[INFORMATION TRUST EXCHANGE GOVERNING ASSOCIATION]

DEFINING LIMITS OF ANTITRUST ENFORCEMENT:
A DISCUSSION ABOUT PRICE FIXING AND COLLUSION

Below is a complete transcript of a June 24, 2010 lecture by Thomas A. Lambert, Wall Chair in Corporate Law and Governance, delivered at the Donald W. Reynolds Journalism Institute (RJI) of the University of Missouri to a group of about 50 executives and scholars in the news industry, during the gathering, "From Blueprint to Building: Making the Market for Digital Information"

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SPEAKERS
Bill Densmore, RJI Fellow; Thomas A. Lambert, Univ. of Missouri law school.

- **VIEW LAMBERT'S SLIDES** **SUMMARY OF TALK**

Bill Densmore 00:00
I want to take a minute to introduce our discussion leader for who will be here for about a half an hour, and he's got a hard stop, like we all do. So it'll be short and sweet, but awfully important. I think one of the challenges of collaborative action in a world where you're dealing with consumer services is to make sure that the action you take collaboratively is is for the right reasons, that it is designed to improve the marketplace from a consumer point of view, and not designed in any way to monopolize the marketplace or create an environment which is anti consumer and because in many ways, some of the things we're talking about today and tomorrow certainly relate to changes in our relationship with the consumer marketplace. I thought it would be really helpful and useful to have an expert from the law school here at the University of Missouri talk to us a little bit about that.

Bill Densmore 01:00
Tom is had practiced law at Sidley & Austin, one of the largest corporate law firms in Chicago, for a number of years. He's a University of Chicago Law School graduate, which means he's no slouch in the law world and Wheaton College undergraduate. And he's also actually just had a part of The Mizzou Advantage task force here at Mizzou, along with Charles Davis, which is an effort to try and pull

together all of the strategic academic resources on the Mizzou campus to the economic development advantage of mid mom and I guess, the whole state. But I've asked Tom to talk for maybe he's got a little PowerPoint talk for 10 or 15 minutes, and then I'm sure there'll be a few questions -- you questions. And then after Tom's finished, he has to go. I'm just going to have a few remarks about how we're going to work the afternoon. But Tom, you got the floor. Thanks very much.

Thomas Lambert 01:59
I'm honored to be here, I tell you, Bill contacted me about a week ago, yeah, and asked me to talk to you today about antitrust law and the antitrust implications of what this group is doing. And unfortunately, I haven't. I don't really know exactly what this group is. I haven't been able to in the week coming down from Chicago, figure that out exactly. So what I'm going to do is to present basically just a wall to you, and then you can apply these principles to the discussions that you're having this afternoon, and I'm happy to answer any questions about specifics.

Thomas Lambert 02:46
So we will start at the very beginning. What antitrust is about. We all know that probably the best regulator in a market economy is competition. Competition drives prices down. Perfect competition drives prices down to the level of marginal costs as far as they can go and have the seller stay in business. It also leads to enhanced better output, better goods and services. So any trust is really the law of competitions, the body of the law that's designed to make sure that firms compete vigorously to the benefit of consumers. All right, so that raises the question, how may competition break down? I always have to try not to lapse into Socratic methods. I won't ask anyone to tell me how competition may break down, but it's pretty obvious. One situation where competition from breakdown is when you have one buyer or one seller. When you have one seller, it's a monopoly. There's no competition because there's only one seller. We've got one buyer. It's a monopsony. Same idea. In addition, you can have a breakdown in competition when you have a number of competitors, but they agree not to compete with each other, and that we refer to as collusion. So these are two primary ways that competition breaks down. And not surprisingly, the Sherman Act, which is the primary antitrust law, follows these two competitive breakdowns. So there is a monopolization provision. It aims to prevent firms from gaining monopoly power. Every person who shall monopolize, attempt to monopolize, blah blah shall be deemed guilty of a felony that aims that single firm conduct attempts to become a monopoly. And then we've got section one collusion provision says every contract combination in the form of trust or otherwise or conspiracy and restraints favor of commerce among several states is declared to be illegal.

