WHEN INDUSTRY CONSOLIDATION DOES NOT EQUAL MONOPOLY: THE MERGER OF XM AND SIRIUS AND ITS IMPACT ON SPORTS MEDIA RIGHTS

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Presented March 6, 2009
Sport and Recreation Law Association Conference
San Antonio, Texas

In the beginning…

- XM and Sirius emerged as the two major providers of satellite radio services in the early portion of the decade
- The two competed against one another to purchase rights to exclusive radio content of sport organizations
- Result was hundreds of millions of dollars in revenue for sport bodies (Bruscas, 2005)

Exclusive Contracts

- XM
  - 11-yr deal worth $650 million for MLB through 2015
  - 10-yr deal worth $100 million for NHL through 2015
  - Deals with PGA Tour, U.S. Open Series and U.S. Open tennis expired after 2008
  - NBA switched to XM in 08-09 after being with Sirius since 2003
- Sirius
  - 7-yr deal worth $220 million for NFL through 2010
  - 5-yr deal worth $107 million for NASCAR through 2011
  - Deal with AFL expired after 2008

(Source: Ourand, Sports Business Journal, Feb. 26, 2007, p.3)

Financial Problems

- As both struggled to attain profitability, the two companies proposed a merger in February 2007
- The U.S. Department of Justice began reviewing the proposed merger under the context of antitrust violations on March 22, 2007

Purpose of Antitrust

- Perfect Competition
  - Numerous sellers and buyers
  - Consumers register preference (Supply and Demand)
  - All prices are known to producers
  - Every producer has equal access to input markets

Antitrust

- §1 Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal
- §2 Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person…. Guilty of felony
- Congress mandates courts to determine direction

Commercial

- Must be a commercial Enterprise
  - Radio communication is commercial
- Must have significant anticompetitive effects
  - Does the merger have anticompetitive effects?
- Part of interstate commerce
  - It is interstate as it is national

§2 Monopolies

- One actor shutting out another
  - a market in which there are many buyers but only one seller;
  - Increase Prices
  - Reduces availability of goods or services
  - Lowers quality of service
  - Stifles innovation

Monopoly

- Unreasonably excludes firms from market
- Significantly impairs ability to compete
- Predatory price fixing

Mergers

- Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Determining whether a merger will have that effect requires a thorough economic evaluation or market study.

Reason to ? Mergers

- When a merger enables a single firm to increase prices without coordinating with its competitors, it has created a unilateral effect. A firm might be able to increase prices unilaterally if it has a large enough share of the market, if the merger removes its closest competitor, and if the other firms in the market can't provide substantial competition.

After the Merge

- Market substantially concentrated
- Difficult for new first to enter market and provide effective competition
- Not an issue here
  - 2 radio versions – customized to each Network- long time to make change
  - Will be able to increase efficiencies

Market

- AM/FM Radio
- HD Radio
- MP3 Players
- Evolution of Future
- Technology
- Limit price increase

FCC Authorization

- "In light of the importance of local sports programming to terrestrial radio stations, we prohibit the merged entity from entering into any agreements that would preclude terrestrial radio station from broadcasting live sporting events." (FCC 08-178, ¶ 155)

Fallout – NBA Switch

- From 2003 to this past October 2008, NBA games were available exclusively on Sirius
- Following the merger, the games were available only through a "Best of XM" package after the NBA switched rightsholders
- Subscribers with an older model Sirius radio did not have the ability to receive "Best of XM" package despite assurances from post-merger company (Saghir, 2008; Van Buskirk, 2008)

Bankruptcy?

- New York Times reports on Feb. 11, 2009 that Sirius XM Radio retains bankruptcy lawyer in advance of $175 million in debt payments due (Sorkin & Kouwe, 2009)
- MLB and NFL shielded from financial harm because of clauses requiring future Sirius XM payments be deposited into escrow accounts (Sandomir, 2009)
  - Sirius placed $85 million in escrow to cover 2006 to 2009 rights payments
  - XM placed $120 million in escrow to cover 2009 and 2010 rights payments (and borrowed $62.5 million to do so)

Liberty Media

- Liberty Media, owner of Atlanta Braves and majority owner of DirecTV, loan Sirius XM $530 million secured by lien on Sirius assets
  - $280 million secured with 15% interest; Of that $171.6 million paid to EchoStar as repayment of prior loan
  - First major principal payment is due Jan. 1, 2012
  - Liberty agrees it cannot own equity in Sirius in excess of 49.9% (Maher, 2009)

Discussion and Conclusions

- DOJ broadly defined the competitive market to include technologies outside of satellite radio
- Leagues and governing bodies entering into exclusive media rights arrangements , especially with upstart businesses, are smart to protect themselves financially
- While the merger of Sirius and XM may not have hurt the consumer (in the eyes of the DOJ and the FCC), it has harmed the ability of leagues to receive commensurate rights fees in the future
  - Although, this may be less concerning since the leagues had not conceived this revenue stream eight

Thank you