Unofficial Notes:

Hogan Lovells: 2017 Winnik International Telcoms and Internet Forum: Convergence and Competition: The Path Forward

November 9, 2017
Washington, D.C.

NOTICE: These notes were taken live at the 2017 Winnik International Telecoms and Internet Forum. They are a good faith representation of our impressions of the events and what was said by participants. However, we cannot guarantee the accuracy of any specific comment. These notes are not endorsed by Hogan Lovells in any way. This document is not a recommendation to buy or sell any security. Please consult with appropriate professional advisors before making significant business decisions. Corrections are welcome.

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Executive Summary

Hogan Lovells hosted the 2017 Winnik Form, named after a late partner, Joel Winnik, on Thursday November 9th in their Washington, D.C. office. This year's event was a half-day, focused on "Convergence and Competition."

It's seems trite to say, but the number of moving parts in the industry is remarkable considering 1) the consolidation of content providers and distributors; and 2) wireless substitution for voice (and increasingly video). Meanwhile, incumbent providers understandably complain the U.S. regulatory framework handicaps them with requirements not shared by new entrants.

As I considered many of the arguments, I had a heretical thought. I imagined if the conference participants were discussing a different industry – pharmaceutical companies and drug stores – as opposed to video content and distribution. Imagine an executive from Pfizer saying "We signed an exclusive agreement so that Lipitor [their highly prescribed cholesterol medication] will only be sold a CVS." Then a RiteAid executive says, "Crestor [another common cholesterol medication] is exclusive to us, but we only sell it bundled with a cream for eczema [a skin condition]." It would be ridiculous and the market would demand change. And that's exactly what's happening in the video content market – lots of change is afoot. The current system does not serve consumers well and technology is allowing new business models – particularly involving the convergence of content production and distribution.

But the blending of content and distribution is raising questions about how mergers should be considered. The former vertical vs horizontal merger analysis is often hard to apply cleanly. Moreover, the rapid change of the industry makes it hard for economists, much less policy makers, to understand the potential for future market abuse or lack thereof. Additional issues involve the tensions between the realization that the market can only support a limited number of players and the desire for robust competition. This becomes especially difficult when it's hard to clearly identify the competitors. Moreover, the industry is becoming increasingly global, and different countries have different regulatory policies.

The classic discussion played-out about whether distribution providers were capable of also creating content. Given industry trends and the erosion of barriers to entry in their core businesses, distribution companies have little option but to try. There seem to be few other options towards creating sustainable competitive advantages or barriers to entry. As a result of distribution companies needing to enter the content market, new portable technologies are making it easier for consumers to watch more content. As a result, we are seeing a massive growth of video content production, Netflix Originals being the best-known example.

Living-up to their reputation, the food and wine at the reception was excellent, even if last year's outstanding crab cakes were missing ☺

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I. Opening Remarks

Michelle Farquar, Partner, Head of Wireless Division

- Welcome everyone – emphasis on convergence and competition

Will Yavinsky, Partner

- Joel Winnik's son-in-law
    - Comments in memory of Joel Winnik

II. Planet Convergence in Technology, Media and Telecommunications

Moderator: Ryan Knutson, Reporter, Wall Street Journal

Joe Amijo, CFO fuboTV, Inc

- Big "free rider problem with video." Allows fuboTV to come in at a lower price
- One-to-one ratio between MVPD losses and OTT gains
- Real value with aggregation
- Can now target advertising to specific homes (e.g., people whose car leases expire over the next three months)
- Optimistic on long-form content
- Implicit in the "Skinny Bundle" is that there will be some losers
- Not a long-term solution for smaller companies to consolidate
- Verizon, and AT&T to an extent, is a cautionary tale of why wireless players can't get into content
- Wireless companies should just partner with someone
- Wireless companies are ill prepared to compete
- Talent pool is more shallow and bad cultural fit
- Wireless carriers tend to ignore competitive response
- Frustration as people can only watch some content at some places

Paul de Sa, Partner, Quadra Partners, LLC

- Analyst think cable loss vs OTT growth is 1:1, but it's more like 1:0.75 – but close
- Many VMPD subscribers effectively want a bundle
- Most price sensitive segments are being lost
- 2nd tier content is getting squeezed
- Top-tier is going well
- Lower end – niche or user created content is also doing well
- Self-deluding to think content is lowering wireless churn

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Neil Fried, SVP, Gov't and Regulatory Affairs, Motion Picture Association of America

- Moving purchasing to online
- Healthy environment
- Increased consumption of content – new opportunities to access makes it easier to consumer more
- Lots of new original series are being created
- Every year, content creation goes up, no sign yet of a peak
- Quality of content is getting better, but business models for distribution may see a shakeout
- People are drawn by high quality content that is exclusive
- User generated content will always be there (low barriers to entry) but won't supplant other content
- More platforms are better for content providers – copyright is infinitely divisible to make economics work for everyone
- Platforms don't need to make content, they can license it
- Piracy is growing with streaming
- Now fully loaded boxes – system called "Cody"
- Illicit streaming edging out illicit download sites

