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ANTITRUST DEVELOPMENTS IN THE MEDIA AND ENTERTAINMENT INDUSTRIES

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The media and entertainment industries have continued to face antitrust issues as industry participants react to various pressures resulting from technological changes, such as the distribution power of the Internet, as well as the erosion of profits due to old-fashioned head-on competition. As media and entertainment companies devise solutions to their business problems, both antitrust enforcement agencies and private plaintiffs have raised antitrust concerns. Some of these solutions have turned out to be efficient conduct that tends to enhance competition; others have proved to be more problematic.

The Impact of FCC Ownership Rules on Antitrust Enforcement

Much of the recent policy debate on competition in the entertainment and media industry has centered on the highly contested changes the FCC made to the media ownership rules in June 2003.[1] Predictably, the rule changes provoked a strong political reaction. Notwithstanding the political consternation, the rule changes do not alter the antitrust scrutiny that the antitrust enforcement agencies will impose on transactions and conduct in the industry.[2] The jurisdiction of the Antitrust Division of the Department of Justice, the FTC and state antitrust agencies are unaffected by the proposed rule changes and they, as well as the FCC, continue to subject transactions and conduct to the regular antitrust scrutiny.

The FCC made the following changes:

Nation-wide Vertical Restriction: The FCC modified its National TV Ownership Rule. This rule limits the number of television stations a network may own nation-wide. The old rule permitted a network's stations to reach no more than 35% of the total number of TV households in the country, irrespective of the level of competition nation-wide or in the local markets. The FCC increased the limit to 45%.

1 2002 Biennial Regulatory Review, 68 FR 46,286 (Aug. 5, 2003).

2 The FCC rules are of course designed to protect not only competition but also other important social and economic goals, such localism and diversity of voices.

Nation-wide Horizontal Restriction: By contrast, the FCC retained its Dual Network Ownership Rule without any changes. This rule prohibits a horizontal merger among any of the top four national television networks (ABC, CBS, FOX, and NBC).

Local Horizontal Restrictions: The FCC modified its Local TV Multiple Ownership Rule by increasing the number of television stations a company may own in a single geographic market. The exact number depends on how many television stations are in the relevant geographic market: if there are five or more, a company may own two stations; if there are 18 or more, a company may own three stations.

Local Radio Ownership Rule: This rule limits the number of radio stations a company may own in a single market. The number now varies from as many as eight radio stations in markets with 45 or more radio stations, to as few as five radio stations in markets with 14 or fewer stations.

Cross-Media or Portfolio Restrictions: The FCC has modified its old rules concerning broadcast-newspaper cross-ownership and radio-television cross-ownership ("Cross-Media Ownership Rule"), regulating the extent to which a company may own television stations, radio stations and daily newspapers in a single market. It is a complex rule that prohibits the cross-ownership of TV stations, radio stations and daily newspapers in markets that have three or fewer television stations. In markets with four to eight television stations, the new rule permits a company to own either: a daily newspaper, one TV station, and half the number of radio stations permitted for that market (by the Local Radio Ownership Rule); or a daily newspaper, and as many radio stations as are permitted for that market, but no television stations; or two television stations and as many radio stations as are permitted for that market, but no daily newspapers. In markets with nine or more television stations, the FCC has eliminated its cross-ownership ban: in such a market, a company may now own daily newspapers, television stations and radio stations.

The rule changes have been contentious, and the future of the new rules is far from certain. Legislators, consumers groups and industry participants have voiced concerns, and many petitions for judicial review of various parts of the new rules have been filed. On August 19, the Judicial Panel on Multidistrict Litigation consolidated all of the petitions in the United States Court of Appeals for the Third Circuit. Importantly, on September 3, the Third Circuit stayed the effective date of the FCC's new ownership rules, ordering that the prior ownership rules remain in effect pending the outcome of the various appeals.[3]

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[3] *Prometheus Radio Project v. FCC*, No. 03-03-3388, 2003 WL 22052896, at *1 (3rd Cir. Sept. 3, 2003).

