Media Deal Fever: The Rush for Content Creation and Distribution Assets

Bradley Pierson and Michelle Honor[1]

Changing industry dynamics and consumer preferences, including the emergence of vertically integrated, direct-to-consumer content ("DTC") providers such as Netflix, Hulu, and Amazon's Prime Video, are fundamentally altering the way people consume media content. To adapt to this evolving media landscape and boost their appeal to consumers, advertisers, and licensees like cable and satellite companies, media firms and telecommunications companies are using M&A to expand their offerings and add content to their portfolios. This has led to a flurry of recent M&A activity in the media industry. The Department of Justice Antitrust Division's ("DOJ") probes of these media deals have focused primarily on determining whether the consolidation of content rights and distribution services will harm competition in markets for content licensing and TV advertising, and DOJ has favored the use of structural rather than behavioral remedies to resolve competitive concerns.

I. Horizontal Mergers of Broadcasters

A. *Sinclair/Tribune*

Interest among some media heavyweights in expanding product offerings and securing control of desirable programming has helped drive recent merger activity involving broadcasters. For example, the failed $3.9 billion acquisition of Tribune Media Company by Sinclair Broadcasting Group would have combined two of the largest owners of TV stations in the U.S. to create a single mega broadcasting firm capable of reaching nearly half of all American TV viewers.[2] In addition to expanding Sinclair's broadcasting footprint, the transaction would have transferred valuable content rights to Sinclair, including ownership of the cable network WGA America and the digital multicast network Antenna TV, as well as a minority stake in the TV Food Network.[3] The parties argued that the merger was procompetitive because "[t]he Tribune stations are highly complementary to Sinclair's existing footprint,"[4] and because the transaction would enable Sinclair to build a next-generation broadcasting platform, scale emerging networks, "bolster local news coverage and be a stronger competitor to internet giants like Facebook and Google."[5]

---

[1] Bradley Pierson and Michelle Honor are associates at Skadden, Arps, Slate, Meagher & Flom, LLP.

[2] Kelcee Griffs, *FCC Opens Comment Period On Sinclair-Tribune Merger*, LAW360 (May 22, 2018) ("Under the FCC's media ownership rules, a single broadcaster may reach only 39 percent of U.S. households, but the combined Sinclair-Tribune machine could reach about 59 percent of American TV viewers, even after its planned station spinoffs. That number plummets to 37 percent — right under the cap — after applying FCC 'discounts' such as the UHF discount, Sinclair's April merger amendment shows.").

[3] Press Release, Tribune Media, Sinclair Broadcast Group To Acquire Tribune Media Company For Approximately $3.9 Billion (May 8, 2018).

[4] *Id.*

[5] Cecelia Kang & Sydney Ember, *Sinclair Deal With Tribune Hits Complications in Washington*, N.Y. TIMES (Feb. 27, 2018).

After the public announcement of the deal in May 2017, the DOJ and the Federal Communications Commission ("FCC") both investigated the transaction. The DOJ's probe focused primarily on determining whether the merger would harm competition in certain local regions by unduly concentrating control of TV stations (and thus content transmission) in those areas. The DOJ appeared to be specifically concerned that the transaction would "give Sinclair too much power over television advertising and over licensing deals with cable and satellite companies that retransmit their broadcasts."[6] In an effort to remedy these concerns, Sinclair and the DOJ began to discuss potential structural remedies. By mid-July 2017, several news outlets reported that the two sides were close to an agreement, and that the DOJ was just days away from announcing a consent decree pursuant to which Sinclair would agree to divest roughly twelve TV stations in cities where it and Tribune both owned stations.[7] Before Sinclair and the DOJ could finalize the consent decree, however, the FCC, which also had concerns about the merger's consolidation of TV stations in certain local areas, referred the transaction to an administrative law judge for review, effectively blocking the deal.[8] The transaction fell apart shortly thereafter.