Alexi Maltas

- Cable companies have known for years that many customers want smaller bundles, but have been forced to provide larger ones
- Regulatory environment designed to limit power of cable companies, but many don't make sense now
- Satellite has less regulation and OTT has almost none
- Trying to wedge 2017 technologies into an outdated 1990s regulatory framework
- Niche programming likely to be lost in skinny bundles
- 3/4 of internet traffic is video as is 2/3 of wireless traffic so wireless carriers are already in video business
- Current regulatory framework doesn't make sense
- Seeing a blurry of distribution and creation – is ATT & CNN really vertical?

Peter Watts

- 30% of people in Britain don't have a Pay-TV subscription
- Subscribers put a value on things being curated
- Europe will be ahead of the U.S. due to trust with data

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- Reform of European rules will impose local requirements on everyone including Netflix, etc.

III. Frederico Fernandez – Mexico Regulatory Environment

Tom Peters, Technical Advisor, Hogan Lovells (Introducer)

Frederico Fernandez

- 2014 Mexican regulator was able to impose conditions on dominant carrier
- Constitutional reform including autonomous regulator with ability to fast track dominant carrier declaration
- Telemex and Televisa were declared dominant; allowed regulator to impose asymmetrical regulation
- 2017 some progress
- Prices falling as much as 75%
- No long distance charges
- New competitor, such as AT&T
- Working with auditor to test compliance with asymmetrical regulation

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IV. Keynote Address: Donald Stockdale, Wireless Bureau Chief, FCC

Ari Fitzgerald, Partner, Hogan Lovells (Introducer)

Donald Stockdale

- Two Issues
  - How the FCC has evolved from protecting monopolies to encouraging innovation?
  - What the FCC is doing to encourage wireless innovation and 5G?

A. How the FCC has evolved from protection monopolies to encouraging innovation

- Originally believed the wireline was a natural monopoly
- FCC and state regulators have ability to regulate
- MCI entered the market and long-distance competition developed
- FCC distinguished between dominant carriers and non-dominant carriers
- Non-dominant carriers got regulatory relief
- Eventually, AT&T was classified as non-dominant in long-distance
- Triggered a long-distance price war
- Wireless – two licenses in each market – one to incumbent and one to a new entrant
- By mid 1990s, FCC fostered competition and innovation
- FCC has limited regulation of the Internet and mobile wireless
  - Declined to mandate specific technologies (CDMA, GSM, TDMA, etc.)
  - Streamlined special access services
  - FCC uses market definition of FTC and DoJ
  - Spectrum auctions
  - Using reverse auctions to universal service support
- Big changes allow competition
  - Microwave allowed competition in microwave
  - Satellite allowed competition in cable

B. 5G - What the FCC is doing to encourage wireless innovation and 5G

- Need more spectrum across all bands
- Incentive auction get 84 MHz
- 150 MHz added 3.5 GHz in a 3-tier system
- New proposed changes to NPRM
- Spectrum Frontiers – ongoing
  - 1st Order in 2016
- Several GHz made available at higher frequencies

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- Also reducing barriers to competition in wireless and wireline areas
- Policies to close the digital divide
- May have spectrum screen in Spectrum Frontiers proceedings – not clear

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V. Panel: Competition and Convergence

Tom Surgrue, of Counsel, Hogan Lovells (Moderator)

- FCC seems more willing to impose behavioral conditions than the DoJ
- DoJ seems more comfortable with structural condition

Rachel Brandenburger, Senior Advisor and Foreign Legal Consultant, Hogan Lovells

- EU has 1.5x number of consumers as the US
- Fewer operators in Europe than in the US
- Economics are very important to evaluating proposed mergers
- Often a gap between how business people see the market and how government and economists see it develop
- Often business people see it before evidence emerges
- Perception that European regulators are a bit biased against US companies despite what they say
- Digitalization and harmonization are taking longer than expected
- Huge push to get to a single European market
- Procedural differences in Europe
- Europe has an administrative process as opposed to a court-based process
- Have seen consolidation of mobile operators and fixed operators and debate about what the minimum number of competitors needed
- Efficiencies argument often hasn't held-up
- Regulators still look at mergers on a vertical/horizontal context

Chris Dippon, Managing Director, NERA Economic Consulting

- Harder to define competitive market
- What are the substitute products?
- 5G is not well defined
- It's important to apply economics and to apply them correctly to look at mergers
- The rush to conclusion on most critical issues
- Take time to walk through the difficult details
- Should not go back to Title II
- Rules should apply to everyone, should not just slap net neutrality on everyone
- Convergence usually leads to vertical mergers. But if competitor builds, will ultimately result in horizontal mergers. Need to look at both as it becomes a matrix. Guideline for vertical mergers are complicated
- Competition would never have brought landlines into everyone's house, but as a society, we decided to do it
- As a society, we need to make a determination of what we want. If we want diversity of

