Testimony before the United States House of Representatives Committee on the Judiciary
Hearing on
"Collusion in the Global Alliance for Responsible Media"

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Spencer Weber Waller
Justice John Paul Stevens Chair in Competition Law
Loyola University Chicago School of Law

Chair Jordan, Ranking Member Nadler, and Members of the Committee: Thank you for the opportunity to present my views at today's hearing.

My name is Spencer Weber Waller. I am a tenured full professor at Loyola University Chicago School of Law where I hold the Justice John Paul Stevens Chair in Competition Law. I also serve as the Director of the Institute for Consumer Antitrust Studies at Loyola Chicago. Today I speak solely in my personal capacity.

Throughout my career, I have specialized in antitrust law and policy in practice as well as in my teaching and publications. I have worked on antitrust matters for the Antitrust Division of the Justice Department, at the Federal Trade Commission, and in private practice. As a full-time professor, I have served as of counsel to three different law firms, also focusing on antitrust law. While I occasionally serve as a consultant or an expert witness on antitrust cases, I do not represent the Global Alliance for Responsible Media (GARM) or its member firms and have no other conflicts.[1]

I am concerned that the antitrust concerns expressed in the announcement of today's hearing and the letters sent to companies here today do not correspond to the consensus understanding of the United States antitrust laws by most courts and commentators. Because I only have access to publicly available information, I cannot opine whether there is, or is not, any specific antitrust violation. Instead, I present a roadmap of the many antitrust issues that need to be addressed in a serious way before any legitimate antitrust concerns exist.

I. The Core Antitrust Principles

Sections One and Two of the Sherman Act[2] are the core U.S. antitrust statutes relevant to today's hearing. Section One of the Sherman Act prohibits contracts, combinations, and conspiracies (some form of agreement) that unreasonably harm competition. Unilateral conduct, including the right to select one customers and suppliers, does not constitute unlawful collusion. To put it differently, without proof of agreement, there is no Section One Sherman Act violation.

[1] To the extent it is relevant, I previously served as an expert witness in an unrelated antitrust matter in Canada adverse to Microsoft, a member of GARM.

[2] 15 U.S.C. §§ 1-2. Other important antitrust statutes include Section 5 of the Federal Trade Commission Act prohibiting unfair methods of competition, 15 U.S.C. §45 and Section 7 of the Clayton Act relating to mergers and acquisitions, 15 U.S.C. §18.

Even where firms act in a similar, or identical, fashion, more is needed to establish an agreement that violates Section One of the Sherman Act. The plaintiff must show that two or more economically independent actors have undertaken a conscious commitment to act together to achieve some unlawful objective.

For example, two or more firms that separately choose to use the same widely available public information, and independently decide to pursue a similar course of conduct, do not necessarily violate Section One. Something more is needed. These plus factors include whether the firms have acted in a way that only makes sense if done together, rather than individually. An important factor cutting against liability is the presence of a legitimate independent business justification for a firm or person taking some action regardless of what anyone else does.[3]

It is important to note that most members of GARM do not compete with each other and each, of necessity, has unique needs for marketing and branding. For example, Microsoft does not compete with McDonalds; nor does Proctor & Gamble compete with Shell. These firms also do not generally compete with content providers such as Mr. Shapiro.

Unilateral conduct violates Section Two of the Sherman Act if it constitutes monopolization or attempted monopolization.[4] This statute requires proof of both monopoly power (or a dangerous probability of achieving such power) and some unlawful or exclusionary conduct. The defendant must do something that goes beyond competition on the merits and engage in conduct that lacks a substantial legitimate business justification.[5]

A unilateral refusal to deal rarely violates Section Two of the Sherman Act. A defendant only violates the law where it controls a truly essential facility, denies a competitor access to that facility, could have reasonably granted access, and lacked any legitimate justification for doing so.[6]

II. The activities of GARM do not appear to be a cartel.

Cartels are one of the most serious concerns of antitrust law. Cartels normally involve an agreement between competitors (sometimes assisted by third parties) to fix prices, rig bids, limit production, divide markets, diminish quality, or interfere with innovation.[7]

This does not appear to be the case with the activities of the GARM relevant to today's hearings. As discussed above, GARM is composed of a diverse coalition of companies, who for the most part do not compete with each other nor compete with most content providers potentially affected by the terms and definitions developed by GARM. These terms and definitions do not affect the price, production, or quality of the goods and services sold by the members of GARM. Advertisers and advertising agencies

[3] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).
[4] Another provision Section 2 of the Sherman Act also prohibits conspiracies to monopolize. This provision is rarely used because it requires the same type of proof as a Section One violation as well as additional requirements.
[5] United States v. Grinell Corp., 384 U.S. 563 (1966).
[6] *See generally* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP., 540 U.S. 398 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983).
[7] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

may, or may not, rely on the GARM terminology or may adopt other criteria to determine how and where to place advertising.