Further, steps have been taken in the Senate and the House of Representatives to roll back the 45% to 35%, and members of the House and Senate are expected to draft a combined bill later this year to override the FCC's action and restore the 35% cap.[4]

The heated controversy over the 45% cap on nation-wide viewership by a single broadcast network also reflects that the dispute over the new rules has little to do with antitrust concerns. The cap on nation-wide station ownership restricts a network's ability to vertically integrate with stations in the local markets. Traditionally, antitrust policy has favored vertical integration as an efficient, cost-effective organizational structure, particularly where there are other competitors who are vertically integrated as well. In light of the express rule prohibiting a merger among the four major broadcast networks, it would seem that the 35% cap, whatever political or populist goals it may address, serves little if any competitive purpose not already protected by the by the antitrust laws. Indeed, the FCC observed that the "national ownership cap probably restricts the full transition to the least costly way for organizing transactions between television networks and local television stations." [5] The FCC also observed that "the Commission's transaction cost economic framework identifies the relevant policy trade-off, namely the incremental social benefit of local programming viewed as a component of the Commission's localism policy goal versus the increased social and private costs of inefficient contracting."[6]

The 35% cap is not the only rule change, and there are other changes that lift the restriction on certain transactions that may turn out to raise antitrust issues. The new rules do not provide any antitrust immunity for these transactions and the regulatory agencies will continue to review each transaction for substantive antitrust concerns. If these transactions, which are made possible only as a result of the new rules, raise antitrust issues, we would expect the regulatory agencies to review and scrutinize them just like any other transaction in any other industry, very few of which have any express restrictions on industry structure. The ultimate fate of the new rules, whether modified or vacated by the Congress or the courts, does not change the antitrust enforcement policy or procedure.

Cooperation Between Direct Rivals: The Three Tenors Case

With an increasing number of firms turning to joint ventures as alternatives to traditional mergers, review of these arrangements has been identified as a priority for U.S.

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4 *The House of Representative Blocks FCC Media Rule*, 15 No. 6 Andrews Ent. Indus. Litig. Rep. 15 (August 2003).

5 2002 Biennial Regulatory Review, at ¶ 368.

6 *Id*.

antitrust authorities.[7] In reviewing one such venture in July 2003, the FTC upheld allegations that Polygram Holding, Inc. (a predecessor to Vivendi Universal) illegally agreed with Warner Communications to restrict competition for audio and video releases featuring "The Three Tenors," Luciano Pavarotti, Placido Domingo and Jose Carreras.[8] The decision was the FTC's first chance in an adjudication to address how competitor collaboration should be analyzed following the Supreme Court's decision in *California Dental Ass'n v. Fed. Trade Comm'n*[9] and the Guidelines for Collaboration Among Competitors issued jointly by the FTC and the Antitrust Division in 2000. The decision was seen as an important vehicle for defining the bounds of acceptable competition between rivals, and the Commission's decision is clearly intended to address joint venture analysis and agreements among horizontal competitors beyond the specific facts presented by *The Three Tenors* proceeding itself.

The claims arose from a 1997 agreement in which Polygram and Warner agreed to jointly release the third Three Tenors album in 1998. The two companies also agreed to establish a "moratorium" on the discounting and advertising of the two earlier recordings by the Three Tenors that each company had distributed separately, outside the framework of the joint venture. Polygram had distributed recordings of the Three Tenors 1990 World Cup concert; Warner had distributed recordings of the Three Tenors 1994 World Cup concert. Apparently concerned that the recording of the 1998 concert would be less commercially successful than the prior recordings because of aging singers and duplicated content, the two companies established a moratorium on price discounting and advertising for the earlier releases before, during and after the joint release in 1998.

The FTC alleged that Polygram and Warner engaged in unfair methods of competition in violation of Section 5 of the FTC Act and Section 1 of the Sherman Act. Warner did not contest the claim and entered into a consent decree. Polygram chose to litigate. An administrative law judge ruled against Polygram, which then appealed to the full Commission. Chairman Muris, writing for a unanimous Commission, upheld the ALJ, and found the moratorium, whether categorized as a *per se* unlawful agreement -- or analyzed under a full "rule of reason" review or a truncated "quick look" analysis -- violated the Sherman Act and Section 5. He noted that the joint venture itself had not been challenged but that discounting and advertising were "inherently suspect." Chairman Muris also rejected Polygram's proffered justification that the moratorium prevented each of the two joint venture partners from free-riding on the release of the new recording by diverting sales to the earlier recordings as inadequate. He found, instead, that the restraints had an actual adverse impact on competition

[7] R. Hewit Pate, *Symposium: Milton Handler Annual Antitrust Review – Antitrust Enforcement at the United States Department of Justice: Issues in Merger Investigations and Litigation*, 2003 COLUM. BUS. L. REV. 411, 416.

