A Primer on Docket Number 18110: The New FCC Cross-Ownership Rules

Roxanne Decyk Young

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
A PRIMER ON DOCKET NUMBER 18110: THE NEW FCC CROSS-OWNERSHIP RULES

The communications industry, previously relatively untouched by federal antitrust activity, has come under direct attack from the FCC recently as a result of the adoption of Multiple Ownership of Standard, FM and Television Broadcast stations; Second Report and Order\(^1\) in January, 1975. The FCC and the media have engaged in a spirited dialogue for the past five years concerning the validity, purposes and parameters of the Order, known as Docket No. 18110. With the adoption of the Second Order, proceedings in relation to Docket No. 18110 were terminated and regulations affecting media concentration\(^2\) were finalized.

The Order has three significant effects on the communications industry. First, seven television station cross-ownerships and nine radio station cross-ownerships must be divested by 1980.\(^3\) Secondly, groups of media vehicles now under cross-

---

2. Media concentration is a measure of the diversity of ownership of media in a given geographical area.

Appendix D

TV Station Monopolies—Divestiture Required

<table>
<thead>
<tr>
<th>City and State:</th>
<th>TV Call Letters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama, Anniston</td>
<td>WMMA</td>
</tr>
<tr>
<td>Georgia, Albany</td>
<td>WALB</td>
</tr>
<tr>
<td>Iowa, Mason City</td>
<td>KGLO</td>
</tr>
<tr>
<td>Mississippi, Meridian</td>
<td>WTOK</td>
</tr>
<tr>
<td>New York, Watertown</td>
<td>WWNY</td>
</tr>
<tr>
<td>Texas, Texarkana</td>
<td>KTAL</td>
</tr>
<tr>
<td>West Virginia, Bluefield</td>
<td>WHIS</td>
</tr>
</tbody>
</table>

Appendix E

AM and FM Station Monopolies—Divestiture Required

<table>
<thead>
<tr>
<th>City and State:</th>
<th>AM Call Letters</th>
<th>FM Call Letters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas, Hope</td>
<td>KXAR</td>
<td>WCRA-FM</td>
</tr>
<tr>
<td>Illinois, Effingham</td>
<td>WCRA</td>
<td>WKAI-FM</td>
</tr>
<tr>
<td>Illinois, Macomb</td>
<td>WKAI</td>
<td>WCRA-FM</td>
</tr>
<tr>
<td>Kansas, Arkansas City</td>
<td>KSOK</td>
<td>WJAG-FM</td>
</tr>
<tr>
<td>Michigan, Owosso</td>
<td>WOAP</td>
<td>WJAG</td>
</tr>
<tr>
<td>Nebraska, Norfolk</td>
<td>WJAG</td>
<td>WJAG-FM</td>
</tr>
<tr>
<td>Ohio, Findlay</td>
<td>WFIN</td>
<td>WFIN-FM</td>
</tr>
<tr>
<td>Pennsylvania, DuBois</td>
<td>WCED</td>
<td>WCED-FM</td>
</tr>
<tr>
<td>Wisconsin, Janesville</td>
<td>WCLO</td>
<td>WJVL</td>
</tr>
</tbody>
</table>
ownership may no longer be transferred intact.4 Thirdly, acquisition of multiple media vehicles in the future is prohibited.5

This article will review the authority of the FCC in antitrust regulation, the proceedings contained in Docket No. 18110, the practical and constitutional challenges to the Order, and the effect of the Order on the communications industry. The Order itself has not yet been tested in the courts, but numerous legal and practical challenges have already been offered through administrative comments and oral argument.6 It is likely that the same arguments will be made either in litigation or as part of the application by an individual media owner for waiver of the rule.