B. *Gray Television/Raycom Media*

The DOJ similarly scrutinized Gray Television's $3.65 billion acquisition of rival broadcaster Raycom Media in 2018. This transaction combined two of the largest owners of top-rated local TV stations and digital assets in the U.S., creating a combined company owning 142 TV stations in 92 markets (including 62 stations ranked first in all-day Nielson ratings in their local markets), that is capable of reaching 24% of U.S. households.[9] The merging parties claimed that the deal combined "highly complementary portfolios" of TV stations and would facilitate Gray's transformation "from a small, regional broadcaster into a leading media company with nationwide scale."[10]

As in its investigation of the failed *Sinclair/Tribune* deal, the DOJ considered whether the *Gray/Raycom* transaction "would eliminate head-to-head competition between" the merging parties in certain local areas and give the combined company the ability to "charge cable and satellite companies higher retransmission fees to carry the combined company's broadcast stations."[11] Specifically, the DOJ expressed concerns that the merger would reduce competition for the licensing of "Big 4" TV network (*i.e.*, NBC, CBS, ABC, and FOX)

---

[6] *Id.*

[7] Kelcee Griffis, *FCC's Sinclair-Tribune Protest Preempted DOJ Approval*, LAW360 (July 17, 2018).

[8] Brent Kendall & John D. McKinnon, *Sinclair's Purchase of Tribune Likely to Win Approval of Justice Department*, WALL ST. J. (Dec. 14, 2017).

[9] Press Release, Gray Television Inc., Gray And Raycom To Combine In A $3.6 Billion Transaction (June 25, 2018) [hereinafter *Gray Press Release*]; Darcey Reddan, *Gray Television, Raycom Agree On $3.65B Media Merger*, LAW360 (June 25, 2018).

[10] *Gray Press Release*, *supra* note 9.

[11] Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures to Resolve Antitrust Concerns in Gray's Merger With Raycom (Dec. 14, 2018).

retransmission content in the nine local markets where Gray and Raycom each owned at least one Big 4 affiliate broadcast TV station.[12]

In its complaint, the DOJ alleged that the licensing of Big 4 TV retransmission content constituted a distinct product market because Big 4 networks carry "unique offerings such as local news, sports, and highly ranked primetime programs," which have unique appeal to viewers, and because multichannel video programming distributors ("MVPDs") "regard Big 4 programming as highly desirable for inclusion in the packages they offer subscribers."[13] Further, the DOJ claimed that "[n]on-Big 4 broadcast stations are typically not close substitutes for viewers of Big 4 stations."[14] By eliminating competition between Gray and Raycom for the licensing of Big 4 programming in these nine markets, the DOJ argued, "the merger would likely give Gray the power to charge MVPDs higher fees for its programming—fees that those companies would likely pass on" to their subscribers.[15] The DOJ also alleged that the merger would enable Gray to charge advertisers higher prices to reach audiences.[16] The DOJ and Gray reached a settlement to resolve these concerns on December 14, 2018, pursuant to which the DOJ approved the deal on the condition that Gray divest Big 4 affiliate stations in the nine local areas where the merging parties owned overlapping Big 4 affiliate stations.[17]

C. ***Nexstar Media/Tribune***

Raising issues similar to those posed by the above transactions, Nexstar Media Group's proposed acquisition of Tribune Media Company will continue to test the DOJ's tolerance for horizontal consolidation in broadcasting. Announced on December 3, 2018, the proposed deal would make Nexstar the largest local TV broadcaster in the U.S., with 213 stations, and arguably give Nexstar excessive power in the markets for broadcast television and local advertising.[18]

Critics of the transaction fear that the deal will lead to increased prices for cable subscribers in markets with Tribune stations,[19] and the Chairman of the House Antitrust Subcommittee, Representative David Cicilline, publicly stated that the merger would "raise the specter of less choice and higher prices" by creating "the largest local television station owner in the country" and "eliminat[ing] direct competition in more than a dozen local

