

MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2020

Tuesdays and Thursdays, 3:00-5:00 pm
Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

CLASS 7 ASSIGNMENT

Instructions

Submit by email by 3:00 pm on Tuesday, September 22
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 7

Assignment

Time: Today
Calls for an outline

Atlanta Newspaper Merger

In times past, many large cities had two or more daily print newspapers. Those numbers have rapidly declined, so that today fewer than a dozen cities have multiple print newspapers.¹ The decline in newspapers has resulted from a shift in news consumption. In particular, increasing numbers of consumers are obtaining their news online. The following table gives results of a national survey of American adults of the sources from which they frequently get their news:²

Local TV	37%
Cable TV	29%
Network nightly news	26%
News websites/apps	33%
Radio	25%
Print newspapers	18%

U.S. newspaper circulation reached its lowest level since 1940, the first year with available data. Total daily newspaper circulation (print and digital combined) was an estimated 28.6 million for weekday and 30.8 million for Sunday in 2018. Those numbers were down 8% and 9%, respectively, from the previous year.³ The chart below gives the historical trends.

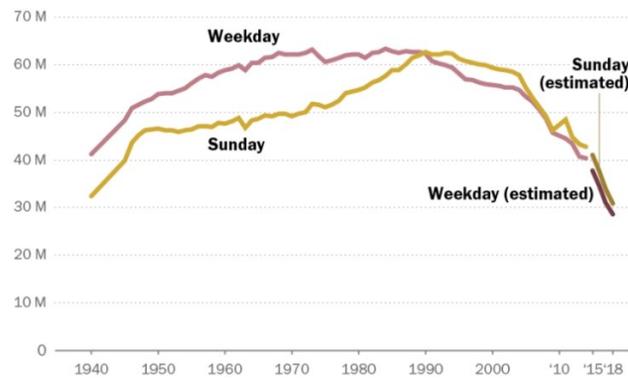
¹ See Jane Kim, *Table for Two? Taking a Look at the Remaining Two-Paper Towns*, Columbia Journalism Review (Mar. 18, 2009) (dated by informative), available at https://archives.cjr.org/behind_the_news/table_for_two.php. See generally Lara Takenaga, *More Than 1 in 5 U.S. Papers Has Closed. This Is the Result*, N.Y. Times (Dec. 21, 2019), available at <https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html>.

² Elisa Shearer & Jeffrey Gottfried, Pew Research Center, *News Use Across Social Media Platforms 2017* (September 2017).

³ Michael Barthel, Pew Research Center, *5 Key Takeaways about the State of the News Media in 2018* (July 23, 2019), <https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018/>.

Newspaper circulation falls to historic lows in 2018

Total circulation of U.S. daily newspapers



To help offset this decline in print readership, most newspapers have created online versions with their print content. Usually, some limited amount of this material is available for free, with the remainder behind a subscription paywall. For most newspapers, this has added only small revenues. While some large papers with a national readership, such as the New York Times, the Washington Post, and the Wall Street Journal, have done very well with digital subscriptions, regional and local papers have had relatively little financial success,⁴ especially since many digital subscribers cancel their print subscriptions.⁵

There also has been a decline in the demand for advertising in newspapers. Not only has newspaper readership declined, which makes newspaper advertising less efficient in reaching customers, but new channels for advertisers to reach potential customers have emerged. Two major types of advertising appear in print newspapers. *Classified ads* are typically small, text-based ads by local businesses and individuals grouped together by category in a dedicated section of the newspaper. Classified ads have essentially disappeared from print newspapers as advertisers have turned to online advertising. *Display ads*, which appear throughout the newspaper, typically run from one-eighth of a page up to one full page and often contain pictures or illustrations. Most display ads are purchased either to promote local business operations (especially retail stores and consumer service providers such as plumbers and electricians) or image advertising by national brands. Display ads constitute the bulk of advertising in print newspapers, although display ads continue to decline in number and revenue.⁶ In place of display ads, national and local advertisers have turned increasingly to online advertising and to a lesser extent cable TV. Advertising revenues earned on online newspaper sites, however, has not