I. AUTHORITY OF THE FCC

The Federal Communications Commission has, since its inception, endorsed a policy favoring diversification of ownership of communications media. The policy derives from at least three specific sources—the First Amendment to the Constitution,7 the Communications Act of 1934,8 and federal antitrust principles.9

A. The First Amendment

The First Amendment has been relied upon by both the FCC as authority for its diversification of ownership policy and by the communications industry as a defense to that policy.10 The constitutionally guaranteed freedoms of expression and of

A cross-ownership exists when two or more media vehicles (such as an AM and FM radio station) are commonly owned by the same person or group. It is obvious that problems arise in the application of any regulations in this area based on the definitions of ownership. For example, is a bank trust department which has invested heavily in several media corporations a cross-owner within the meaning of the Order?

4. Id. at 6468-71.
5. Id.
6. The FCC commenced work on this Order by publishing a Notice of Proposed Rulemaking. Thereafter, any interested party was entitled to file a brief, consisting of objections to or arguments in favor of the impending regulations. Additionally, some parties presented oral arguments and statistical studies to the Commission. Before the final Order was promulgated, the FCC considered all briefs, studies and arguments submitted on the topic.
7. U.S. CONST. amend. I.
10. Id. at 6450-51.
the press are more fully protected, according to the FCC, by encouraging the maximum number of channels of expression.\textsuperscript{11} "It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government or by a private licensee."\textsuperscript{12} "It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences that is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC."\textsuperscript{13} The principle of diversification of ownership is effectuated under the authority of the Communications Act of 1934 and through FCC cognizance of federal antitrust policy.

\textbf{B. The Communications Act of 1934}

The Communications Act of 1934 authorizes the FCC to adopt rules governing the issuance of broadcast licenses which would prohibit cross-ownership of broadcast stations or newspapers and broadcast stations in the same geographic area.\textsuperscript{14} Specifically, section 309(a) requires the Commission to promote the "public interest, convenience and necessity"\textsuperscript{15} in granting licenses. "Public interest" has been interpreted by the Supreme Court to include such factors as "the widest possible dissemination of information from diverse and antagonistic sources."\textsuperscript{16} The Commission has adopted the position that diverse and antagonistic sources are necessarily separately owned sources, and that greater diversity of expression is encouraged when media channels are both owned and operated by as many different persons as possible.\textsuperscript{17}

\textbf{C. Federal Antitrust Policy}

Although the Justice Department rather than the FCC is authorized to enforce the antitrust laws, the FCC has assumed the authority to promote antitrust policies under the "public

\begin{thebibliography}{9}
\bibitem{11} Id. at 6451.
\bibitem{13} Id.
\bibitem{14} Communications Act of 1934, 47 U.S.C. §§ 2(a), 4(i), 4(j), 301, 303, 309(a) (1934).
\bibitem{15} Id. at § 309(a).
\bibitem{16} Associated Press v. United States, 326 U.S. 1, 20 (1945).
\bibitem{17} Second Report, 40 Fed. Reg. 6449, 6454 (1975).
\end{thebibliography}
interest” qualification of its licensing function. Since the communications industry is considered commerce, it is subject to both federal antitrust laws enforced by the Justice Department and administrative regulations enforced by the FCC.

Two congressional acts are regarded as the basis for federal antitrust policy. The Sherman Act of 1890 prohibits “contract[s], combination[s] . . . or conspirac[ies] in restraint of . . . trade or commerce.” The Clayton Act of 1914, specifically the subsequently enacted section 7 (known as the Celler-Kefauver Act of 1950), is particularly relevant to the communications industry. It forbids corporations from acquiring stock or assets of a competing corporation “where . . . the effect . . . may be substantially to lessen competition, or to tend to create a monopoly.” Although the portions of the Second Order that apply prospectively spring primarily from First Amendment considerations, the order to divest is a direct expression of federal antitrust law.