---

[12] Complaint ¶ 3, *United States v. Gray Television, Inc.*, No. 1:18-cv-02951 (D.D.C. Dec. 14, 2018).
[13] *Id.* ¶¶ 16-17.
[14] *Id.* ¶ 18.
[15] *Id.* ¶ 6.
[16] *Id.*
[17] Proposed Final Judgment ¶ IV.A, *United States v. Gray Television, Inc.*, No. 1:18-cv-02951 (D.D.C. Dec. 14, 2018).
[18] Congressional Research Service, Nexstar-Tribune Merger: Potential Competition Issues (2019); *see also* Charlotte Slaiman, *Nexstar-Tribune Merger Threatens Our Public Discourse*, Public Knowledge Blogs (Dec. 10, 2018).
[19] Slaiman, *supra* note 18.

markets."[20] Adding to critics' concerns, Nexstar purportedly shared its plans to increase prices for Tribune content immediately after the merger closes and to implement additional price increases in the future. Nexstar has made an effort to assuage these concerns, however, by offering to divest certain TV stations in order to obtain regulatory approval. Indeed, Nexstar has proposed selling 19 of its local TV stations in 15 overlapping markets to broadcast groups Tegna and E.W. Scripps and is in "active negotiations" to divest two additional stations in Indianapolis, Indiana.[21]

II. Horizontal Merger of Content Creators: *Disney/Fox*

Unlike the mergers described above, which primarily involved consolidations of media *broadcasting* services, The Walt Disney Company's $71.3 billion acquisition of Twenty-First Century Fox joined together two major media content *creators*. Under the terms of the deal, Fox spun off the Fox Broadcasting Network, Fox News Channel, and several other networks and TV stations into a newly listed company.[22] Disney then sought to acquire Fox's film and TV production businesses, as well as FX Networks, National Geographic Partners, Fox's regional sports networks ("RSNs"), and Fox's minority interest in Hulu, thereby giving Disney a controlling 60% stake in the popular streaming service.[23]

Disney claimed that the transaction would benefit consumers because it would "significantly increase Disney's international footprint and expand the content and distribution for its direct-to-consumer ("DTC") offerings," including Hulu, ESPN+, and the new Disney-branded streaming service Disney+, which will launch in late 2019.[24] Specifically, Disney argued that by combining the two companies' complementary content portfolios (*e.g.*, Disney's Marvel and Star Wars universes with Fox's Avatar and X-Men), the deal would enable Disney's DTC content platforms (Disney+, ESPN+) to offer appealing alternatives to incumbent DTC providers like Netflix and Amazon.[25]

The DOJ's probe of the *Disney/Fox* transaction focused primarily on whether Disney's ownership of both ESPN and Fox's RSNs would substantially harm competition for sports

---

[20] Ted Johnson, *Key House Democrat Warns of Mass Newsroom Layoffs With Nexstar's Tribune Acquisition*, VARIETY (Dec. 3, 2018).
[21] Tony Maglio, *Nexstar to Sell 19 TV Stations, Including New York's WPIX, for $1.32 Billion in Cash*, THEWRAP (Mar. 20, 2019).
[22] Press Release, The Walt Disney Company, The Walt Disney Company To Acquire Twenty-First Century Fox, Inc., After Spinoff Of Certain Businesses, For $52.4 Billion In Stock (Dec. 14, 2017).
[23] Matthew Perlman, Disney's Fox Deal To Get Scrutiny, But Will Likely Clear, LAW360 (Dec. 14, 2017) [hereinafter *Disney/Fox Announcement*].
[24] Press Release, The Walt Disney Company, The Walt Disney Company Signs Amended Acquisition Agreement To Acquire Twenty-First Century Fox, Inc., For $71.3 Billion In Cash And Stock (June 20, 2018).
[25] *Disney/Fox Announcement*, *supra* note 23.

programming in the local areas where the RSNs operate.[26] Specifically, the DOJ alleged that the transaction would "likely diminish competition in the negotiation of licenses for cable sports programming with MVPDs" because "[a]fter the merger, an MVPD negotiating with Disney would" have to agree to stepped up licensing fees or else "face the prospect of a dual blackout of ESPN and the local RSN in one or more" areas and suffer the likely resulting subscriber losses.[27] The DOJ argued that this increased leverage "would likely lead to an increase in total licensing fees," which would be passed on to customers of the MVPDs in the form of increased subscription fees.[28] Disney and the DOJ reached a settlement to resolve these concerns on June 27, 2018, pursuant to which Disney agreed to divest 22 of the Fox RSNs in exchange for deal approval. The transaction closed on March 20, 2019.[29]