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voices, for example, there are ways to address, such as subsidies

Robert Griffen, Vice President and Associate General Counsel, Verizon

- Convergence can break-up business models and create new questions
- Need to start with evidence and economic theory
- Some gaps, but economists looking for ways to fill those gaps
- Market can only sustain a certain number of operators
- Big 4-3 debate in Europe and the US. Few authorities really look deep at details or properly consider convergence
- Core of our business remains wireless
- Big push is to get higher frequency spectrum and get more data through it – requires more fiber
- Looking at getting more into advertising
- Not buying large content provider as AT&T is trying
- Vertical mergers will be looked at differently

Rick Kaplan, General Counsel and EVP, Legal and Regulatory Affairs, NAB

- Hard to disentangle technology from business models
- Now FCC is looking to review media ownership rules
- People get information in different ways now
- FCC is a bizarre animal when dealing with mergers
- ALJ (Administrative Law Judge) back and forth process makes mergers take a lot longer than needed
- Sometimes need to make concessions that have nothing to do with the deal or potential harms
- Access to confidential files by competitors is odd
    - Note: Moderator agreed with this
- In practice, it's hard for DoJ to monitor behavioral conditions over long time
- Cross ownership rules are getting reviewed because none have the power they used to have
- ATSC 3.0 will increase competition and possibly include mobile providers
- Infrastructure projects are expensive for new entrants. Convergence makes it even harder. Diversity costs money

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VI. Tom Sullivan, International Bureau Chief, FCC

Trey Hanbbury, Partner, Hogan Lovells (Introducer)

Tom Sullivan, International Bureau Chief, FCC

- Hard fought battle on D sector at WTU
- FCC has chair of ITU-T (top of ITU-D)
- FCC's views on emergency communications and cyber security were adopted
- WRC 2019 is coming up
    - Actively pushing bands for 5G
    - Pushing 600 MHz
    - 26 GHz is important priority
- Good relationship with CTEL and trying to align with US policies
- Good relations with Canada and Mexico – especially on 600 MHz

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VII. Fireside Chat

Michele Farquar, Partner Hogan Lovells (Moderator)

- People are talking more about what competition means to Google and Facebook, etc.

Chip Pickering, CEO, INCOMPAS

- 10th year of the iPhone. Went from no apps to many apps
- Lots of new demand driven by new content
- Apple and Facebook will spend $1B in new content in 2018
- Netflix spent $6B on new content in 2017
- New content will drive increases in network investment
- Progression of expansion of markets from convergence
- Getting to a more competitive world with content and infrastructure
- It is a long-standing set of principles and policies that have struggled, but new principles of net neutrality and Title II have allowed the current explosion of content and infrastructure build
- Want to stop fighting this issue and start building networks
- New anti-trust department at FCC is going back to conservative position that behavioral remedies are harder – may make it more difficult to complete the AT&T/Time Warner merger

Rick Chessen, SVP of Law and Regulatory Policy, NCTA – the Television & Internet Association

- Network created platform for OTT growth
- Wireless and wireline convergence
- Cable down from 98% to ~50% of traditional market
- Over half of content was vertically integrated – now down to 12-14%
- Still have some old rules, but world has changed
- Massive change in network speeds
- Agrees we have not seen the top of the increase in quality and quantity
- Would look at eliminating provisions imposed in 1992 that reflect things that no longer exist such as things to limit power of cable providers and not others
- Net neutrality has only been around for two years of the internet's 20-year history
- Title II is not the reason for its success
- Not clear it's necessary to be vertically integrated to be successful (e.g., Netflix)

VIII. Closing Remarks

Peter Watts, Partner, Hogan Lovells

- Hardest part of law is dealing with conflicts of interest
- Convergence makes it hard; we don't know who is competing with who
- Convergence is more than we've spoken about – include cars, medical, etc., and all of the regulations in those areas
- Convergence is ultimately about data
- Managing trust is going to be the biggest factor
- Culture is very important is dealing with the issues

IX. Cocktail Presentation

Mark Brennan (Introducer)

Neil Chilson, Chief Technologist, Federal Trade Commission

- IOT promises enormous benefits.
- Consumers may face data security challenges, but many of these are analogous to the early days of personal computing.
- These challenges are surmountable if we – engineers, lawyers, policy makers, industry, and consumer advocates – tackle these challenges now, as we did then, with a layered, enforcement-focused approach that permits innovation rather than one that prescribes interventions.
- At the FTC, we will continue to take that approach by educating businesses and consumers, incentivizing creative solutions, and addressing harmful practices through appropriate enforcement action.

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