

Commentary on Draft Determination of New Zealand Commerce Commission re Fairfax/NZME Proposed Acquisition

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1. I am the James Parker Hall Distinguished Service Professor of Law and the Ludwig & Hilde Wolf Teaching Scholar at the University of Chicago Law School and Senior Fellow at the Computation Institute of the University of Chicago and Argonne National Laboratory.¹ At the Law School, I currently teach classes, depending on the year, in Antitrust, Copyright, Network Industries and Secured Transactions, as well as a seminar in technology policy. I also teach The Legal Infrastructure of Business at the University of Chicago Booth School of Business. Finally, I have an online course, *Internet Giants: The Law and Economics of Media Platforms* available through the Coursera platform.² I was engaged in this matter to provide analysis to the parties on their contemplated merger.

2. On October 15, 2016, I made an initial filing in this matter entitled *Commentary on News Media Quality Issues in Fairfax/NZME Proposed Acquisition* (the “October 15th Filing”). Since that filing, on November 8, 2016, the New Zealand Commerce Commission (the “Commission”) issued a draft determination in this matter (the “Draft Determination”). A key issue for the Commission was its conclusion regarding media plurality³ and that conclusion seemed to be based in part at least on a report commissioned by the Commission that was filed on November 16, 2016. That report, *Impact of the proposed NZME/Fairfax merger on media plurality in New Zealand: expert review of the Commerce Commission’s Draft Determination Document* (the “UK Review”), was produced by Dr. David Levy and Robin Foster.

3. This document offers relatively brief commentary on issues raised in the Draft Determination and the UK Review. My understanding is that there are legal questions raised by the Commission’s reliance on media plurality in a competition analysis and that NZME and Fairfax will challenge what the Commission has done regarding that in the Draft Determination, but that is an issue of New Zealand law outside my expertise. Instead, my focus here is how the plurality analysis raised in the Draft Determination

¹ <http://www.law.uchicago.edu/faculty/picker>

² <https://www.coursera.org/learn/internetgiants>.

³ See Draft Determination ¶ 997.

and the UK Review match with the original analytical framework for media quality that I set out in my October 15th Filing.

4. In my first filing in this matter, I made four key points:

- (1) The emergence of media platforms like Facebook and Google has destabilized the historical media business. Substantial amounts of advertising have exited the traditional media business and have moved to the new media platforms. Traditional media firms have moved online and are now digital-first operations, but their businesses appear to be at financial risk given the role played by Facebook and Google. And the rapid move to smartphones as the key device for consuming media seems to work to the benefit of these dominant media platforms and against traditional media firms.
- (2) The diversity of media produced in the market is likely to be influenced by the extent of competition in the market, and traditional media economic analysis suggests that the proposed NZME/Fairfax merger might actually boost diversity of content rather than reduce it.
- (3) Media markets are two-sided markets. A traditional print newspaper or a modern media platform sits between readers/viewers on one side of the market and advertisers on the other side of the market. When only one side of the market pays in a two-sided market that may have important consequences for the content produced. On the Internet, most content is free to consumers and is supported by advertising, so only advertisers pay. We should expect content that serves the interest of advertisers and not necessarily the content favored by consumers.
- (4) Media content is a classic economic public good and that means that there are real concerns about free riding in the media business. Again, the extent of competition in the media market will influence the extent to which free-riding concerns interfere with the production of content.

5. The Draft Determination and the UK Review consider the issue of media plurality. In reaching its preliminary conclusion that the Commission would decline to authorise the merger, the potential consequences of the merger for media plurality seemed to loom large. In reaching that conclusion, the Commission made a number of important mistakes that undercut its analysis.

