American Bar Association
Section of Antitrust Law

Report of the Section of Antitrust Law of the American Bar Association on the Proposed Television Improvement Act of 1997

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These views are expressed on behalf of the Section of Antitrust Law of the American Bar Association. They have not been approved by the Board of Governors or House of Delegates of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

Introduction

On April 9, 1997, Senators Brownback, Lieberman, Dewine, and Kohl introduced S. 539, the Television Improvement Act of 1997. This bill would provide an exemption from the antitrust laws for

> joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of developing and disseminating voluntary guidelines designed
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> (1) to alleviate the negative impact of telecast material such as, but not limited to, violence, sexual content, criminal behavior, or profane language; or
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> (2) to promote telecast material that is educational, informational, or otherwise beneficial to the development of children.

The exemption would not apply

> to any joint discussion, consideration, review, action, or agreement which
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> (1) results in a boycott of any person; or
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> (2) concerns the purchase or sale of advertising, including (without limitation) restrictions on the number of products that may be advertised in a commercial, the number of times a program may be interrupted for commercials, and the number of consecutive commercials permitted within each interruption.

Executive Summary

The Senate is considering a bill that would provide an exemption from the antitrust laws for joint action by persons in the television industry "for the purpose of developing and disseminating voluntary guidelines designed . . . to alleviate the negative effect of" certain types of programming, or "to promote telecast material that is educational, informational, or otherwise beneficial to the development of children." A similar exemption in the Television Program Improvement Act of 1990 ("1990 Act"), 47 U.S.C. § 303c, for joint action "for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material" expired in 1993.

The American Bar Association Section of Antitrust Law (the "Section") disfavors antitrust exemptions directed to narrow industry categories. The antitrust laws are designed to provide generally applicable rules for the operation of our free enterprise system. Narrow exemptions are rarely justified because they are either not necessary to eliminate the risk of antitrust liability, or are inappropriate to the extent the conduct they would permit is anticompetitive or does not reflect a strong contrary goal that cannot be met in a manner consistent with antitrust policy.

There is no history of government enforcement action or private litigation suggesting a likely challenge to conduct of the limited type that is within the stated purpose of the exemption. There is a long history of development and dissemination of voluntary guidelines in the television industry, but no precedent establishing that conduct of the type that would be exempt is unlawful or likely to be deterred because it will be subject to substantial antitrust challenge. The only direct statement by the Antitrust Division on enforcement policy shows that the government recognizes conduct of this type to be analogous to legitimate standard setting activities in other industries and not likely, on balance, to be anticompetitive.

Under these circumstances, the antitrust exemption proposed in S. 539 is not necessary for the accomplishment of the goals set forth in the bill, and there is ample evidence in case law and the enforcement policy of the Antitrust Division of the

Department of Justice that the conduct that would be exempted, if properly limited, does not violate the antitrust laws. The legislation would, however, reflect the type of micro-management of the antitrust laws and exemption which the Section believes to be imprudent. In the case of 539 it is particularly inappropriate because the statute is framed in a manner which ignores competition concerns and could immunize conduct which deliberately or inadvertently raises serious antitrust issues. Accordingly, the Section urges that S. 539 be rejected.

Discussion

As the findings contained in section 2 of S. 539 state, television is undoubtedly "a pervasive presence in the daily lives of Americans," and it plainly "plays a particularly significant role in the lives of children." In recent years, there have been various legislative and private efforts to combat what many believe to be the unacceptably high level of violence in television programming, and similar concerns about sexual content and other forms of programming not suitable for viewers of all ages. The public opinion polls cited in the findings on which S. 539 is based show that the content of television programming is an important concern for a large majority of the American public.

The current bill is at least the second congressional attempt to address the issue of voluntary guidelines on television programming content. The 1990 Act provided a three year exemption for joint action directed to alleviating the effects of violence on television. The exemption proposed in S. 539 appears to be modeled on the 1990 Act, although there are important differences in the language of the proposed new exemption, and the exemption that would be established by S. 539 would be permanent. The 1990 Act exempted

> joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material.

47 U.S.C. § 303c(c). As would be the case under S. 539, the exemption did not apply to "any joint discussion, consideration, review, action, or agreement which results in a boycott of any person." 47 U.S.C. § 303c(d)(1). The exemption provided by the 1990 Act was available in the case of action "engaged in only during the 3-year period beginning on December 1, 1990."