III. Horizontal Merger of Integrated Content Providers: *Comcast/Sky*

The battle between U.S. media giants Comcast and Twenty-First Century Fox for the majority stake of vertically integrated British broadcasting company Sky illustrates the media industry's intense interest in consolidation throughout all stages of the supply chain.[30] With Comcast's eventual success in becoming Sky's controlling shareholder,[31] the transaction merged the two vertically integrated broadcasters and content producers, combining Comcast's broadcasting, cable television, internet services, telephone services and content production businesses, with Sky's broadcasting services, internet services and content production businesses, including Sky's broadcasting rights to English Premier League games, Formula One races and other sporting events.

While the transaction avoided scrutiny in the U.S. because Sky does not serve customers in the U.S., the European Commission ("EC") did review the transaction. The EC ultimately approved the merger without conditions on June 15, 2018,[32] reasoning that the transaction would lead to only a small increase in Sky's existing share of the markets for the acquisition of TV content and for the wholesale supply of TV channels in Austria, Germany, Ireland, Italy, the U.K., and Spain. Further, the EC determined that Comcast would not have

---

[26] Press Release, U.S. Dep't of Justice, The Walt Disney Company Required to Divest Twenty-Two Regional Sports Networks in Order to Complete Acquisition of Certain Assets from Twenty-First Century Fox (June 27, 2018).

[27] Complaint ¶¶ 23-24, *United States v. Walt Disney Company*, No. 1:18-cv-50800 (S.D.N.Y June 27, 2018).

[28] Complaint ¶ 24, *United States v. Walt Disney Company*, No. 1:18-cv-50800 (S.D.N.Y June 27, 2018).

[29] Final Judgment ¶ IV.A., *United States v. Walt Disney Company*, No. 1:18-cv-50800 (S.D.N.Y June 27, 2018); Erich Schwartzel and Joe Flint, *Disney Closes $71.3 Billion Deal for 21st Century Fox Assets*, WALL ST. J. (Mar. 20, 2019).

[30] Michael J. de la Merced, *U.K. Clears Way for Bidding War Between Comcast and Disney Over Sky*, NEW YORK TIMES (June 5, 2018); *see also* Stu Woo & Ben Dummet, *21st Century Fox to Sell Sky Stake to Comcast*, WALL STREET JOURNAL (Sept. 26, 2018).

[31] Mike Farrell, *Comcast Completes Buy of Majority of Sky Shares*, MULTICHANNEL NEWS (Oct. 9, 2018).

[32] Aoife White, *Comcast Clears EU Antitrust Hurdle for Sky Ahead of Disney Fight*, BLOOMBERG (June 15, 2018).

the economic incentive to prevent or limit Sky's competitors from accessing its films, TV content, or channels because pay-TV distributors would continue to have access to comparable content from other providers. The EC also determined that Sky would not have the incentive to stop purchasing content from Comcast's competitors because doing so would reduce the quality and breadth of Sky's product offerings, leading to subscriber losses.[33] With the EC's blessing, the deal closed in late 2018, highlighting the value that media companies place on consolidation in both content creation and content distribution capabilities.

IV. Vertical Media Transactions: *AT&T/Time Warner*

Interest in securing control of desirable programming is not only driving recent merger activity between competing media conglomerates (*e.g.*, *Comcast/Sky*); it is also prompting vertical merger activity between content distributors and the content creators that supply them. By gaining control of the content delivery supply chain—including the creation, distribution, and licensing of content—MVPDs are hoping to bolster their value proposition and better compete with vertically integrated streaming services like Netflix, Hulu, and Amazon's Prime Video. However, while vertical mergers can generate significant cost savings that may be passed on to consumers in the form of lower prices, they sometimes may also present competitive problems. The DOJ's concerns with vertical integration in the media space are well illustrated by the agency's attempt to block AT&T's acquisition of Time Warner. The acquisition combines AT&T's mobile and fixed telecommunications networks and content distribution services with Time Warner's content production capabilities.[34]