The public nature of these terms and definitions also are very different from the secretive processes by which cartel members meet to create and enforce their unlawful agreements.[8] Protecting brand image and successful marketing strategies are two of the many types of business justifications that routinely are considered in rule of reason antitrust cases. This suggests that something much more benign is at work here and that any court would carefully consider such information in their analysis.

Based on the publicly available information, GARM also appears substantially different from a trade association or even a traditional standard setting body. The GARM initiative does not appear to involve the creation of binding industry standards that determine whether products and services can be sold. While standard setting processes have been challenged on antitrust grounds, those cases typically involve the use of deception or the creation of standards that outright ban the creation or sale of a competitor's product.[9]

III. Characterizing GARM's conduct as a boycott does not change the antitrust analysis.

The law governing group boycotts (sometimes referred as concerted refusals to deal) has evolved substantially over the past fifty years. Group boycotts today are only per se unlawful when they are used to implement an otherwise per se unlawful cartel type agreement, or when firms with market power collectively deny a competitor access to some key source of supply it needs to survive. For example, the Supreme Court condemned an agreement by a group of Los Angeles car dealers to injure innovative competing car dealers by cutting off the supply of new cars from the manufacturers.[10] GARM's activities appear very different from this type of classic group boycotts cases.

Since 1985, antitrust law treats all other types of agreements not to deal under the rule of reason requiring deep analysis on a case-by-case basis. This requires proof of the agreement, the relevant market or markets affected, the market power of the firms involved, an unreasonable degree of competitive harm, and the absence of legitimate business justifications.[11]

This is a heavy burden for any antitrust challenge. It is particularly so in light of the publicly stated justifications offered by GARM that the terms and definitions help its members, and others, individually assess whether online advertising options are appropriate in effectively reaching target audiences and avoiding harm to sales, brand images, or corporate reputations.

IV. There are important separate issues of First Amendment protection for GARM.

Separate from the traditional antitrust analysis outlined above, the First Amendment, and the interests in free expression, also limit the application of antitrust laws in important ways. The *Noer-Pennington*

[8] See THE INFORMANT! (Warner Brothers 2009)(fictionalized account of the operation of a real world cartel in the food additives industry).
[9] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 208).
[10] United States v. General Motors Corp., 384 U.S. 127 (1966). *See also* Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941).
[11] Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

doctrine immunizes conduct that seek to influence governmental action and public policy through a variety of tactics including "publicity campaigns", even it is also intended to harm competition.[12]

The Supreme Court has held that such protection is necessary because there is no evidence that Congress intended to apply the Sherman Act to political, rather than commercial, conduct.[13] In addition, the Court was concerned that to impose antitrust liability to publicity campaigns, lobbying, and related conduct, would raise significant First Amendment concerns.[14]

As a result, there is antitrust immunity for conduct designed to influence public opinion and government action at the federal, state, or local level in any branch of government, even if competition is harmed. There is a narrow exception where the government petitioning is a sham, such as perjury, or bringing frivolous litigation, not applicable to the issues involved in these hearings.[15]

The Supreme Court and the lower courts have shown a separate, and special, caution for applying the antitrust laws to impose liability for political or social boycotts, even if there is a degree of economic self-interest by the groups conducting the boycott. The Supreme Court held that the First Amendment protects a civil rights boycott of white merchants in Mississippi by the NAACP.[16] Similarly, the Eighth Circuit provided antitrust immunity for a boycott by the National Organization of Women of convention facilities and businesses in Missouri for its failure to enact the Equal Rights Amendment.[17]

First Amendment protection for such conduct is wise, even where some of the boycotters may also benefit in some way from changing the status quo. Simply put, the Supreme Court stated in *Claiborne Hardware*: " … boycotts to achieve political ends are not a violation of the Sherman Act." [18]

V. Conclusions

The Committee's expressed concerns over the conduct examined today are not consistent with the consensus view of antitrust law set forth in the leading cases. Moreover, there are significant First Amendments implications raised by the actions of GARM. These First Amendment issues suggest that even if the antitrust concerns were fully justified, and every issue in this antitrust roadmap were satisfied, there would be a plausible argument that the conduct was protected as a matter of free speech and expression.

The policy implications of imposing antitrust liability conduct in these circumstances are quite concerning, regardless of one's political views. A leading antitrust treatise published by the American Bar Association aptly states: "Boycotts are a common instrument for bringing about social change or advancing, political, religious, or other noncommercial goals."[19]

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[12] Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).
[13] *Noerr*, 365 U.S. at 136-37.
[14] *Id*. at 138.
[15] Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).
[16] NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).
[17] State of Mo. v. Nat'l Org. for Women, 620 F.2d 1301 (8th Cir. 1980).
[18] *Claiborne Hardware*, 458 U.S. at 894 (quoting the prior opinion in the case by the Mississippi Supreme Court).
[19] I ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 129 (9th ed. 2022).

Using the antitrust laws to challenge expressive conduct of this type interferes with commonplace forms of advocacy by consumer, business, civic, religious, and political groups of all types and political persuasions that are part of the fabric of our country and entitled to substantial First Amendment protections. As a result, I do not see any benefit from further legislative action on these issues at this point.