The 1990 Act was not based on a conclusion that conduct falling within the scope of the exemption would violate the antitrust laws in the absence of an exemption. To the contrary, the House Committee on the Judiciary made the following observations in its favorable report on the bill that led to the 1990 Act.

> The committee does not accept the argument that the antitrust laws now prohibit all joint activities contemplated by the legislation. Under existing law, many joint activities among competitors are not viewed as harmful to competition. Thus, trade associations and industry-wide groups have met for years in order to discuss common problems, to develop standards to improve the safety of the products and even to conduct joint research and development. Because such activities are generally not aimed at restricting competition or decreasing output, but instead are directed at improving competitiveness and efficiencies, the antitrust laws are not needed to restore the operation of a free market economy.

House Report No. 101-123 at 8. The House committee also expressed agreement with the position that would later be taken by the Antitrust Division on the question of whether the antitrust analysis employed in a dispute between the United States and the National Association of Broadcasters in 1982 should be viewed as an impediment to joint action of the type covered by the exemption.

> The committee does not believe that the decision in *U.S. v. National Association of Broadcasters* can be read as prohibiting all joint voluntary agreements in the broadcast industry. In *NAB*, the district court struck down participation by broadcasters in a voluntary code in which there was industry-wide adherence to a rule prohibiting multiple products from being advertised during a single commercial. The court found the multiple product standard to be an artificial device aimed at enhancing the demand for commercial time and/or limiting the supply of commercial time available. Finding the effect to be similar to a tying arrangement, the court found the practice to be a *per se* violation of the antitrust laws. This particular rule was anti-competitive. Other parts of the NAB code were not viewed as anti-competitive, however, and were not invalidated. The committee does not believe that joint,

> voluntary agreements that are not anti-competitive in their effect, and that do not give rise to ancillary restraints, raise antitrust problems.

Id. Although it recognized that the conduct to be exempted was not likely to be held illegal, the committee believed a limited exemption could be justified because of the inaccurate perception of some members of the industry that joint action directed to the development of voluntary guidelines was likely to be subject to antitrust condemnation.

> [T]he committee acknowledges that the antitrust laws are still perceived by some as an impediment to persons in the television industry developing joint voluntary guidelines. Because of its interest in protecting impressionable viewers from abuse, the committee is willing to approve the *limited, temporary*, exemption in H.R. 1391 so that if persons in the television industry wish to voluntarily develop guidelines to reduce the negative impact of television violence, they will not be dissuaded from doing so by possible fears about antitrust exposure.

Id. There have been no recent developments that call the substance of the House committee's antitrust analysis into question. Joint action toward the development and dissemination of voluntary standards unaccompanied by any coercive activity or boycott is not likely to present serious antitrust concerns.

The House committee report on the 1990 legislation referred to a case brought by the Antitrust Division against the National Association of Broadcasters, and found the case distinguishable. The exception provided in subsection 4(b)(2) of the present bill specifically excludes from the new exemption the conduct that led the Department of Justice to challenge certain National Association of Broadcasters advertising guidelines in *United States v. National Ass'n of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982) ("*NAB*"). In the *NAB* case, the government challenged three sets of standards in the Association's guidelines. The first limited "the amount of commercial material which may be broadcast each hour," the second "set a maximum limit on the number of commercial interruptions per program as well as on the number of consecutive announcements per interruption," and the third "prohibit[ed] the advertising of two or more products of services in a single commercial if that commercial is less than sixty seconds in duration." 536 F. Supp. at 153-54 (citations omitted). On the parties' cross-motions for summary judgment, the court held the third restriction to be a *per se* illegal

violation of section 1 of the Sherman Act, considering it "an artificial device to enhance the demand for commercial time, as a means to limit the supply of such time, or as a practice akin to a tying arrangement." 536 F. Supp. at 160 (citations omitted). The other challenged standards were held to be subject to analysis under the Rule of Reason, summary judgment was denied, and a trial was held necessary to determine whether the standards would ultimately be held unlawful. 536 F. Supp. at 154-59. A short time later, the parties settled. *See United States v. National Ass'n of Broadcasters*, 553 F. Supp. 621 (D.D.C. 1982). We agree with the House committee that the *NAB* case does not present an obstacle for the development of voluntary guidelines such as those addressed in S. 539. The *NAB* decision was based on the supply-reducing effect of the rule restricting the advertising of multiple products. The dissemination of voluntary guidelines has no similar effect on supply, and no other anticompetitive impact likely to produce a finding of illegality.