The DOJ's challenge of this transaction marks its first court challenge of a vertical merger in nearly forty years and signals a significant departure from the behavioral remedies that the DOJ used to clear Comcast's acquisition of NBC Universal in 2011.[35] The DOJ alleged that the vertical integration of Time Warner video content, such as the networks HBO, CNN, TNT and TBS, with AT&T's video distribution services, namely DirecTV's satellite TV offerings, would give AT&T undue leverage over competing video distributors. Specifically, the DOJ was concerned that a video distributor negotiating with the combined company would have no choice but to either agree to increased content licensing fees, which would ultimately be passed on to subscribers, or else lose the right to display AT&T's premium content to its customers, also known as a "blackout."[36]

Following a trial, the District Court held that the transaction was not likely to substantially lessen competition. The court rejected the DOJ's contention that the transaction would increase AT&T's bargaining leverage such that it would be able to impose price increases on rival distributors seeking to license its content. The District Court concluded that Time Warner's content is not "must have" because, as the court pointed out, there are some

---

[33] *Id.*; *see also* Press Release, European Comm'n, Mergers: Commission clears Comcast's proposed acquisition of Sky under EU merger rules (June 15, 2018).
[34] Press Release, AT&T Inc., AT&T Completes Acquisition of Time Warner Inc. (June 15, 2018).
[35] Joel Grosberg & Matt Evola, TAKEAWAYS FROM AT&T-TIME WARNER MERGER WIN, LAW360 (Feb. 27, 2018).
[36] *Id.*

content distributors that are successfully operating without Time Warner's networks and related programming. Further, the District Court reasoned that it was not in AT&T's financial interest to "black out" or foreclose rival distributors from licensing its programing because its business model depends on advertising and licensing fees that increase with the number of viewers, and noted that blackouts were contractually impossible here because Time Warner sent letters to distributors irrevocably offering to engage in arbitration for seven years.[37]

At the end of February, a three-judge panel from the U.S. Court of Appeals for the D.C. Circuit upheld the district court's decision.[38] The panel found that the district court rightfully rejected DOJ's assertion that the transaction would give AT&T undue bargaining leverage in negotiations with other video distributors, citing "real-world" evidence that an integrated content programmer and distributor has little economic incentive to withhold its content from other distributors and emphasized that blackouts were no longer contractually possible.[39] Following the D.C. Circuit's decision, the DOJ announced that it does not plan to appeal the decision to the U.S. Supreme Court, thereby ending the agency's initiative to block the merger. While the D.C. Circuit's decision effectively ended the Trump administration's efforts to undo the blockbuster media merger, some speculate that the decision may not have been a total loss for the government because it may have laid the groundwork for future agency challenges of vertical transactions on criteria other than price, including decreased product quality and reduced innovation.[40]

V. Conclusion

The DOJ's actions in the transactions discussed above suggest that the agency is particularly concerned about the dangers of consolidated control of content rights and distribution services. This concern appears to stem from the DOJ's belief that some media content is more valuable than others (*e.g.*, Big 4 programming in *Gray TV/Raycom Media* and sports programming in *Disney/Fox*), and that if one company gains too much control over the delivery of such content (*e.g.*, *Sinclair/Tribune* would have created a company reaching 50% of Americans), then it will have disproportionate leverage over advertisers and rival distributors seeking licensing rights, which will ultimately result in higher subscription fees for consumers. Recently, the DOJ has relied primarily on structural remedies (*e.g.*, divestitures) and has even pursued litigation to resolve its concerns with recent consolidation in the media industry. However, it is unclear whether the agency will change its approach in the wake of its failed attempt to block the *AT&T/Time Warner* merger.

---

[37] Matthew Perlman, 3 TAKEAWAYS FROM JUDGE LEON'S RULING ON TIME WARNER DEAL, LAW360 (June 13, 2018).
[38] Bryan Koenig, AT&T, TIME WARNER'S MERGER WIN STANDS AT DC CIRC., LAW360 (Feb. 26, 2019).
[39] Grosberg & Evola, *supra* note 35.
[40] Koenig, *supra* note 38.