D. Case Law

Case law resulting from challenges to FCC antitrust authority has strongly supported the Commission’s efforts to decentralize media ownership and access. The preeminent decision in this area is Associated Press v. United States in which the FCC succeeded in striking down restrictive press service by-laws. Prior to World War II, the Associated Press operated under by-laws which prevented members from selling news to nonmembers and granted Associated Press members a virtual veto power over competing newspapers’ attempts to gain membership. One of several suits decided under this decision involved attempts by publisher Marshall Field to obtain Associated Press membership for the Chicago Sun, a newspaper in competition with the Chicago Tribune. The Justice Department charged that the conduct of the Associated Press, the Tribune and other defendants constituted “(1) a combination and conspiracy in restraint of trade and commerce in news

20. Id. at § 1.
22. Id. at § 18.
23. Id.
among the states, and (2) an attempt to monopolize a part of that trade.\textsuperscript{25} Although the defendants argued that enforcement of the Sherman Act in this case would constitute a violation of First Amendment freedom of the press, the Supreme Court was not persuaded, adopting instead Judge Learned Hand's conclusion from the appellate court decision

\ldots that [the newspaper] industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.\textsuperscript{26}

Federal authority to enforce diversity of ownership of the channels of media and thereby diversity of expression was solidified by subsequent Supreme Court decisions finding antitrust violations in such circumstances as discriminatory refusal of advertising in \textit{Lorain Journal Co. v. United States}\textsuperscript{27} and restraint of the circulation of news in \textit{United States v. Times-Picayune Publishing Co.}\textsuperscript{28} Early foundation for the Second Order was laid when the Court recognized FCC authority to regulate concentration of stations under the same control in \textit{United States v. Storer Broadcasting Co.}\textsuperscript{29} The 1975 Order itself evolves logically from the decision in \textit{United States v. Times Mirror Company}\textsuperscript{30} which involved an attempt by the publisher of California's largest daily newspaper, the \textit{Los Angeles Times}, to purchase the largest independent daily publisher in Southern California.

These decisions, combined with numerous findings affirming the FCC's discretion in licensing of the use of the radio spectrum,\textsuperscript{31} are relied upon by the Commission to support the regulations which have issued from \textit{Docket No. 18110}.

\textsuperscript{25} Id. at 4.
\textsuperscript{26} Id. at 28, quoting Judge Hand, \textit{Associated Press v. United States}, 52 F. Supp. 362, 372 (D.C. N.Y. 1943).
\textsuperscript{27} 342 U.S. 143 (1951).
\textsuperscript{28} 345 U.S. 594 (1953).
\textsuperscript{29} 351 U.S. 192 (1956).
\textsuperscript{31} See \textit{United States v. Storer Broadcasting Co.}, 351 U.S. 192 (1956); \textit{Clarksburg
II. DOCKET No. 18110

The Commission’s actions since 1970 cannot be considered as an isolated attempt at antitrust regulation. The FCC has for almost forty years actively pursued decentralization of media ownership, not only in conjunction with the Justice Department in antitrust litigation, but also through administrative rules and regulations and its discretionary control over the granting and renewal of broadcast licenses.

Multiple ownership was first investigated by the FCC in 1938, followed by promulgation of the first multiple ownership rules in 1940.\(^{32}\) These early rules limited any one owner to five broadcasting stations (this has since been expanded to seven with qualifications as to the type of media involved). Other multiple ownership rules were adopted in 1941,\(^{33}\) 1943,\(^{34}\) and 1944.\(^{35}\) Investigation of newspaper ownership of broadcasting commenced in 1941 and continued until 1944.\(^{36}\) Investigations were resumed in the early 1950’s and again in the mid-1960’s.\(^{37}\)

Proceedings on Docket No. 18110 began in 1968 with the adoption of a Notice of Proposed Rule-Making\(^{38}\) which, broadly speaking, proscribed common ownership of TV-AM, TV-FM or AM-FM combinations in the same market. The rules were intended to be prospective only, with no requirement of divestiture of existing combinations. Subsequently, new rules resulting from the First Order\(^{39}\) and its modifications in a Memorandum Opinion and Order\(^{40}\) prohibited common ownership of VHF television stations and aural stations in the same market. Although AM-FM combinations were permitted by the Commission, there was no hint of common newspaper-broadcast ownership restrictions or of divestiture (although