[8] *In the Matter of Polygram Holding, Inc.*, No. 9298, 2003 WL 21770765 (Jul. 24, 2003).

[9] 526 U.S. 756 (1999).

based upon the effects of similar restraints in similar settings, even though the FTC had offered no evidence on this issue at the administrative trial. In short, the Commission held that the companies' agreement to restrict discounting and promotion on each other's individually-owned releases was simply a form of price fixing extending to products outside the scope of the joint venture itself.

Three Tenors presented the FTC with a relatively simple set of facts to use as a vehicle to articulate its view of certain basic antitrust principles. It is a broad opinion covering the analysis of agreements among competitors, including joint ventures, and, importantly, the allocation of evidentiary burdens in the evaluation of horizontal restraints. The decision shows that horizontal agreements among competitors will continue to receive close scrutiny and that restricting competition among products outside a joint venture rarely can serve as a pro-competitive justification for agreements among joint venture partners.

Alternative Newsweeklies and Market Division

Similarly, the DOJ's highly publicized investigation of New Times Media and Village Voice Media demonstrated the government's determination to enforce the antitrust laws against what it perceives to be horizontal market allocation arrangements, treating them as per se violations, and reacting skeptically to proffered business justifications.

Following a trend of rapid growth for alternative press outlets during the 1990s, newsweekly chains such as New Times and Village Voice Media either acquired or started new papers with the belief that advertisers would be attracted to smaller newsweeklies with unique viewpoints that would enable them to reach younger readerships in localized markets. With 125 alternative newsweeklies currently published throughout the United States, these papers have proved to be highly popular within local markets. Following a widespread pullback in advertising over the past two years, however, market conditions for these newsweeklies have become increasingly difficult, and such expansion less sustainable.

According to the DOJ, New Times Media and Village Voice Media competed head-to-head for readers and advertisers in only two geographic markets: Cleveland and Los Angeles.[10] After negotiations for a merger of the two firms had collapsed, the two firms reopened discussions for a smaller transaction affecting only their Cleveland and Los Angeles publications. The two chains agreed that New Times Media would close down its Los Angeles paper, the *New Times Los Angeles*, which had been losing money for the past five years, in return for an $11 million credit from Village Voice Media. In return, Village Voice Media would close its *Cleveland Free Times,* which had also been losing money, in exchange for a $2 million credit on its side of the transaction. The agreement left the New Times Media's *Cleveland Scene* as the

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10 *See* Department of Justice, Competitive Impact Statement in *United States v. Village Voice Media, LLC*, No. Civ.A. 1:03 CV 0164, 2003 WL 21659092 (N.D. Ohio Feb. 12, 2003).

sole alternative newsweekly in that city, while the Village Voice Media's *L.A. Weekly* remained the dominant alternative paper in Los Angeles.

The agreement led to a DOJ investigation in which it was alleged that the transaction was designed simply to "take out" competitors. The DOJ asserted that the two chains had entered into a naked agreement not to compete against each other by dividing markets in violation of Section 1 of the Sherman Act. The DOJ took the position that the agreement was a *per se* violation, eliminating the burden to show how the agreement would harm consumers, or whether competition from other publications, such as dailies, would justify the restraint on competition among the newsweeklies. Following the investigation, the companies entered into a consent decree according to which each company was required to assist in the opening of new weekly papers in Los Angeles and Cleveland by selling various assets – including the rights to the names of the closed papers – as well as lists of advertisers and equipment. Both companies were also required to pay fines to the states of California and Ohio, which had joined the suit filed by the DOJ.[11]

The case illustrates the government's continuing scrutiny of horizontal market allocation arrangements, notwithstanding deteriorating business conditions, apparent efficiencies and other advertising outlets available locally. The consent decree also signals that the DOJ continues to pursue aggressive remedies to maintain competitive conditions in local media markets – in this case, one that will leave the government with responsibility for overseeing which new entrants are given the assets from the sale to open new papers in Los Angeles and Cleveland.