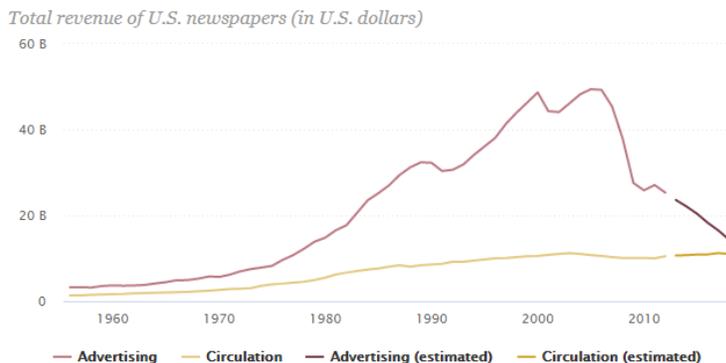
⁴ Joshua Benton, *The L.A. Times' Disappointing Digital Numbers Show the Game's Not Just about Drawing in Subscribers—It's about Keeping Them*, NiemanLab.com (July 31, 2019), <https://www.niemanlab.org/2019/07/the-l-a-times-disappointing-digital-numbers-show-the-games-not-just-about-drawing-in-subscribers-its-about-keeping-them/>.

⁵ Doug J. Chung, Ho Kim & Reo Song, *The Comprehensive Effects of a Digital Paywall Sales Strategy* (HBS Working Paper #19-118, 2019).

⁶ *Insert ads*, which we will ignore here, are a third type of newspaper advertisement. Insert ads are typically preprinted by an outside vendor hired by the advertiser and delivered to the newspaper to be included with the distribution of a newspaper issue.

materially helped newspapers, since almost 70 percent of all digital advertising dollars are captured by Google, Facebook and Amazon.⁷

Overall, the newspaper business for many newspapers is financially precarious. Newspaper revenues declined dramatically between 2008 and 2018. While circulation revenues have remained roughly flat notwithstanding circulation declines, digital and print advertising revenue fell from \$37.8 billion in 2008 to \$14.3 billion in 2018, a 62% decline.⁸



Over the past 15 years, more than one in ten daily newspapers in the United States has shuttered⁹ and the number of journalists working for newspapers has been cut in half.¹⁰ Newspapers have high fixed costs in their newsrooms, printing operations, and administrative/ marketing. Variable costs are largely for paper and printing and to some extent distribution. As newspaper revenue has declined, many newspapers find that they cannot cover their costs. Some newspapers have decreased their print publication schedules from daily to only three or four days a week to reduce costs. While this saves on the variable costs of paper, printing, and distribution, the newspaper's high fixed costs remain. Some newspapers have reduced the size of their newsrooms, cutting reporters and correspondingly reporting less news, although this can accelerate the loss of readership and with it further declines in circulation and advertising revenue.

Your firm represents the Atlanta Times, which together with the Atlanta Post are the two newspapers in Atlanta.¹¹ The Post has approached the Times seeking to be acquired, and Katherine Hearst, the Times' publisher, is seeking advice as to whether the Times can acquire the Post.

⁷ Nicole Perrin, *Facebook-Google Duopoly Won't Crack This Year*, eMarketer.com (Nov. 4, 2019), <https://www.emarketer.com/content/facebook-google-duopoly-won-t-crack-this-year>.

⁸ Elizabeth Grieco, Pew Research Center, *Fast Facts about the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy* (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/>.

⁹ Penelope Muse Abernathy, The Center for Innovation and Sustainability in Local Media, *The Expanding News Desert* 27 (2018) (noting that the number of daily newspapers in the United States declined from 1472 in 2004 to 1283 in 2018).

¹⁰ Elizabeth Grieco, Pew Research Center, *U.S. Newspapers Have Shed Half of Their Newsroom Employees since 2008* (April 20, 2020), <https://www.pewresearch.org/fact-tank/2020/04/20/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008/>.

¹¹ The facts in the remainder of this hypothetical are completely fabricated with little concern about reality.

The Times and the Post have 50,000 and 80,000 print and digital subscribers, respectively, out of 400,000 households in Atlanta proper where the papers are distributed and another 1 million households in the surrounding metropolitan area. The Times is considered a “liberal” paper and the Post a “conservative” one, and there is essentially no overlap in the subscriber base. The Times is also considered to have “higher quality” reporting.