---

\(^{32}\) 47 C.F.R. §§ 73.636, 73.240 (1974).
\(^{34}\) F.C.C. Tenth Annual Report 11 (1944).
\(^{35}\) 47 C.F.R. § 4.226 (1944).
\(^{36}\) 47 C.F.R. §§ 73.636, 73.240 (1974).
\(^{40}\) 28 F.C.C.2d 662 (1971).
multiple ownerships of VHF and aural stations could not be sold intact).

Also in 1970, the Commission adopted a Further Notice of Proposed Rule-Making\textsuperscript{41} which contained a proposal requiring divestiture within five years of common ownership of broadcast stations and daily newspapers in the same market.

The Docket represented the most vigorous attempt yet by the FCC to encourage diverse media ownership. To do this, the Commission relied upon basic antitrust considerations to define the type of media concentration which would exceed minimum diversity requirements.\textsuperscript{42} First, the Commission established that two or more media vehicles, for example a television station and a daily newspaper, constitute a relevant product market.\textsuperscript{43} The Commission explained their conclusion by means of an industrial analogy:

if a steel company seeks to acquire an aluminum company, does this constitute a form of horizontal integration leading perhaps to impermissible oligopolistic concentration? To answer the question requires among other things a determination of the relevant product market, and, in this example, a knowledge about the conditions under which aluminum or steel could be used as substitutes for one another, either generally or in some particular uses . . . According to the Department of Justice, newspaper and television stations are in many ways engaged in the same business, namely attracting audiences and selling them to advertisers.\textsuperscript{44}

Secondly, the FCC determined what area constitutes a relevant geographic market.\textsuperscript{45} Although the Order itself is phrased

\textsuperscript{41} 22 F.C.C.2d 339 (1970).

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E.I. duPont de Nemours & Company, 353 U.S. 586, 595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of such submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.
\textsuperscript{45} Id.
in terms of broadcast terminology, essentially a violative combination results when two or more media in combination encompass a particular city or town.\textsuperscript{46} Although media combinations may have far-reaching effects in any particular geographic area, unless both elements, the product market and geographic market, are valid, there is no antitrust basis for condemnation of cross-ownership. The Justice Department has stated that:

[i]t must be understood that our analysis of a merger in the media field is basically no different from our analysis in any other field . . . . [T]he Antitrust Division must make an analysis which is essentially economic. In the media business, as in all other businesses, if we cannot find a provable economic effect in an identifiable market, there is no action we can take under Section 7 to prevent a merger.\textsuperscript{47}

The \textit{Order} has not yet been tested in the courts, but several issues are apparent from even a cursory review of the changes adopted. If, for example, the FCC's appropriation of Justice Department antitrust techniques is not a valid administrative action, the FCC will have to defend the \textit{Order} solely on its First Amendment policy principles.

\textbf{III. CHALLENGES TO THE ORDER}

A plethora of comments, replies and studies has been filed at the FCC in reaction to \textit{Docket No. 18110}, both supporting and challenging the validity of the \textit{Order}. Challenges to the \textit{Order} fall within four general classifications: (1) First Amendment challenges, (2) Fifth Amendment challenges, (3) authority of the FCC to effectuate antitrust policy, and (4) validity of the relevant product market and relevant geographic market definitions adopted by the FCC.

More than one hundred and fifty organizations, including the Green Bay Newspaper Company, The Journal Company, the Kenosha News, and the Wisconsin Daily Newspaper League, filed comments on the validity of the \textit{Order}.\textsuperscript{48} WTMJ-radio filed a brief for an administrative oral argument on

\textsuperscript{46} Id. at 6468-71.
\textsuperscript{47} C. Mahaffie, \textit{Mergers and Diversification in the Newspaper, Broadcasting and Information Industries}, 13 \textit{ANTITRUST BULL.} 927, 930-31 (1968).
Docket No. 18110. More than twenty major studies were submitted on the subject. Many of the individual challenges consist of the same or similar arguments, so this section will review the most significant arguments offered by large media associations and those generating the most controversy.