Revenue Sharing Arrangements for Home Video Rental

Not all creative solutions to remain competitive have failed to pass antitrust muster. The home video rental industry has provided a contentious arena for antitrust litigation, with suits brought by independent video retailers under the Sherman and Cartwright Acts and federal and state price discrimination statutes against Blockbuster, the largest home video chain, its parent company Viacom, and all of the major movie studios. Independent retailers pursued claims in federal court in Texas and in state court in California. Faced with clear declines in their businesses, plaintiffs challenged the "revenue-sharing agreements" between Blockbuster and each of the film studios and claimed that such agreements were not made available to them as the result of a conspiracy among Blockbuster and the studios to put the independents at a disadvantage and, further, that the agreements led to unlawful price discrimination harming their businesses. Plaintiffs' claims have been rejected in both cases. The Texas court directed a verdict for all defendants after a two-week jury trial.[12] That

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11 Department of Justice, *News Release: Justice Department Reaches Settlement With NT Media, LLC, and Village Voice Media, LLC Ending Illegal Market Allocation Agreement*, 2003 WL 176908, at *1 (D.O.J. Jan. 27, 2003).

12 *Cleveland v. Viacom Inc.*, Civ. No. SA-99-CA-783-EP (W.D. Tex. Jul 4, 2002).

dismissal was affirmed by the Fifth Circuit in August 2003.[13] The California state court also dismissed the claims on defendants' summary judgment motion in early 2003.[14]

In the late 1990s, the home video industry was sagging as video retailers were not stocking enough copies of new releases to meet demand and renters, unable to find copies of current titles, had largely exhausted their interest in older library titles. Blockbuster, by far the largest video retailing chain, pushed the film studios to a new business model where, rather than an outright purchase of each copy, it would obtain many more copies of new releases by paying a small amount for each title up front and then splitting the rental revenues with the studio during the rental life of the film. Blockbuster offered these revenue sharing arrangements on a long-term basis, generally three to five years, and, importantly, agreed to output deals, accepting all titles that a studio would release for rental in the home video "window." The studios entered into similar arrangements with other video chains as well. Thus, retailers increased the overall cost and size of their inventories but reduced their costs per copy in the hope that consumer demand would increase once they found more copies of current releases in stock when they wanted to rent them.

This innovative business model, however, entailed far more risk for independent video stores which had little appetite for long-term output obligations, exposing them to losses if they hoped for increases in consumer demand from great copy depth did not materialize. Each studio developed alternative arrangements to meet the needs of the independents, which account for half of the rental business nationally.

The independents claimed that their alternatives were not as good as the Blockbuster deals, and further, that those deals had been part a conspiracy, orchestrated by Blockbuster, Viacom (its parent) and Paramount (its sister corporation), to put the independents at a disadvantage.

These allegations fit more clearly into a theory of price discrimination rather than conspiracy. Because courts uniformly hold that price discrimination claims for damages, however, cannot be certified as class actions, plaintiffs' lawyers try to recast such claims into conspiracy actions more amenable to class treatment.[15] These efforts, as was the case here, typically result in plaintiffs stretching to construct a "conscious parallelism" theory where there is no direct proof of any conspiracy but at most "parallel" behavior that can support an inference of conspiracy. (Here, each studio contract with Blockbuster was claimed to be more advantageous than their deals available for independents.)

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13 *Cleveland v. Viacom Inc.*, No. 02-50811, 2003 WL 22014776 (5th Cir. Aug. 25, 2003).

14 *Eddins v. Redstone*, No. BC 244 270 (Cal. Super. Ct. Feb. 20, 2003) (unpublished opinion).

15 Here, both Texas federal court and California state court, however, denied class certification of the conspiracy claims.

Since *Matsushita*,[16] courts have treated such claims carefully since permitting suits based upon ambiguous circumstantial proof of conspiracy may chill the competitive conduct the antitrust laws are designed to encourage. Here, both the federal and state courts refused to permit these claims to go to jury in the face of very weak circumstantial proof of conspiracy and clearly articulated non-conspiratorial explanations for each defendant's business conduct.

