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T.V.iolations Everywhere?

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With all of the attention "TV Everywhere" is getting, it is not surprising that the most recent scrutiny is coming from public interest groups that are claiming the TV Everywhere platform (under which cable providers will offer their subscribers access to the content on screens outside of their homes) presents significant antitrust concerns. Just two weeks after Comcast launched X-Finity, its version of TV Everywhere, several public interest groupspetitioned the Justice Department and the Federal Trade Commission toinvestigate perceived antitrust violations. Free Press, Media Access Project, Consumers Union, Consumer Federation of America and New America Foundation's Open Technology Initiative are among those who have asserted that the TV Everywhere model is anticompetitive because it will cause a rise in prices, divide markets, tie products and threaten new competition. The cable providers who have invested in and implemented TV Everywhere trials deny the allegations that the initiative violates antitrust laws, and instead argue that TV Everywhere benefits consumers by making more content available on the Internet. While advocates call it "innovative", antagonists call it "incumbents protecting their turf," – which as of late will ultimately boil down to a question for the Department of Justice. Antitrust laws are meant to protect competition in the marketplace, recognizing that competition is necessary to ensure fair pricing and better quality for the consumer. Therefore, the fundamental question from compare car insurance quotes an antitrust perspective is, will TV Everywhere threaten or hinder competition in the online television content space? The public interest groups calling for an investigation argue that it most certainly will stifle competition in the emerging market for online television programming. They go so far as to allege collusion among the major video service providers networks, claiming that theTV Everywhere initiative rests on an illegal "horizontal" agreement among competitors. In its complaint to the DOJ, Free Press asserts that the TV Everywhere alleged agreements amongst the cable providers are collusive horizontal agreements likely to be found illegal under the applicable per se rules governing antitrust law. The per se rule applies only to practices that are themselves clearly unreasonable restraints of trade regardless of market facts, such as horizontal collusion, including horizontal price-fixing, market allocation, and certain group boycotts. Additionally certain tying arrangements are also per se violations. Antitrust case law has established each such activity as "unreasonable restraints of trade". **Price Fixing** Price collusion among competitors has been determined by the Supreme Court to be a per se violation of Section 1 of the Sherman Act regardless of the actual impact on the market. Typically, in order for a court to find per se illegal collusion there must be a "horizontal agreement" in place, i.e., an agreement among competitors. National Cable and Telecommunications Associations Chief Executive Kyle McSlarrow publicly denounced the anti-competitive allegations in a statement issued in response to the filing of the DOJ complaint. McSlarrow asserted that TV Everywhere is the result of true market player collaboration rather than collusion. He defends TV Everywhere noting that antitrust authorities have encouraged collaboration in the past, sometimes even among competitors, for the sake of innovation and market stimulation. "Distributors do not have the ability to unilaterally decide how content is distributed. Content owners, through individual business arrangements with a growing array of distributors ultimately make those decisions. All in all, Free Press and other parties are complaining about decisions content owners make about how their content should be distributed." McSlarrow also argued that with respect to the various TV Everywhere initiatives being tested the relationships are purely vertical (i.e., based on arrangements between one content company and one or more individual distributors) and not horizontal (i.e. based on agreements between distributors, one the one hand, and agreements between content owners, on the other hand) in nature. As he said, "The fact that market participants are experimenting with models in addition to fee- or advertiser-supported models is not a sign of anti-competitive conduct." **Dividing the Market** Deliberate and strategic division or allocation of customers, territories or portions of the market between competitors, i.e., "market allocation", has also been deemed a violation of Section 1 of the Sherman Act. Market allocations are subject to per se illegality findings whether or not price setting is involved, and whether or not the parties involved are actual or potential competitors. Free Press and other public interest groups assert that the TV Everywhere "horizontal" arrangement amongst the cable providers illegally allocates geographic and product markets. While the reality is that under the TV Everywhere model, competing distributors allocate markets geographically, that allocation is not a "voluntary" one but rather the result of the fact that each major cable provider has a de-facto "monopoly" in the geographic areas in which they have been granted a franchise to operate. The cable providers plan to continue, through TV Everywhere, to serve only those consumers within the geographic areas to which they currently provide services, rather than branching out to compete with providers in other areas. While critics may argue that this is an unlawful "market allocation", cable providers view this as nothing more than a continuation of servicing their current customer base by including a premium content feature in addition to the services already being provided to such customers. Tying Free Press and other public interest groups have also accused the cable providers offering TV Everywhere of unlawful "tying", which the Supreme Court has held occurs when a seller enjoys a monopolistic position in the market for the tying product and a substantial volume of commerce in the "tied" product is restrained. Free Press stated that, "by tying online television to incumbent MVPD [multichannel video programming distributors] subscriptions, TV Everywhere is designed to undermine new forms of competition and consumer choice currently emerging over the Internet." Free Press, among others, believes that true competitive pressure should require existing cable TV providers to meet consumer demand for online TV, rather than allow them to resist the demand by tying online programming to what is being perceived as "inflated" cable TV subscriptions. On the other hand, some say that TV Everywhere is not only good for consumers, who can choose to legally access high quality video content they are already paying for on the Internet, but is also good for program distributors because it opens up a gateway for new content that wasn't previously (legally) available online, and ultimately that it represents a promising initiative for bridging old and new media. **Competition** Public interest groups also claim that TV Everywhere could be a threat to competition for video start-ups such as Vuze, Roku and Hulu. However, this may not necessarily be a true apples-to-apples comparison since these video start-ups are not traditionally considered direct competitors of major cable operators, nor would it be possible to determine that the success or failure of non-TV Everywhere online television content providers is directly attributable to the business models of the major cable providers. Ultimately, content providers, without whom both cable providers and on-line video providers wouldn't have much of a business, still remain free to make their content available wherever they want. Even before TV Everywhere initiatives were rolled out, those providers sought to distribute their content on competing cable, satellite, telephone and online platforms. TV Everywhere appears to be an extension and evolution of those existing platform distribution models. It is unclear at this stage whether or not the assertions made by the public interest groups will gain traction with DOJ or lead to further scrutiny or regulation. It is clear, however, that the TV Everywhere initiative reflects a "dynamic and rapidly-changing market in which no one knows the ultimate outcome". As the model evolves, it is likely that we will see its impact throughout the legal and regulatory landscape, including antitrust law, policies for an open Internet (i.e., net neutrality), content providers' and distributors' rights and interests and demand/consumption of online and traditional television content by consumers. On March 11, 2010, the Digital HHR team is presenting "TV Everywhere—Is It Everywhere You Want to Be?", a live, CLE-accredited Webinar exploring the legal and business issues surrounding TV Everywhere, including the antitrust issues we've discussed here. We will also continue to stay abreast of these developments as an on-going effort to provide our clients with guidance to enable them to take advantage of the rapidly-changing environment in which they operate.

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