A. First Amendment Challenges

The freedom of a newspaper owner to publish was the substance of one of several challenges made by the American Newspaper Publishers Association (hereinafter ANPA) to the Order. ANPA charged that the Order requiring divestiture of either a newspaper or television station if both the only daily newspaper and the only television station for a given area are owned by the same person violated the freedom of the press. The Commission defended its position by relying on Associated Press v. United States:

First, the Commission is following the long established policy of promoting the widest possible dissemination of information from diverse and antagonistic sources" . . . [sic] (citation omitted). Second, the First Amendment does not protect business relations that are either unlawful or not in the public interest. Finally, we believe the opponents overstate their case in this and in the other arguments. The Commission has never proposed and is not now proposing to prohibit someone from owning a newspaper and a television station. It is plain that what we are doing is grandfathering present newspaper-television owner combinations; we are only requiring divestiture in egregious cases . . . . (emphasis added).  

Though the Commission's diversification of ownership policy has been upheld by the Supreme Court, the Commission relies on both its diversification policy and antitrust considerations appropriated from the Justice Department in the Order. Associated Press provided judicial approval of the FCC policy, i.e., diversity of ownership and expression. In addition, it was specifically in the face of a concerted combination to restrain

49. Id.
50. Id.
51. Id. at 6450.
52. 326 U.S. 1 (1945).
trade in news, which is distinguishable from a mere cross-ownership. In Associated Press the court stated:

[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. . . . Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.  

The ANPA argued that if it cannot be shown that illegal combinations of media exist, then newspaper-television combinations do not fall within the influence of Associated Press since there was no combination to keep others from publishing.

The second FCC argument, that illegal business combinations are not protected by the First Amendment, is difficult to refute. However, the ANPA argued that cross-ownerships, even within the parameters delineated by the Commission, are not unlawful per se or violative of the public interest based on the ANPA's challenge of the definitions of relevant product market and relevant geographic market. These challenges are discussed more fully below.

The FCC's statement that it will order divestiture only in egregious cases seems more offensive than placatory. Not only is an egregious case not defined, but that definition presumably will be made by the Commission itself.

All of the FCC's First Amendment considerations supporting divestiture are susceptible to cogent argument from the media's point of view as well. Until the arguments are resolved through litigation, the First Amendment challenges are likely to retain a great deal of support within the communications industry.

B. Fifth Amendment Challenges

The ANPA also argued that the Order violates the Due Process Clause of the Fifth Amendment, particularly in the

case of newspaper owners, because the FCC is discriminating against a class. The Commission correctly asserts, however, that "[r]ules that treat in an equal manner all parties whose activities raise similar public interest problems are not discriminatory." The ANPA has rebutted this argument on two grounds: (1) the definition of a "public interest" problem, like the definition of an egregious case, is too indefinite, and (2) there is evidence that the order would have a particularly harmful effect upon newspaper-television owners because of the economics of their business.

The FCC has admitted that newspaper-licensed stations often provide superior service to the public, but they attribute that superiority not to the common ownership, but rather to "journalistic traditions and pioneering broadcast operations." Communications industry data, on the other hand, attributes this superiority to other causes, specifically to the fact that many newspapers can afford to operate only as a result of the profitability of a co-owned television station. The loss of these combinations, either through immediate divestiture or through separation of the operations at a future sale, would, according to the ANPA, actually reduce the number of newspapers which could afford to operate and thus undercut the FCC's avowed policy of diversification of media.

