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September 15, 2010

VIA ONLINE SUBMISSIONFederal Trade Commission
Office of the Secretary
Room H-135 (Annex S)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: News Media Workshops - Comment, Project No. P091200

We are pleased to submit these comments on behalf of the Section of Antitrust Law of the American Bar Association (the "Section"). These comments address and oppose proposed antitrust exemptions or immunities for certain concerted activities of news organizations. The views expressed in these comments have been approved by the Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

I. The Commission Should Reject An Antitrust Exemption for the News Industry

The FTC Staff has released a "Discussion Draft" analyzing the future of journalism.¹ In the discussion of possible policy initiatives to allow news organizations to compete more effectively, the FTC staff identifies proposals that were discussed by participants in the hearings. Specifically, there were two proposals for antitrust exemptions to allow news organizations to: (1) agree jointly to erect pay walls so that consumers must pay for access to online content; and (2) agree jointly on a mechanism to require news aggregators and others to pay for the use of online content, perhaps through the use of copyright licenses.² We address only these two proposals and do not comment on the remaining recommendations or any other aspect

¹ Federal Trade Commission, Federal Trade Commission Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism, report released June 15, 2010, available at <http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf>. (hereinafter, "Discussion Draft").

² Discussion Draft at 13-15.

of the Discussion Draft.³ We further note that the Discussion Draft reaches no conclusions about whether an antitrust exemption is necessary.

The Section submits that industry-specific exemptions or immunities from the antitrust laws should be rare and allowed only after thorough consideration, including evaluation of the potential harm to competition and consumer welfare. Because exemptions and immunities sacrifice competition and consumer welfare, they should be authorized only when some countervailing social value significantly outweighs the general presumption in favor of competitive markets. It does not appear the requisite circumstances have been demonstrated to justify an exemption for news organizations.

A. Antitrust Exemptions and Immunities Generally

The Section is inherently skeptical of industry-specific exemptions and immunities, whether created judicially or by statute.⁴ Whether justified or not, such exemptions, by their very definition, have the potential to harm consumer welfare. As the Antitrust Modernization Commission (“AMC”) commented in its report:

Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.⁵

That is not to say that exemptions and immunities are never warranted. To the contrary, an exemption or immunity from the antitrust laws may be appropriate in the presumably rare instances in which it is determined that an important value unrelated to competition, such as free speech, federalism, or national security, would be impeded by competitive forces in the marketplace. Even so, an exemption or

³ We recognize that many of the policy proposals and potential policy recommendations addressed in the Discussion Draft implicate principles of copyright law including, for example, the possibility of federal hot news legislation, statutory limits to fair use, and licensing issues. These comments are not intended to address those separate issues.

⁴ Comments of ABA Section of Antitrust Law on FTC Report Re State Action Doctrine, at 2-3 (May 6, 2005); ABA Antitrust Section Testimony on The Health Insurance Industry Antitrust Enforcement Act of 2009 and the Railroad Antitrust Enforcement Act of 2009; ABA Antitrust Section Comments to the Antitrust Modernization Commission on General Immunities and Exemptions, the Shipping Act Antitrust Exemption, and the McCarran-Ferguson Act; Reports of the ABA Antitrust Section on the Free Market Antitrust Immunity Reform Act of 1999, the Quality Health-Care Coalition Act of 1999, the Antitrust Health Care Advancement Act of 1997, and the Television Improvement Act of 1977 (all available at www.abanet.org/antitrust).

⁵ Antitrust Modernization Comm’n Report and Recommendations 350 (2007).

immunity should only be allowed if rigorous analysis demonstrates that the benefits of advancing that value significantly outweigh the harm to competition.

B. The Costs and Benefits of Antitrust Exemptions

The benefits associated with statutory antitrust exemptions and immunities typically inure to small, concentrated interest groups. Industries or groups of firms covered by a statutory exemption or immunity receive substantial benefits, and the benefits tend to accrue proportionally to all competitors within the favored industry or interest group.

Unlike the benefits, however, the costs associated with statutory exemptions and immunities are diffuse. Costs imposed by antitrust exemptions and immunities are usually passed through to individual consumers in the form of higher prices, lower output, reduced quality or reduced innovation. And these costs tend to be spread among vast numbers of consumers. Therefore, in most cases no single consumer or group of consumers is adversely affected enough to initiate effective opposition to the exemption or immunity.

C. The Standard for Evaluating Exemptions and Immunities

Congressional decisions whether to enact exemption or immunities from the antitrust issues should be based on a rigorous and consistent application of the following basic principles.

First, Congress should grant antitrust exemptions and immunities rarely and only after thorough consideration of the impact of the proposed exemption or immunity on consumer welfare. Congress should start with the presumption that the exemption or immunity will harm competition and consumer welfare,⁶ and the claimed non-competition benefits of the proposal should be evaluated against that injury.

Second, Congress should only grant those exemptions and immunities that are drafted narrowly, so that competition is reduced to the minimum extent necessary to achieve the intended goal. In addition, if Congress determines that an exemption or immunity is appropriate, it should, where feasible, prefer exemptions and immunities that restrict antitrust remedies only, rather than ones that entirely shield conduct from antitrust scrutiny.⁷

Third, Congress should enact antitrust exemptions or immunities only when the proposed exemption or immunity achieves a congressional goal (e.g., national

⁶ See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 [need full cite first time] (“The Sherman Act reflects a legislative judgment that, ultimately, competition will produce not only lower prices but also better goods and services.”).