In a 1994 business review letter, the Antitrust Division considered the applicability of the analysis employed in the *NAB* case to action of the type that would be exempted by S. 539. Following the expiration of the three year exemption provided by the 1990 Act, the Association of Independent Television Stations ("INTV") requested a statement by the Division of its enforcement intentions with respect to a program of voluntary guidelines established by INTV in June 1993, six months before the expiration of the exemption. INTV developed a series of policies directed to the portrayal of violence in entertainment programming, and distributed the policies to its members. In addition, INTV developed a series of parental advisories, which it disseminated and encouraged the use of in connection with programs containing violent material that might be objectionable to some viewers. INTV had no power to compel compliance with its policies, and it did not condition membership in the organization on compliance. Letter of November 18, 1993 from James B. Hedlund to Hon. Anne K. Bingaman.

In a business review letter advising INTV that it had no present intention to challenge the INTV program, the Antitrust Division expressed the view that "INTV's

proposed activities seem clearly distinguishable from those challenged by the Department of Justice in [*NAB*]." Letter of January 25, 1994 from Hon. Anne K. Bingaman to James B. Hedlund -- n.1. The letter explained that

> The government's basic contention in *NAB* was that the challenged commercial advertising restrictions had as their actual purpose and effect the artificial manipulation of the supply of commercial television time, with the end that the price of time was raised, to the detriment of both advertisers and the ultimate consumers of the products promoted on the air. The Department does not view the *NAB* case as prohibiting the kind of activities that the Television Program Improvement Act was enacted to encourage.

Id.

The business review letter also classified the voluntary activity undertaken by INTV as consistent with other forms of association behavior that are not considered to be illegal per se, and unlikely to be found to be anticompetitive.

> INTV's activities may be likened to traditional industry standard-setting efforts that do not necessarily restrain competition and may have significant procompetitive benefits. Absent unequivocal anticompetitive purpose or effect, product standard setting is evaluated under an antitrust rule of reason that balances any potential anticompetitive effects against procompetitive benefits. The measures you describe INTV and the independent television stations having taken since the passage of the Television Program Improvement Act and further comparable cooperative activities are in the Department's view unlikely to be anticompetitive. They are not intended to, nor can we predict that they would have the effect of, significantly decreasing competition among broadcasters, cable operators or other television media, among program producers, or among advertisers.

Id. at --.

The Division specifically recognized the potential benefits of programs such as that undertaken by INTV.

> It is possible that INTV's efforts to promote voluntary television violence guidelines will have substantial procompetitive effects. Such guidelines could disseminate valuable information on program content to both advertisers and television viewers. Accurate information can enhance the demand for, and increase the output of, the industry's products. For example, viewers, including particularly parents, may react to uncertainty about the nature of violence in television programming by reducing television viewing in their homes. Violent television programming is seen by many as distasteful or harmful,

> and reasonable voluntary industry efforts to alleviate such concerns can be likened to reasonable safety standards that are procompetitive in that they reduce consumer risk and thereby increase the demand for an industry's products. For the foregoing reasons, the Department does not believe that continuance of the activities by INTV and the independent television stations that have been exempted from the antitrust laws by the Television Program Improvement Act -- including measures already taken or the proposed comparable cooperative measures that may be taken in the future -- warrant antitrust concern.

Id. See also Consolidated Metal Prod., Inc. v. American Petr. Inst., 846 F.2d 284, 296 n.46 (5th Cir. 1988) ("Because product information reduces uncertainty, it both increases consumer demand for the product and encourages producers to improve their products."). We believe the Department's analysis in the INTV business review letter is sound, and is consistent with the manner in which the courts have addressed analogous joint action in other cases.

"[I]t has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations." *Consolidated Metal Prod.*, 846 F.2d at 294. As the Department of Justice observed in the INTV business review letter, the use of standards as a means of communicating information about products often serves the procompetitive goal of enabling consumers to make informed decisions, thus increasing demand. *See Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126, 129-30 (6th Cir. 1980). Guidelines, standards, and certification programs are procompetitive because they satisfy an important need: "Product information is crucial to a competitive market." *Consolidated Metal Prod.*, 846 F.2d at 296. Because of these competition-enhancing effects, "when a trade association provides information . . . but does not constrain others to follow its recommendations, it does not violate the antitrust laws." *Schachar v. American Acad. Of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989), *citing Consolidated Metal Products, Inc. v. American Petr. Inst.*, 846 F.2d 284 (5th Cir. 1988). *See also Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486-89 (1st Cir. 1988) (standards valid absent "special circumstances, showing, in an individual case, that the standard setting at issue serves no legitimate purpose, or that it is unnecessarily harmful."), *citing George R. Whitten, Jr.,*

Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 558 (1st Cir. 1974). The conduct that is the subject of the proposed exemption in S. 539 falls easily within these basic rules recognizing the procompetitive effects of standards and guidelines and the absence of serious antitrust concern associated with voluntary actions that serve to increase the base of information available to consumers and thus to promote competition.