It is interesting to note that in the May, 1975 Memorandum Opinion and Order the FCC seems to have given at least partial recognition to the ANPA's argument: "... looking only at the small superiority obscures the important gain in diversity which would result. We continue to believe that absent unusual circumstances, diversity is the more important point when it can be achieved without hardship or disruption." (emphasis added). Thus, though any Fifth Amendment objection may be argued persuasively from either side, the financial practicalities of the communications industry might necessitate intensive Commission review of individual waiver applica-

56. Id.
57. Id. at 6451.
58. Id.
62. Id.
tions and require some amount of flexibility in order to regulate most efficiently in light of the exigencies of any given situation.

C. FCC Authority to Promulgate Rules

Sharp criticism has been leveled at both the FCC and the Justice Department charging that the 1975 rule is merely the result of an improper attempt by the Justice Department to regulate the communications industry through the FCC. A former FCC Commissioner stated that: "... in my opinion, what the Department of Justice is doing in this instance is abusing legal process, or, if you prefer, trying to blackmail the FCC into following the course that the Department of Justice thinks it should follow. And I submit that this is improper." 63

There is a practical reason for the Justice Department's interest in reaching antitrust violations through the Commission; the FCC reviews all licenses granted to broadcast stations every three years when they come up for renewal. The FCC's only available remedy is to deny renewal, but it is a remedy which the Justice Department could not use in standard antitrust litigation. 64 The FCC acting without the 1975 Order could, at best, order to hearing cases to which the Justice Department had filed petitions and there is no way that the Commission, under its present administrative procedure, could handle the number of hearings which would result. 65

While it is something of a departure from standard procedure for the FCC to order divestiture, there is little legal authority to contest the Order on that basis alone. However, commentators have relied on Ricci v. Chicago Mercantile Exchange 66 to challenge antitrust considerations as a basis for the divestiture policy:

Under the Communications Act, as under the Commodity Exchange Act, the area of administrative authority does not appear to be particularly focused on competitive considerations; there is no express provision in the Act directing administrative officials to consider the policy of the antitrust laws in carrying out their duties and there is no other indica-

64. Id. at 365.
65. Id. at 365-66.
tion that Congress intended the adjudicative authority given
the Commission . . . to be a complete substitute for judicial
enforcement of the antitrust laws. 67

Another challenge of the FCC’s rule-making authority was
made by the ANPA, questioning the Commission’s authority
to issue rules directly affecting newspaper owners. 68 Relying
heavily on Stahlman v. FCC, 69 they pointed to the Court’s
statement that

[i]f in this case it had been made to appear, as counsel for
appellant insist, that the Commission’s investigation was
solely for the purpose of the consideration or adoption of a
hard and fast rule or policy, as a result of which newspaper
owners may be placed in a proscribed class and thus made
ineligible to apply for or receive broadcast licenses, we should
be obliged to declare that such an investigation would be
wholly outside of and beyond any of the powers with which
Congress has clothed the Commission. 70

However, the FCC has distinguished cross-ownerships from the
facts in Stahlman which “deals with newspaper owners in gen-
eral and is not related to the issues in this proceeding.” 771 Cross-
ownership orders, according to the FCC, do not apply across
the board to newspaper owners; a newspaper owner is free to
obtain broadcast licenses if they are not within the relevant
geographic market. Only when the dual considerations of pub-
lic interest and antitrust policy are threatened does the Order
take effect.

D. Validity of the Relevant Product Market and Relevant
Geographic Market Adopted

Vehement criticism has been directed toward the FCC’s
conclusion that newspapers and television stations constitute
a relevant product market and that the city and its environs
constitute a relevant geographic market for communication
purposes.

(1973).
69. 126 F.2d 124 (D.C. Cir. 1942).
70. Id. at 127. See also Tri-State Broadcasting Co. v. F.C.C., 96 F.2d 564 (D.C. Cir.
1938); McClatchy Broadcasting Co. v. F.C.C., 239 F.2d 15 (D.C. Cir. 1956), cert.
denied, 353 U.S. 918 (1957).
1. Relevant Product Market

The communications industry has functioned for many years on the advertising and marketing premises that television broadcast time and newspaper space are not fungible, or even similar enough to be used for the same purposes.