⁷ The National Cooperative Research Act/National Cooperative Research and Production Act, 15 U.S.C. §§ 4301-4306, and the Standards Development Organization Act of 2004, 15 U.S.C. § 4301, provide useful examples of this.

security) that significantly outweighs the aims of the antitrust laws in a particular situation.⁸

Fourth, the proponent of the exemption or immunity should bear the burden of justifying enactment, given the harm to competition and consumer welfare that would result from it.⁹

Finally, Congress should include within any exemption a reasonable sunset provision.

D. Applying the Standards to an Exemption for News Organizations

Applying the standards described above, the Commission should reject an antitrust exemption for the activities of news organizations described in the Discussion Draft.

First, rather than outlining a clear need for an exemption, the Discussion Draft reports conflicting views on whether such an exemption is necessary. The Discussion Draft does not articulate what national policy goal is in play that would significantly outweigh the benefits of competition. Based on our review of the Discussion Draft, it appears that no rigorous analysis of the impact on consumer welfare of the proposed exemption has been completed.

Second, the exemptions under discussion are overbroad. We note that the proposals recorded in the Discussion Draft are more narrowly drafted than, for example, a broad exemption for all news organizations.¹⁰ However, the discussed exemption still sweeps too broadly. In particular, there is no consideration of whether newspapers of different sizes or business models may need this exemption. If, for example, in this economic environment smaller community newspapers continue to prosper, there is no need to extend the exemption to them.

Third, there is no reason to believe that even narrowly tailored exemptions would address the fundamental problem here. For example, a tremendous amount of advertising has left newspapers for other sources—the Discussion Draft states that

⁸ However, the judgment that an immunity is beneficial for the simple fact that it reduces competition in a particular market or protects a particular competitor is not sufficient, in the Section's view, to justify it.

⁹ This allocation of burden is consistent with the antitrust laws being the "Magna Carta of free enterprise," ensures that competition is not swallowed in an avalanche of exemptions and immunities, and is consistent with the judicial treatment of exemptions and immunities in litigation. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); see also *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994) (proponent of state action immunity bears burden of proving application of immunity). It is also consistent with judicial analysis of exemptions and immunities outside of the realm of the antitrust laws; for example, a person claiming a tax exemption bears the burden to prove his entitlement and any reasonable doubt must be resolved against the exemption and in favor of the taxing power.

¹⁰ The proposal, of course, could be limited further to provide only for a limitation on damages, and to insert a sunset provision. However, these additions would not cure the defects identified below.

revenues from advertising have dropped 45% since 2000.¹¹ The Discussion Draft also questions whether online advertising or other sources will recapture these lost revenues.¹² There is no evidence or analysis to conclude that allowing newspapers collectively to decide what to charge readers when they access online content is going to solve this problem. It would appear contrary to the purposes of the antitrust laws to allow news organizations to collectively agree on charges paid by ultimate consumers, the readers.

Likewise, it appears that no cost-benefit analysis has been provided or considered. Unless the proponents of the exemption carry their burden of demonstrating that the benefits of the exemption clearly and significantly outweigh the harm to consumer welfare, no exemption should be recommended. Given the apparent transitional period that news organizations are facing, any exemption would be premature. Perhaps newspapers will go completely online and will charge for their content successfully--without the need to act collectively. Whether this strategy will be successful remains to be seen. Interfering with free market forces during this transitional period could have significant unintended consequences.

At the same time, it is clear that there is room for news organizations to operate within the antitrust laws. To the extent that there are questions about a particular collaboration, there are other avenues short of an exemption that news organizations can, and indeed have, pursued. The Discussion Draft reports that news organizations have obtained business review letters from the Department of Justice on at least two occasions. These business review letters suggest that certain collaborations described in the Discussion Draft would not violate the antitrust laws. If collaborative activities would not otherwise violate the antitrust laws, it is unwise to grant them an antitrust exemption that could have unintended consequences that are detrimental to consumers.

Particularly when considering whether to add an exemption, it is important to undertake a rigorous analysis and only add an exemption when necessary. Once on the books, antitrust exemptions often live a very long life and are extremely difficult, if not impossible, to remove.

II. Conclusion

The antitrust laws are a crucial safeguards of free markets. Exemptions and immunities come at significant cost to the free market system and impose significant costs on consumers. They should not be granted without careful consideration of the specific facts, and without acknowledging and accounting for the cost of the exemptions and immunities in terms of sacrificed consumer welfare.

We urge the Commission not merely to be silent on the issue of granting an exemption, but rather to explicitly reject the idea of an antitrust exemption based on the current record. The Antitrust Section believes that Congress should not grant any

¹¹ Discussion Draft at 2

¹² *Id.* at 2-3.

exemption or immunity without consultation with and evaluation by the Federal Trade Commission and the Department of Justice. The enforcement agencies possess the institutional expertise to assess the economic impacts of exemptions and immunities from the antitrust laws, and are likely to provide valuable insight to the analysis. The Commission's views should be given substantial weight, and we urge the Commission to express them.

If you have any questions regarding these comments, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Allan Van Fleet", with a stylized flourish at the end.

Allan Van Fleet
Chair, Section of Antitrust Law