UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

NEWS MEDIA WORKSHOP COMMENT — PROJECT No. P091200

COMMENT SUBMITTED BY BROUILLETTE & PARTNERS LLP

The comment below is being submitted by Brouillette & Partners LLP a boutique law firm located in *Montréal*, *Québec*, Canada founded by attorney and engineer Robert Brouillette. The firm offers legal services to start-up companies developing technology. (**www.brouillette.ca**.). The comment reflects our views, not those of any of our clients. Daniel Martin Bellemare, attorney at law, member of the *Québec* and Vermont Bar, has accepted to submit a comment on our behalf *pro bono*. Mr. Bellemare shares a business address with us.

Our comment centers on a specific issue raised in the Commission's Notice, namely, whether certain types of joint horizontal actions involving news organizations should be exempt from antitrust laws. We are thankful to the Commission for having taken the initiative to organize and sponsor this event. We also appreciate this opportunity to submit a comment on the very important issue of Internet's impact on journalism.

SUMMARY OF COMMENT

News organizations already enjoy some form of antitrust exemption. (15 U.S.C. § 1801-1804). Therefore, the real issue is whether the existing exemption should be broadened. Unless convincing evidence to the contrary is presented, we are inclined to believe at this stage that the current antitrust exemption granted new organizations should remain as it is. Over the last thirty years, Supreme Court's decisions have narrowed the scope of the *per se* rule of illegality under 15 U.S.C. § 1 as to horizontal price restraints. This kind of restraint may now be subject to

the rule of reason analysis applied to most horizontal non price restraints if certain product and market conditions are present. This, combined with the existing antitrust exemption, provides businesses with the level of flexibility required to face the new economic and financial challenges posed by the Internet.

COMMENT ON INTERNET'S IMPACT ON JOURNALISM

On October 7, 2009, the Federal Trade Commission ("Commission") issued a notice in the Federal Register announcing workshops and, by the same occasion, inviting public comments on "*the Internet's impact on journalism in newspapers, magazines, broadcast television and radio, and cable television*". (74 Fed. Reg. 51,605 (2009)). In the notice issued in the Federal Register, the Commission seeks public comment *inter alia* on the advisability to exempt traditional media organizations such as newspapers, magazines, radio and television from antitrust laws for certain horizontal price and non price restraints on trade.

Antitrust exemption for news organization is no novel issue, for as already mentioned there is an antitrust exemption for news organizations for enumerated conduct. Today, the question whether that exemption is appropriate is prompted by the Internet. Advertising has been the main source of revenues for traditional media organizations. Internet has lowered substantially barriers to entry in the advertising industry, causing many newcomers to bring vigorous competition therein. Thus, competition for advertising dollars is strong.

Again, unless convincing evidence to the contrary is presented, we see nothing in antitrust laws preventing news organizations to adapt to the Internet. Antitrust laws, especially the legal standards enunciated under Sherman Act § 1, enable businesses and individuals to position media firms in the new technological environment created by the Internet without causing any

undue burden. The legality of joint horizontal price arrangements with tangible and demonstrable pro-competitive virtues — but "naked" price fixing *(*see *Broadcast Music, Inc., v. Broadcasting System, Inc.,* 441 U.S. 1, 20 (1979) citing *White Motor Co. v. U.S.* 372 U.S. 253, 263 (1963)) and market division (see *U.S. v. Topco Associates, Inc.,* 405 U.S. 596 (1972)) — is assessed under the rule of reason. The legal standard set forth in *Broadcast Music, Inc., v. Broadcasting System, Inc.,* 441 U.S. 1, (1979) and *National Collegiate Athletic Assn. v. Board of Regents,* 408 U.S. 85, (1984) takes into account specific conditions as to products and markets when it comes to decide the legality of specific type of conduct under U.S. Sherman Act §1.