For purposes of the antitrust considerations of the Order, however, the FCC has determined that, as advertising vehicles, radio, television and daily newspapers constitute a relevant product market.

Commentators from the industry have reacted strongly to this.

The simplistic notion that television and newspaper advertising functions are so similar in characteristics and uses as to constitute a single product universe wilts under the glare of analysis. Such an argument ignores the imprint of recent influences bequeathed by the evolution of the economy, it evades the ramifications of some basic techniques in marketing strategy, and it does not pay heed to the consequences of modern technology.

In fact, the industry has gone so far in its criticism of this determination as to state that

... the conclusion is inescapable that the Justice Department has indulged in an exercise of convoluted gerrymandering to create an aberration fitting the description of what Mr. Justice Fortas once called a "strange red-haired, bearded, one-eyed man-with-a-limp classification."

The basis for these criticisms lies in practical media strategy. Advertisers regard television and print as distinct and complementary advertising vehicles rather than interchangeable media. Yearly, advertising and marketing population demographic studies reveal, to the satisfaction of businessmen spending many millions of dollars per year, that distinct audiences with markedly divergent characteristics can be reached through the unique qualities of messages conveyed through different types of media.

75. Id.
76. See, e.g., E. Cundiff & R. Still, Basic Marketing 512 (1964); A. Barbon & C.
Since the ultimate issue under section 7 of the Clayton Act is the effect on competition, media owners have argued strongly that according to the competition test presented in *U.S. v. E.I. du Pont de Nemours*,7 these media are not "reasonably interchangeable."78 The Court indicated that the final position of the market line depends upon

... how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. For example, one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different.79

The differences between newspapers and television were thoroughly catalogued in *U.S. v. Citizen Publishing Co.*80 The trial court concluded, from charges of violation of Clayton section 7 and monopolization under section 2 of the Sherman Act against two Tucson newspapers, that the relevant product market was restricted to the newspaper business based on price, use and quality differences between the two media.81 In light of the legal and statistical support for challenges to the Commission's determination of the relevant product universe, it is likely that this point will be highly contested.

2. Relevant Geographic Market

Inconsistency is apparent even in the FCC's approach to determination of the relevant geographic market in numerous situations. In *Frontier v. FCC*,82 the Commission used the city and its environs rather than the grade B, or wide-area, coverage of the television station in question. In the 1975 *Order*, the FCC relies upon the smaller grade A contour of television broadcast.83 Additionally, market-share determinations for newspapers have varied from study to study.84

---


77. 351 U.S. 377 (1956).
78. Id. at 395.
79. Id.
81. Id. at 986-92.
82. 21 F.C.C.2d 570 (1970).
84. Id. at 6454.
The National Citizens' Committee for Broadcasting has urged adoption of the deJonckheere study on market share. Using this method, various weights would be attributed to radio, television and daily newspapers in a given area, and concentration of media would be determined on the basis of a combination of the relative weights. This approach would avoid the inflexible ban used by the FCC which is less sensitive to individual market characteristics.

It is almost impossible for the FCC to avoid the highly arbitrary nature of delineating geographic markets. Since relatively minor market deviations can result in major differences in applicability of the Order to individual cross-ownerships, review of cross-ownerships on a case-by-case basis would provide the most equitable approach to resolving whatever violations may exist.

IV. THE EFFECT OF THE ORDER

Conversations with Justice Department attorneys instrumental in the promulgation of the Order have revealed a basic desire on their part to break up communications conglomerates owned by "media barons." However, those cross-ownerships directly affected by the order are relatively small media combinations. It is not unlikely that large communications conglomerates, with the resources and sophistication to obtain waivers and circumvent certain regulations and requirements, will be virtually unaffected, while less significant combinations, already operating at a financial disadvantage, will be hardest hit.

