collaborations make clear, courts and enforcement agencies take a nuanced approach towards a proposed joint venture’s overall competitive effect, asking whether competitive harm is threatened, whether any competitive benefits exist, and whether the benefits outweigh the harm.<sup>20</sup> Newspapers’ attempts to cut costs, improve service, lower prices, or offer new or better content through competitor collaborations are unlikely to yield intense antitrust scrutiny.

In the last year, the DOJ has issued two business review letters relating to newspaper collaborations that demonstrate the antitrust laws’ inherent flexibility. The first business review letter involved a proposal by MyWire Inc. to develop and operate an internet subscription news aggregation service called the Global News Service.<sup>21</sup> MyWire’s plan for its Global News Service was to allow users to browse among both related free- and fee-based material from varying publishers’ sites in a single interface. The DOJ’s business review letter concluded that the vertical agreements reached by MyWire with content providers would benefit consumers by allowing them access to a broad array of related content without the need to conduct individualized searches. Publishers would also stand



to benefit from increased traffic and the revenue generated by the Global News Service subscriptions. In light of the non-exclusive nature of those vertical agreements and the independent pricing power retained by MyWire, the DOJ assured MyWire that it had no intention of challenging its proposal.

In the second instance, in April 2010, the DOJ issued a business review letter stating that it did not intend to challenge the Associated Press' proposal to develop and operate a voluntary, centralized news registry designed to facilitate the licensing and online distribution of news content created by the AP and other similarly situated news originators. The AP intended to give content owners the ability to control what content appeared in this registry, as well as dictate the terms by which such content could be licensed. In giving its tacit approval of the registry, the DOJ cited the granular control content owners could exercise over the news included in the registry as an important factor in their conclusion that the registry would not lessen competition. Additionally, the DOJ noted that the reduction of transaction costs for content owners who could determine licensing and terms through the registry was a significant pro-competitive benefit that might encourage the proliferation of licensed content to users. In the DOJ's judgment, the registry offered the "promise of a new efficient way for licensing and tracking news content over the Internet."<sup>22</sup>

Christine Varney in her recent speech discussing the news industry cited these business letters as illustrative of "the latitude publishers have as they meet the demands of the twenty-first century media marketplace. Collaborations that do not restrain competition unnecessarily pass muster under the antitrust laws, particularly if those collaborations promise efficiencies or other benefits."<sup>23</sup>

## V. Conclusion

The Fourth Estate is too crucial a part of a functioning democracy, and the internet too powerful a medium, for journalism to die in transition to a web-first approach. Nonetheless, calls for further regulation or legislation that are designed to cushion this transition should be viewed with extraordinary caution and skepticism. Antitrust exemptions are rarely good for consumer welfare and, in this case in particular, are simply not necessary given the innovative business models that are emerging to facilitate digital transition in the news industry. ▼

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- 1 The Discussion Draft offered proposals in four significant subject areas: namely, copyright; antitrust; tax and corporate innovations; and government partnership. This article discusses the proposals that relate to antitrust only. Fed. Trade Comm'n, FEDERAL TRADE COMMISSION STAFF DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM (2010), <http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf> (hereinafter DISCUSSION DRAFT).
  - 2 Google's Comments on the Federal Trade Commission's News Media Workshop and Staff Discussion Draft on Potential "Policy Recommendations to Support the Reinvention of Journalism" are available at <http://googlepublicpolicy.blogspot.com/2010/07/business-problems-need-business.html>.

- 3 JOSEPH D. STRAUBHAAR & ROBERT LAROSE, *MEDIA NOW: UNDERSTANDING MEDIA, CULTURE, AND TECHNOLOGY*, at 94 (2005).
- 4 See GWENYTH L. JACKAWAY, *MEDIA AT WAR: RADIO'S CHALLENGE TO THE NEWSPAPERS, 1924-1939*, at 1-10 (1995).
- 5 See *The Future of Journalism: Hearing Before the Subcomm. on Commc'ns, Tech., & the Internet of the S. Comm. on Commerce, Sci., & Transp.*, 111th Cong. (2009) (statement of Marissa Mayer, Vice President, Search Products and User Experience, Google, Inc.).
- 6 DISCUSSION DRAFT, *supra* note 1 at 2.
- 7 See Google Webmaster Central, Block or Remove Pages Using a Robots.txt File, <http://www.google.com/support/webmasters/bin/answer.py?answer=156449>.
- 8 See Google Webmaster Central, Using Meta Tags to Block Access to Your Site, <http://www.google.com/support/webmasters/bin/answer.py?answer=93710>.
- 9 Avis n° 10-A-29 du 14 décembre 2010 sur le fonctionnement concurrentiel de la publicité en ligne, ¶¶ 383-385.
- 10 DISCUSSION DRAFT, *supra* note 1 at 13.
- 11 *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671-72 (7th Cir. 1992).
- 12 *Associated Press v. United States*, 326 U.S. 1, 7 (1945).
- 13 *Id.* at 6 and 20.
- 14 DISCUSSION DRAFT, *supra* note 5, at 14 (citing Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV., Oct. 19, 2009, at 28-29, available at [http://www.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php?page=all](http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?page=all); Robert G. Picard, Tremors, Structural Damage and Some Casualties, but No Cataclysm: The News about News Provision, Background Paper to the Presentation by the Author at the Federal Trade Commission Workshop: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age? (Nov. 7, 2009), at 11, <http://www.ftc.gov/os/comments/newsmidiaworkshop/544505-00029.pdf>).
- 15 Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (1970).
- 16 15 U.S.C. §§ 1802(5) and 1803(b).
- 17 Alden F. Abbott, Assoc. Dir. for Policy & Coordination, Bureau of Competition, Fed. Trade Comm'n, Prepared Statement Before the Antitrust Modernization Commission on Statutory Immunities and Exemptions (Dec. 1, 2005), at 3-4, <http://www.ftc.gov/os/2005/12/051202statutory.pdf> (citations omitted).
- 18 *Id.* at 6-7.
- 19 Christine A. Varney, "Dynamic Competition in the Newspaper Industry," Remarks Prepared for the Newspaper Association of America, at 7 (March 21, 2011), available at <http://www.justice.gov/atr/public/speeches/268742.htm>.

- 20 See generally, FTC AND DOJ ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.
- 21 Letter from Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, to Charles E. Biggio, Esq. (Feb. 24, 2010), available at <http://www.justice.gov/atr/public/busreview/255624.pdf>.
- 22 See Dynamic Competition in the Newspaper Industry, *supra* note 18. Similar analyses are being undertaken in other jurisdictions as well. The French Competition Authority, for example, recently looked at a so-called "digital newsstand" joint venture under consideration by news publishers in France ("Les projets de kiosques numériques"). They concluded that "such initiatives may well constitute pertinent responses to the concerns or questions raised above [and] may allow the press to establish a viable and long-lasting economic model for the Internet." See Avis n° 10-A-29, *supra* note 8 at ¶¶ 386-396.
- 23 *Id.*