6. There seems to be agreement that there are currently five large media firms working in New Zealand (NZME, Fairfax, TVNZ, MediaWorks and RNZ) and then there are a large number of other media voices in New Zealand.⁴ In that context, it is hard to see how the merger reduces in any meaningful way the media plurality available in the New Zealand market, as I explain further in this note. And neither the Draft Determination nor the UK Review does any actual analysis of the current extent of media difference between NZME and Fairfax. Presumably the extent of any theoretical loss via the merger has to depend on the current voice distance between

⁴ See Draft Determination Table 17; UK Review, p. 12.

NZME and Fairfax but neither the Draft Determination nor the UK Review actually looks at that.

7. There is also agreement on the idea that New Zealanders consume content from many media firms simultaneously, so called multi-sourcing.⁵ Multi-sourcing shrinks substantially the possibility that one side of an issue would be unavailable to New Zealand consumers. A frustrated news source blocked by the merged firm would have every reason to reach out to another large New Zealand media firm and multi-sourcing means that consumers would be exposed to that position on the issue.

8. That is all true without even getting to the role that the new media platforms like Facebook and Google play in the distribution of news. The Commission noted, correctly at least for now, that Facebook and Google are not news-producing firms, but the Commission then took the additional, hard-to-understand step, of discounting Facebook and Google as firms *distributing* news.⁶ Google drives a substantial amount of traffic to media websites, a point made clear when Spain changed its laws in an effort to force news aggregators to pay directly for content. Google exited the market and news media sites lost a substantial amount of in-bound traffic.⁷

9. More recently, the emergence of so-called fake news as an issue in the recent U.S. election demonstrates the powerful way that Facebook can amplify even marginal voices. A fake story stating that the Pope had endorsed Donald Trump in the U.S. election received 1 million shares on Facebook, while the extended investigative reporting by *The New York Times* regarding Donald Trump's taxes received only 200,000 shares.⁸

10. This is powerful social media amplification of small voices. Not necessarily the voices we want amplified – part of the reason why it is so important to sustain traditional media and the journalistic standards that come with that – but this makes crystal clear the way that Facebook distributes content. With social media amplification through connected networks of friends and family, even small media voices can achieve enormous reach and visibility. It is hard to see how the Commission can simply ignore this in its analysis. And the hope in the UK Review that the “influence of the main

⁵ See Draft Determination Table 18; UK Review p. 15 (“The draft determination presents data on cross-sourcing of news from the main providers in New Zealand, which seem to show that there is a high-level of multi-sourcing of news from the main providers in New Zealand.”).

⁶ Draft Determination p. 65 n.242 (“For the avoidance of doubt, we do not consider that third party news aggregators and social media networks, such as Facebook and Google, are competitors in the market for online New Zealand news.”)

⁷ See Oxera, *An era of negotiations: news publishers and online intermediaries*, October, 2016 (online at <http://www.oxera.com/Latest-Thinking/Agenda/2016/An-era-of-negotiation-news-publishers-and-online-i.aspx>) (finding a net drop of online news consumption of 16% among former Google News users).

⁸ Will Oremus, *The Real Problem Behind the Fake News*, *Slate*, 15 Nov. 2016 (online at http://www.slate.com/articles/technology/technology/2016/11/the_problem_with_facebook_runs_much_deeper_than_fake_news.html).

players will be of larger magnitude and perceived as such by most politicians”⁹ seems difficult to square with the fake news phenomenon.

11. The Google/Spain situation is a crisp example of media plurality and the amplification power of media platforms at work. Overall consumption of online news by former Google News users dropped by 16% after the change in Spain. The presence of the media platform intermediary actually mattered in a substantial way for online consumption of news. But there was a second effect that was even more interesting. Traffic to the big five news sites in Spain actually *rose* from former Google News users after Google News closed.¹⁰ Why? Presumably Google News was showing readers lots of smaller sites. When Google News went away, users reverted to going to big brand sites directly. That is exactly a demonstration of the amplification power of the media platforms: smaller sites wouldn’t have been seen without Google News and were being seen with it.