One of the first major acquisitions directly affected by the Order became national news during the summer of 1975. A Texas banker, Joseph Allbritton, attempted to acquire the faltering Washington Star and its associated broadcast stations. The Star, in dire financial straits, provided the only real competition to the Washington Post. The owners of the Star newspaper-broadcast combination refused to sell the Star unless the combination was sold intact. Although waiver applica-

85. T. deJonckheere, Monopoly in the Media (1968).
87. Conversation with Sinclair Gearing, Attorney, U.S. Department of Justice. See also N. Johnson, Media Barons and the Public Interest, ATLANTIC, June, 1968 at 43-51.
tion was filed two months before promulgation of the Order, the Commission waited until July, 1975 to decide that waivers could not be granted without a hearing. The Commission not only set a precedent as to its unwillingness to grant waivers to cross-ownership rules, but acted slowly and indecisively in an urgent situation. Treasury Secretary Simon was quoted as saying,

A guy comes to town to try to save the only other newspaper we have in Washington D.C.—and for nine months they [the FCC] fool around with it and then say, “We need another year to make a decision.” I think it’s damn unfair . . . I think it’s unconscionable . . . Does [the Star] have to go out of business in a year as a result of inaction on the part of government? 89

It remains to be seen whether the Commission will respond more quickly in future situations.

V. CONCLUSION

The 1975 Order and Report will continue to draw harsh criticism from the communications industry. Lee Loevinger, a former Commissioner, has stated that “[o]bviously, there is no concentration. There is no monopoly anywhere in terms of access to the public here. In fact, the contrary is the case; we are inundated by the loud clamoring voices seeking our attention.”

Not only is the Order itself controversial, the charges of improper Justice Department interference with the activities of a regulatory agency are not likely to be ignored. The economic practicalities of the communications industry are bound to force this issue into a final determination by the courts.

Roxanne Decyk Young

89. Id. at 24.
1. Section 73.35 of the Commission's rules and regulations is amended to read as follows:

§ 73.35 Multiple ownership.

(a) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mV/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186; or one or more television broadcast stations and the grant of such license will result in the predicted or measured 2 mV/m groundwave contour of the proposed station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted or measured 2 mV/m contour, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published.

(b) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in or be stockholders, officers, or directors of, more than seven standard broadcast stations.
(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations which place(s) a city-grade signal over the community during daytime hours. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

2. Section 73.240 of the Commission’s rules and regulations is amended to read as follows:

§ 73.240 Multiple ownership.

(a)(1) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 mV/m contours of the existing and proposed stations, computed in accordance with § 73.313; or one or more television broadcast stations and the grant of such license will result in the predicted 1 mV/m contour of the proposed station, computed in accordance with § 73.313, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted 1 mV/m contour, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published.

(2) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other FM broadcast station in the grant of such license would result in a concentration of control of FM broadcasting in a manner inconsistent with the public interest convenience, or necessity. In determining whether there is such a concentration of control, considera-
tion will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven FM broadcast stations.

(b) Paragraphs (a) and (c) of this section are not applicable to noncommercial educational FM stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, direct or indirectly owns, operates or controls the only commercial aural station or stations which place(s) a city-grade signal over the community during daytime hours. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

3. Section 73.636 of the Commission's rules and regulations is amended to read as follows:

§ 73.636 Multiple ownership.

(a)(1) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684; or one or more standard broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of license of one of the standard broadcast stations, or will result in the predicted or measured 2 mV/m groundwave contour(s) of the standard broadcast station(s), computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of the proposed station, or one or more FM broadcast
stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of license of one of the FM broadcast stations, or will result in the predicted 1 mV/m contour(s) of the FM broadcast station(s), computed in accordance with § 73.313, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the Grade A contour, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band.

(b) Paragraphs (a) and (c) of this section are not applicable to noncommercial educational television stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station which places a city-grade signal over the community. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.