Online Music Distribution: Joint Ventures and Copyright Infringement Actions

Since the mid-1990s, the music industry has waged a fierce battle against Internet technologies that enable computer users to download songs without permission at no cost in violation of the copyrights held by record companies. File-sharing systems such as Napster – and, more recently, KaZaA, Streamcast and Grokster – allow Internet users to bypass record companies, causing steep losses in sales for the music industry. The popularity of such technology is staggering and, for the music industry, daunting. The implications for either digitized entertainment content are ominous.

The music industry has responded to the threat presented by Internet distribution through a combination of price reductions to reduce the incentives for listeners to engage in piracy, business arrangements, in the form of joint ventures to exploit electronic distribution while honoring copyrights, and aggressive litigation strategies aimed at the file-sharing services themselves and at individual users. These strategies have generated antitrust issues.

The major record labels launched the joint ventures during 2002, MusicNet (whose partners included Warner Music, EMI and BMG) and pressplay (a joint venture of Universal Music Group and Sony). As joint ventures among horizontal competitors, the arrangements were scrutinized by the DOJ and the European Commission. The theory of the investigation was that while the structure of the ventures did not by themselves present antitrust problems, there was a risk of "spillover" effects since each record was releasing music in electronic form both through its joint venture and outside its joint venture. The DOJ took no actions based on this theory and, in the interim, the ventures which proved lackluster as an alternative to free file sharing, were restructured for business reasons unrelated to antitrust concerns.

Record companies have also pursued aggressive copyright actions against various file-sharing services beginning with the successful suit against Napster, which resulted in that service shutting down. Recently, however, the large music companies suffered a defeat, when a federal court in California upheld the legality of two of the most popular peer-to-peer file-sharing systems, Grokster and Morpheus.[17] The court dismissed copyright infringement claims filed against two companies that distribute file-sharing software – Streamcast Networks and Grokster. In contrast to Napster, which operated as a central registry, these newer entities allow

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16 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

17 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp.2d 1029 (C.D. Cal. 2003).

users to connect directly with one another and thus do not supervise the peer-to-peer sharing.[18] That decision is being appealed.

Further, the market initiatives and copyright suits pursued by the major record companies provoked antitrust and copyright misuse counterclaims from Sharman Networks, which was one of the companies sued by the major labels.[19] Sharman alleged that the majors restrained trade by refusing to license any copyrighted works to Sharman or companies doing business with Sharman; by making copyrighted content available on less favorable terms than those available to favored distributors such as pressplay and MusicNet; unfairly controlling distribution fees; and pressuring artists not to license their work to file-sharing systems not controlled by the major record labels. This conduct, the counterclaim alleged, unlawfully precluded Sharman from competing effectively in the market for distribution of licensed copyrighted works. These counterclaims were recently dismissed, however, upon the court's finding that Sharman, as a distributor of file-sharing *software* rather than content, could not have been directly harmed by the conduct alleged.

Nevertheless, such counterclaims demonstrate that in its effort to prevent copyright infringement through file-sharing, the recording industry will continue to face potential antitrust issues and counterclaims to infringement claims.

Internet Film Distribution

Faced with an online piracy threat similar to that confronting the music industry, major movie studios have taken steps to offer film distribution over the Internet on an on-demand basis. Five studios – Sony, Paramount, MGM, Warner Bros and Universal – launched a joint venture, MovieLink, which will enable viewers to download recently released films directly to their computers. The DOJ has been reviewing whether the movie studios will use online film distribution agreements as a means to stifle competition by refusing to license movies to other companies that seek to provide online film services, or to fix the prices charged to consumers for the service.

The studios participating in MovieLink have structured their joint venture so that each studio will individually control how much its movies will cost and when they will be released through MovieLink. Additionally, the studios have announced that they will not offer films to MovieLink on an exclusive basis, and several studios have entered into arrangements with

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18 *Id.* at 1037.

19 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, No. CV01-8541-SVW, first amended answer and counterclaims filed (C.D. Cal. Feb. 18, 2003). Earlier, Napster had also received permission to pursue copyright misuse discovery against the record labels, much of which centered on alleged anticompetitive arrangements by the majors. That claim was abandoned when Napster collapsed.

other video-on-demand companies. Such control over pricing and release, coupled with non-exclusivity may counter the concerns of the DOJ.

Developments in Mergers: Echostar, DirecTV and News Corp.