12. The takeaway from the Google/Spain case is that Google News was accounting for a decent amount of genuinely incremental traffic and it was also moving traffic away from big-brand media sites to smaller voices. An amplification of the media plurality already available in the market. It is hard to find smaller voices and Google was doing just that and consumers were reading those sites. Again, it is hard to see how the Commission can simply discount Facebook and Google in evaluating the extent of effective media plurality in New Zealand.

13. The Commission seems to pay too little attention to the incentives of the merged firm to produce news with different perspectives. My analysis of media diversity in my October 15th Filing applies directly to presenting commentary and news with different perspectives. As the UK Review notes in its discussion of internal plurality,¹¹ a single publisher can offer a “diverse range of perspectives in its provision of news.” The Commission discounts this possibility in its analysis,¹² but at no point does the Commission consider the incentives of the merged firm to provide these different perspectives if that is what New Zealanders want. This is ultimately a question of product variety and most firms provide a range of products to take into account different tastes among consumers.

14. The Commission completely ignores the role of payment plurality in media markets. Online content is paid for by advertisers and that can be expected to have consequences for the type of content produced, just as it does for offline content, a point that I made in my October 15th Filing. Given the Commission’s overriding concern with media plurality, it seems particularly surprising that the Commission didn’t see as an advantage of the merger the possible way in which it could improve payment plurality.

15. This would arise most naturally in the context of paywalls for content. If the merger made it possible to sustain a paywall for one of the online websites of the

⁹ UK Review, p. 13.

¹⁰ See Oxera report, *supra* note 7.

¹¹ UK Review, p. 6.

¹² See Draft Determination, ¶¶ 978-981.

merged firm, it would mean that consumers could self select into the type of content they preferred: “free” content supported by ads with the content designed to ensure that advertisers would want to be matched with that content and a competing site paid for, at least in part, by direct payments by consumers with content focused on the direct interest of readers.

16. The UK Review notes the complexities of paywalls and the probable need for a paywall to sustain high-quality news, but also ignores the way that advertising shapes content in ways that are not in the interest of readers.¹³

17. Finally, the Draft Determination is actually replete with evidence of exactly that type of news free-riding that I identified in my October 15th Filing.¹⁴ The Commission’s approach here seems remarkably static: it posits that NZME and Fairfax are the news producers and other large New Zealand media firms are entitled to rely on them instead of producing news on their own. There seems to be no consideration of how those firms would reconfigure to produce more original news on their own if their opportunities for free-riding on NZME and Fairfax were reduced.

18. This is obviously very complicated. The titanic shift that has occurred in the news media business via the likes of Facebook, Google and the other media platforms suggests that there is a genuine risk that democracies could weaken considerably the vital role played by traditional news media. They need to be sustained and the proposed merger is an effort to do just that. In focusing on the important issue of media plurality, the Commission has paid too little attention to the extent of New Zealand media sources; to the cross-media consumption patterns of New Zealanders; to the powerful role that media platforms like Facebook and Google play in the distribution of news and the amplification of small media voices; and finally to the interests of news media firms in producing content from a wide range of perspectives to better satisfy their customers.

¹³ UK Review, p. 17. I would note that seemingly it is only the academics and consultants – me and the authors of the UK Review – who believe in paywalls, as my understanding is that the parties to the proposed merger don’t believe paywalls are realistic given the current pattern of news consumption.

¹⁴ See, e.g., Draft Determination, ¶¶ 559, 591 (“TVNZ, MediaWorks and RNZ advised that one key source of news comes from monitoring competing New Zealand news websites. TVNZ advised that it ‘lives and breathes’ other news websites for ideas for stories, looking ‘what angles do we have or don’t we have that they may have, so that happens every minute’; “We consider that NZME and Fairfax play a particular role in setting the agenda for online New Zealand news provided by other publishers, as evidenced by TVNZ, MediaWorks and RNZ monitoring and following up on stories published by the Applicants.”).