For instance, the legality of "blanket licenses" for musical compositions issued by ASCAP and BMI on behalf of copyright owners, at fees negotiated by the two associations, was found to be a type of horizontal restraint whose legality had to be determined under the rule of reason, instead of the *per se* rule, notwithstanding the agreement's price component. ("*We have some doubts – enough to counsel against application of the per se rule – about the extent to which this practice threatens the central nervous system of the economy, that is, competitive pricing as the free market's means of allocating resources*"). (Citations and Quotations Marks Omitted). (*Broadcast Music, Inc., v. Broadcasting System, Inc.,* 441 U.S. 1, 23 (1979). (Stevens, J., dissenting on other ground).

Moreover, "*price fixing is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable*" and "*[l]iteralness is overly simplistic and often overbroad*". (441 U.S., at 9). (Emphasis and Quotations Marks Omitted). Blanket licence was found to fall outside the category of price fixing because musical compositions sold in a bundle are a different product from individual copyrighted musical recordings. ("*The*

blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product"). (Broadcasting System Inc., 441 U.S., at 21-22).

Similarly, the legality of a joint arrangement among college institutions implemented under the umbrella of a national association setting the terms, conditions, and fee amount for televised amateur football games licensed to television networks was analyzed under the rule of reason. The *per se* rule yields to the rule of reason should cooperation becomes necessary to market a product. ("*Our decision today not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved* ". (Emphasis and Footnote Omitted). (*National Collegiate Athletic Assn. v. Board of Regents,* 408 U.S. 85, 117 (1984)). Still, under the above circumstances the rule of reason applies even if the parties to the agreement have market power and the agreement restricts output. ("*Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life"). (Id.* 120).

Businesses and individuals sued under Sherman Act § 1 on a claim that they were privy to a joint horizontal price agreement must prove that the agreement is absolutely necessary to compete — a heavy burden . (*NCAA* 408 U.S. 85, at 116 (1984)). But, to the extent a product's characteristic requires collusive action for competition to materialize, Sherman Act § 1 allows cooperative arrangements for that purpose. ("*Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of*

*their competitive character requires consideration of the * justifications for the restraints".* (*NCAA* 408 U.S. 85, at 103 (1984)). *A priori,* the rulings in Broadcasting Systems and NCAA leave ample room for horizontal joint action by businesses and individuals to meet technological development, provided justification therefor is consistent "*with the basic policy of the Sherman Act*". (*NCAA* 408 U.S. 85, at 117 (1984)).

Lastly, "*pricing decisions of a legitimate joint venture [approved by consent decree] do not fall within the narrow category of activity that is per se unlawful under § 1 of the Sherman Act"*. (Emphasis Omitted). (*Texaco Inc. v. Dagher,* 547 U.S. 1, 8 (2006)). A legitimate joint venture is a *"lawful joint venture",* one that is not a "*sham"*. (Ibid., at 6, n.1). Thus, the legality of a joint venture set up to produce a product produced independently by the parties before — as opposed to producing a new joint product — is assessed under a rule of reason analysis. ("[*T*]*he ancillary restraints doctrine has no application * where the business practice being challenged involves the core activity of the joint venture itself – namely, the pricing of the very goods produced and sold by the [joint venture]*". (547 U.S., at 7-8).

So, news organizations may apply to the Commission for a consent decree approving a joint horizontal price or non-price agreement. Once approved, the decree erects substantial protection against treble damages awards under 15 U.S.C. § 15. Frivolous and abusive private antitrust suit may be dismissed summarily pursuant to Fed. R. Civ. P. 56 (see *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574 (1986) and *Eastman Kodak Co. v. Images Technical Services, Inc.,* 504 U.S. 451 (1992)) with a reasonable attorney fee award to the prevailing party. (See also *Bell Atlantic Corporation v. Twombly* 550 U.S. 544 (2008).

For the foregoing reasons, existing antitrust exemption together with the latitude granted businesses and individuals by the rule of reason under Sherman Act § 1 are two elements that should be given serious consideration regarding the advisability to grant further antitrust exemption to news organizations.

Signed this 5th day of November 2009.

/s/

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