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Is Spanish Radio a Separate Market?

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When the merger of two radio companies results in the combined company controlling a significant share of a radio market, the merger may undergo review by both the Commission and the U.S. Department of Justice (DOJ) to determine if the merger is in the public interest. In undertaking that inquiry, the government considers whether the combined company will exceed the FCC's multiple ownership caps and/or wield an anticompetitive (and hence impermissible) level of market control. If the merged company would exceed those caps or otherwise be anticompetitive in one or more markets, it may be forced to sell off stations.

Regulators have formulas to determine what an impermissible level of ownership or control is in a given market . . . but what exactly is *the market*?

This question is, obviously, key to the ultimate resolution of the regulatory analysis: the broader the definition of the relevant market, the more competition the merged company will face, and the more competition that exists in a market, the less likely that the merged company will be deemed to exercise an impermissible level of control over that market.

We've seen this market-definition debate being waged in connection with the recently-granted XM-Sirius satellite radio merger. XM and Sirius argued that satellite radio is not a separate market from traditional "terrestrial" radio and other forms of electronic media, and therefore would not constitute a monopoly in the market. The National Association of Broadcasters (NAB) and other traditional radio broadcasters countered that satellite radio was a separate market and that therefore the merger should not be allowed (since merging the only two participants in the satellite radio market would create a monopoly in that market – and monopolies are generally understood to be anticompetitive situations).

But while the satellite radio merger has garnered quite a bit of media attention, another market definition debate has been quietly waging in the halls of government, namely, whether Spanish radio should be considered a separate market?

In the past 20 years, Spanish radio in the U.S. has transformed from a sleepy sideshow of broadcasting into a major multimillion dollar industry with several publicly-traded corporations possessing major market stations that compete with their English-language counterparts for audience ratings. Moreover, as the U.S. Latino population has migrated from traditional urban concentrations in markets like Miami, New York and L.A., Spanish radio has flourished in newly-emerging Latino markets in the Southeast, Midwest and Northwest. Charlotte, Seattle, Milwaukee and Detroit are only some of the fastest growing Spanish radio markets.

This question of market definition looms large not only for each transaction that must be analyzed, but also for the Spanish radio industry as a whole.

The issue first surfaced in the mid-1990s. My client, Heftel Broadcasting (a predecessor of HBC and Univision Radio), owned two popular Spanish radio stations in the Miami market. It wanted to pick up two more Spanish stations there. The proposed acquisition would give Heftel less than control of the overall Miami market (by the FCC standards of the day); *but* it would result in Heftel having a market share exceeding 50% of the Spanish radio market there – an impermissible level *if* Spanish radio were to be treated as a separate and distinct market unto itself.

In a pleading battle in which I served as communications counsel to Heftel, the FCC allowed the proposed acquisition. The FCC reasoned that treating Spanish radio as a separate market could impede the expansion of Spanish radio, especially into small markets. The FCC also feared that identifying Spanish radio as a separate market could create a loophole allowing English language groups to exceed the FCC's multiple ownership caps by merely flipping their stations to a Spanish format and therefore removing them from the market. (One Heftel official at the time observed that to rule any other way would have effectively prevented Spanish broadcasters from being first to venture into emerging Latino markets because the new entrant would almost always have a monopoly in the market.)

In 2003, the FCC upheld this position in granting the Univision-HBC merger (which created Univision Radio), although the dissenting commissioners believed otherwise. However, in that instance, DOJ broke ranks and declared that Spanish radio *would* be considered a separate market for purposes of antitrust analysis. More recently, during the review of the 2008 buyout of Clear Channel, the FCC again (over the objection of the dissenting commissioners) refused to declare Spanish radio to be a separate market while the Justice Department again carved out Spanish radio as a separate market. This didn't come as a complete surprise. The Justice Department has long been concerned about the ability of radio broadcasters to exceed market concentration caps by playing with station formats.

That concern is not entirely without basis. In at least one instance several years ago, the DOJ was requiring a large broadcaster to dump a group of its English language stations in connection with a merger. The broadcaster initially agreed to sell the stations to another of my clients, a Spanish broadcaster. But when the seller learned that the buyer would continue broadcasting the stations in English – and not switch them all over to a Spanish format – the seller abruptly called off the deal and sold the stations to another Spanish broadcaster. This is precisely the type of scenario that worries the Justice Department – namely, the potential for a deliberate sale of spin-off stations to Spanish broadcasters in an effort to effectively remove them from competition with the English-language stations that the merged company is retaining.

However, although the DOJ's concern has merit, the treatment of Spanish radio as a separate market presents its own serious problems.

In another instance, when Clear Channel was required to spin off stations in connection with its acquisition of AM/FM, the DOJ staff was skeptical about Spanish language broadcasters seeking the spin-offs. The DOJ feared that they would change the stations to Spanish programming and effectively remove them from competition with Clear Channel. This put Spanish language broadcasters at a disadvantage by forcing them to incur delays and additional costs in dealing with the DOJ, which in turn put their financing and the transactions at risk.

Then there's the question of enforcement. If the Justice Department allows a broadcaster to buy a merger spin-off station on the condition that an English-language format will be retained on the station, how can the Justice Department enforce that promise if the new owner later decides to change the station to Spanish? And just what is a Spanish language format nowadays? For instance, how would the government classify newly-emerging cross-over formats like *Reggaeton* and *Hurban* that frequently program in both English and Spanish (or *Spanglish*)?

And there's a broader question: should the DOJ – or any part of the government – be dictating formats to radio broadcasters? After all, the FCC, with the blessing of the Supreme Court, has for more than a quarter century declined to get involved in regulation of formats. The FCC's restraint in that regard has been based, among other things, on practical difficulties – but there's also a serious First Amendment issue that would have to be considered before the government could start to regulate programming content. The complex legal issues presented by this clash of First Amendment, antitrust, administrative law and public policy considerations is already attracting attention – for example, it was recently addressed in a thoughtful article by my friend Professor Catherine Sandoval in

the Federal Communications Law Journal. It will certainly continue to be the focus of discussion in academia, the courts, governmental agencies and corporate boardrooms.

As the Spanish broadcasting and advertising market continues to track the growth of the U.S. Latino population, we can expect this issue to reemerge and continue to be debated well into the future.