The findings contained in S. 539 demonstrate that the courts and the enforcement agencies have had substantial experience with action of the type that would be exempted by the bill. It is therefore reasonable to conclude that the Antitrust Division's enforcement policy as expressed in the INTV business review letter rests on a solid theoretical footing and can be expected to be followed in the future. The findings mention, for example, the longstanding Television Code of the National Association of Broadcasters, one of the more significant voluntary private efforts to address the questions presented by content issues in television programming. As the findings point out, the Code's "programming standards were never found to have violated any antitrust law,"[1] and were not challenged in the *NAB* case. The findings also mention the 1992 agreement by the broadcast television industry to adopt voluntary guidelines intended to "proscribe gratuitous or excessive portrayals of violence," and the 1996 commitment to the development of a comprehensive rating system.

The INTV business review letter also serves as a reminder that industry participants, who are concerned about the possibility of antitrust challenges to activity directed to the development and dissemination of voluntary guidelines, have the opportunity to request that the Justice Department review their planned activities under the business review procedure. *See* 28 C.F.R. § 50.6 (1996). The availability of this

[1] The findings note that the Code was abandoned after the *NAB* case. To the extent the abandonment of the Code was linked to fears of antitrust exposure, subsequent events have demonstrated that those fears are unfounded and do not demonstrate the need for an exemption. In the INTV business review letter, the Department of Justice has publicly distinguished the advertising restraints in issue in *NAB* from the programming guidelines addressed in S. 539. The House committee considering the 1990 Act also reached the conclusion that voluntary programming guidelines are entirely different from the supply restrictions challenged in *NAB*.

procedure, and the existing law establishing the legality of activity directed to the dissemination of voluntary guidelines, serve to eliminate the fear of unwarranted antitrust litigation.

The Section has frequently opposed the enactment of narrow, industry-specific exemptions from the antitrust laws. We believe that the efficient operation of the national economic system is best served by the general applicability of the antitrust laws. In view of the absence of any real need for the legislation, without regard for the presence or absence of any need for the standards sought, the problems addressed in S. 539 do not present a circumstance in which an industry specific exemption can be justified.

There are also features in the language of S. 539 that present concerns independent of the general issues presented by industry specific exemptions. The first is a potentially significant difference between the language of the 1990 Act and S. 539. The exemption contained in the 1990 Act applied to joint action "for the purpose of, *and limited to*, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material." 47 U.S.C. § 303c(c) (emphasis added). The exemption proposed in S. 539 does not include the phrase "and limited to." There is nothing of which we are aware in the history of the 1990 Act or other factors that suggests that the deletion of this limiting language is appropriate. The limiting language could be important in making the exemption unavailable to persons who engage in conduct that goes beyond the development and dissemination of voluntary guidelines.

The focus of the proposed exemption on conduct that is undertaken "for the purpose of" specified results is also troublesome. The reference to action "for the purpose of" the enumerated goals tends to take the focus of the exemption away from a careful evaluation of the effects of the specific conduct in issue and direct it to the subjective intent of the actors. Action taken "for the purpose of" the development and dissemination of voluntary guidelines might include more than the development and dissemination activity itself, and this can be both unnecessary and pernicious. Clearly,

there are circumstances where properly motivated conduct (as defined by S. 539) can have a wide variety of anticompetitive effects. In large measure, S. 539 also makes irrelevant the means chosen and the availability of less anticompetitive or coercive alternatives. The precedents described above give ample comfort that any challenge to described conduct is unlikely. If, however, there is a need to review actions, the traditional rule of reason inquiry is appropriate and the subjective issue of intent should not be the sole determinant of legality.

There is no basis for a conclusion that the traditional antitrust analysis under the Rule of Reason is more difficult to apply or less forgiving in the context of the proposed exemption than in the thousands of other industry contexts in which analogous judgments must be made. Nor is there a solid case to be made that the absence of an exemption is deterring desirable action at a net cost to society. Despite the lack of an exemption, the industry has taken several steps to address the problems addressed in the bill. To the extent the goals of the S. 539 have not been met, there is no reason to conclude that a reasonably founded fear of antitrust liability or litigation is the cause.