In late 2001, Echostar Communications agreed with Hughes Electronics and its parent, General Motors, to purchase Hughes and its DirecTV subsidiary. One year later, in October 2002, the DOJ sued to enjoin the transaction. The FCC also refused to approve the merger after concluding that the likely harm to competition outweighed any public interest benefits.[20] The DOJ concluded that the transaction would be a merger to monopoly in those areas of the country not served by cable operators and would lead to a 3-to-2 merger in cable areas, seriously threatening price competition and innovation. The DOJ, along with twenty-three states attorneys general, filed suit in federal district court in Washington, D.C. to enjoin the merger.[21] The DOJ asserted that the relevant product market consisted of multichannel video programming distribution ("MVPD"). Together, DirecTV and Echostar are the only providers of direct broadcast satellite services in the U.S. For most households in the United States, a local cable operator provides the only MVPD source aside from Echostar and Hughes. In rural areas without access to cable television, Hughes and Echostar provide the only source for MVPD. Accordingly, the DOJ maintained that for millions of consumers, the merger would lead to a monopoly; and, for millions of others, the merger would result in a duopoly by decreasing the number of MVPD providers from three to two.[22] The DOJ found that the claimed efficiencies from the transactions, and commitments to establish national pricing policies, fell far short of justifying the transaction.

The FCC similarly concluded that the merger, if allowed, would lead to further concentration in the already highly concentrated MVPD market, and mirrored the DOJ analysis that the transaction would lead to monopolies or duopolies in the many geographic markets.

The FCC's denial was therefore not a surprise, as mergers leading to monopoly or duopoly face a presumption of illegality. However, the FCC was faced with a question outside of traditional antitrust considerations – namely, whether a merger of the sole direct broadcast

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20 *In the Matter of Application of Echostar Communications Corp.*, 17 F.C.C.R. 20559 (Oct. 18, 2002). The FCC concluded that the merger would eliminate a current viable competitor in every market in the country, such that each U.S. household would effectively face either a monopoly or a duopoly. The denial marked the first instance since the 1970's that the FCC blocked a deal. The FCC reviews such transactions to determine whether they will serve the public interest; the DOJ's mandate is to decide whether a merger is likely to substantially lessen competition in violation of Section 7 of the Clayton Act.

21 Complaint, *United States v. Echostar Comm'n Corp.*, 1:02 CV02138 (D.D.C. 2002), *available at* http://www.usdoj.gov/atr/cases/f200400/200409htm.

22 *Id*.

satellite providers should be permitted in order to allow for the creation of a viable competitor against the dominant cable operators, which for a long time had local monopolies. The DOJ and the FTC routinely have taken the position that efficiencies almost never justify a merger to monopoly or near monopoly.[23] The FCC dealt with the issue on the facts.

The FCC rejected the efficiency justification because the applicants failed to persuade it that the capacity needed to enhance the competitiveness of direct broadcast satellite against cable could be obtained only through a merger. The FCC explained that improvements in digital compression and in other technologies could provide direct broadcast satellite operators with the opportunity to obtain the capacity they would need to attain their programming objectives. In emphasizing that the merger was not the sole means through which the applicants could achieve their programming goals, the FCC's analysis was consistent with the DOJ and FTC Merger Guidelines.

In contrast to the failed Echostar-DirecTV bid, News Corp.'s pending acquisition of Hughes received comparatively little attention. Vertical integration, which will result from this transaction between a programmer and a direct broadcast satellite operator, typically presents fewer antitrust concerns than horizontal integration. Whereas the transaction, in and of itself, has not received as much antitrust scrutiny, there likely will be public and media scrutiny into whether News Corp.'s conduct will present antitrust concerns after the vertical integration is complete.

Conclusion

Technology will continue to cause dislocation in the media and entertainment industry. As industry participants develop new business tactics, distribution arrangements, and mergers or alliances in the face of the changes in the marketplace, they will continue to draw the attention of both regulators and private plaintiffs. Horizontal agreements or mergers among direct competitors will continue to be closely scrutinized. Efficient distribution arrangements and vertical mergers, despite the alleged impact on smaller competitors, will likely be treated with greater tolerance.

[23] U.S. Dep't of Justice and Federal Trade Comm'n, 1992 Horizontal Merger Guidelines § 4 (1992), *available at* http://www.ftc.gov/bc/docs/horizmer.htm.