Both the Times and the Post have experienced significant ongoing declines in their respective revenues and neither is covering its operating costs. The Times has a negative cash flow of \$100,000 per month and the Post has a negative cash flow of \$300,000 per month, and both firms believe that their financial performance will only decline further in the future. One reason for the differences in cash flow is that the Times has reduced its print publication schedule to four days a week (Monday, Wednesday, Friday, and Sunday), while the Post continues to be distributed daily. In the last two years, both the Times and the Post have significantly reduced their newsrooms in order to cut costs and the reduction of the quality of both newspapers has been a subject of much commentary in Atlanta. In a related effort to cut costs, both newspapers also have ceased reporting on local news in the suburban areas outside of Atlanta and are no longer promoting the sale or distribution of newspapers in the more distant suburbs. Recently, the Post stated publicly that it may have to cease operation in the next year or so unless it can return to a positive cash flow or is acquired by someone who can financially support it. The Post also announced that it would not consider reducing its print publication schedule to only three or four days per week, since although this would save considerable printing and distribution costs cashflow would still be negative. The Times believes that Atlanta is not big enough to support two profitable newspapers and does not believe that anyone else would consider buying the Post to run it as a newspaper. In the absence of an acquisition, the Times also believes that the Post will terminate operations and liquidate the business in the next year or so.

The Times believes that by acquiring the Post the combined paper can become profitable. The parties are discussing a purchase price in the neighborhood of \$70 million. This is close to the Post’s liquidation value, which resides primarily in the office building it owns in downtown Atlanta. But this is just an offset of the purchase price; the question remains of how the acquisition can stem the losses and create a positive cashflow. Although Hearst has only begun to consider how she would run the combined company, her current thinking is essentially to cut costs: liquidate the Post and consolidate all operations in the Times, which has plenty of excess capacity to service the Post’s subscribers with the Times. Under this plan, Hearst would sell the Post’s office building, liquidate the Post’s printing and distribution facilities, close the Post’s online web site, lay off most of the Post’s employees, and fold the Post’s printing, web site, distribution, marketing, advertising sales, and backoffice operations into the Times’ existing operations.

Hearst is thinking about making some significant changes to the Times’ postmerger operations. Most importantly, she is considering returning the Times to a daily publication schedule, which would require the Times to retain some of the Post’s newsroom employees to create content. With the larger newsroom, the Times could increase the depth and quality of its reporting within Atlanta proper in order to make the paper more attractive to the 270,000 households that do not subscribe to either paper. It also plans to reassign some Post reporters (or hire new ones) to reinstitute coverage of some of the suburban areas and will begin to actively market and

distribute the combined newspaper there. If this proves successful, the Times will increase reporting and distribution to other suburban areas over time.

The Times also believes that it can keep most of the advertising revenues that the two papers would have obtained if they remained independent, since most advertisers who allocate some of their ad spend to newspapers advertise in both newspapers given the disjoint subscriber base. While postmerger advertisers will place only one ad in the paper as opposed to two ads premerger, Hearst will increase advertising prices to reflect the higher circulation of the combined papers while keeping the cpm at premerger levels.¹²

Hearst would like to meet at 3:00 pm this coming Tuesday over Zoom to discuss the antitrust risk and how to minimize this risk. She will have with her the Times' executive editor, general counsel, and chief financial officer both to answer questions and assess the advice. Daniel Kafee, the partner in charge of the matter, has agreed to a two-hour meeting and has asked you to prepare an outline to structure the meeting along the following lines:

1. Substantive risk
 - a. Possible theories of anticompetitive harm that might apply to the transaction
 - b. Possible defenses against each theory of harm
 - c. Questions that need to be answered to assess the strength of both the theories of harm and the defenses
 - d. Ideas for what the Times might do—for example, in its postmerger business plans for the combined company or tactically with customers or the enforcement agencies—to minimize the substantive risk
2. Inquiry risk
 - a. Who has the incentive and ability to challenge this transaction and in what forum?
 - b. What are the incentives (and therefore the likelihood) of each of these persons challenging the transaction?
 - c. Ideas for what the Times might do to minimize inquiry risk
3. Remedies risk
 - a. If the transaction is challenged, are there any “fixes” that could resolve the competitive concerns?
4. Purchase agreement considerations
 - a. What provisions should the Times seek to include in the purchase agreement
 - b. What provisions is the Post likely to seek
 - c. Thoughts on where the negotiations on these various provisions are likely to land

Finally, Kafee recalls that there is something called the “failing company defense” in merger antitrust law and he wants to be sure that you address it (whatever it is) in the outline when discussing possible defenses. He thinks that there may be a section on this in the 2010 DOJ/FTC Horizontal Merger Guidelines.

¹² A cpm is the “cost per thousand impressions” on a printed page or web site. So, for example, if the cpm rate for a particular display ad is \$30.00, then the price of placing the display ad in a newspaper with a circulation of 100,000 is \$3000. This is a standard measurement in advertising to enable comparisons among ad placements with different circulations.