Thomas Lambert 04:43
Okay, we are concerned here. Well, concerned with the collusion provision. It's doubtful that we're ever going to have a single mono well, maybe Rupert Murdoch will one day be a monopoly. News monopolist, but not yet. The concern here is collusion, that the venture that you're considering would amount to an agreement not to compete, that could run afoul of section one, the Sherman Act, right? So section one requires two elements for there to be a violation of the law. First, a contract combination or conspiracy, that's basically an agreement, and it can be a horizontal agreement, that is agreement among competitors at the same level of a distribution scheme, or it could be a vertical agreement, say an agreement between a manufacturer and a retailer. Here we'd be concerned about an agreement among competitors, competing news organizations. Horizontal restraints are the most dangerous types of restraints, so you have to have a contract combination or conspiracy, and then it must result in a restraint of trade.

Thomas Lambert 05:45
Well, what is a restraint of trade? Well, what it quite literally means is that because of this agreement, an economic transaction that would otherwise occur is not occurring. So price fixing is the classic restraint of trade. When two competitors agree to set their price at $9 per widget, they are basically

restraining themselves from making a sale to anyone at some price less than $9 a widget. So restraint of trade is just an agreement not to engage in some transaction you would otherwise engage in. Now, the Supreme Court, very early on, realized that, literally, section one of the Sherman Act is nonsensical. Every single commercial contract restrains trade. When I promise to buy your car, you are promising not to sell it to someone else. You are restraining yourself from selling it to someone else. So every single contract restraints trade. And what the court says is, well, what we mean is it must be an unreasonable restraint trade.

Thomas Lambert 06:47
So we've got two elements here, an agreement and an unreasonable restraint of trade. In this case, with respect to what you all are considering without doubt, the first problem is satisfied. This is going to be a collaborative venture among a number of competitors that would be a contract combination or conspiracy. The question is, when does it result in an unreasonable restraint of trade? All right, the Supreme Court has struggled to set forth what constitutes an unreasonable restraint of trade. I'm going to talk about some of the foundational cases, and then some of the modern cases, one of which is really, really useful, I think, to you all, but the very first case that the Court considered here, one of the very first cases is, is a case involved in Chicago Board of Trade. The members of the Board of Trade had agreed to this thing called a call rule that said that the price of a certain type of grain contract to arrive grain contracts would be fixed every day at the end of the trading session and couldn't be changed until the following morning. So that is literally fixing of the price for some period of the day. The government sued, and the Supreme Court held this is actually okay. This is a reasonable restraint of trade, even though it involves literal price fixing. Now in the Chicago Board of Trade case, the Court wrote what is probably the most famous statement in interest law. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable history of the restraint evil believed to be to exist, the reason for adopting the particular remedy. All these are relevant facts. That is a really nasty inquiry. If you're a litigator, you love it when the court says things like this, because you have, you'll be fighting forever test, and the court did do and conduct a very probing inquiry in this case. And what the court says this restraint, even though it literally fixes price for a period of Day of the day, it actually creates enormous efficiencies. What it does is it encourages anybody who has a two ride contract to sell or wants to buy, one to show up at the call session, that's when the prices are negotiated. The reason you show up is because if you don't, you're stuck with the price that's determined there until the following morning. So this has the effect of bringing everyone together, which lowers transaction costs and has all sorts of efficiencies and actually enhances market output. Thus, this thing was determined to be legal, alright.

Thomas Lambert 09:48
Few years later, seven years later, the court decides a case called Trenton potteries. Chicago Board of Trade has said, when we evaluate trade restraints, what we want to do is apply this rule. Of reason, we will accept the restraint, as long as it's a reasonable restraint, right? So Trenton potteries involved a case where competing sellers of sanitary bathroom pottery, which I think that means toilets had agreed to set the prices of toilets, but they stipulated and the court agreed that the prices were set at reasonable rates. So their argument was, hey, this is a reasonable restraint of trade. We fixed prices, but these are pretty much the prices that would prevail in perfect competition. That's reasonable. The Court held, no, no, that is illegal on its face. If you have fixed price and you can't tell us a good story for why you did so, we're going to say that what you've done is illegal. It engaged in almost no inquiry here, very cursory, struck the restraint down, all right.

Speaker 1 10:49

Few years later, six years later, court decides a case called Appalachian Coals. This is 1933 Depression era. There was excess supply among sellers of Appalachian coals. The price of Appalachian coal had been driven very, very low, and so 137 coal producers hired a joint sales agent to go out and sell and market Appalachian coals, kind of like the Got Milk campaign. Got Appalachian coal, and they're competing against other forms of fuel. Basically. Now in order for the sales agent to do its job, it had to set the price of Appalachian coal. This is a fungible commodity. So if you had some wholesalers pricing at some point, other coal sellers pricing at another point, we'd have arbitrage. Things wouldn't really work. So there was literal price fixing by this joint sales agent. The Court held out that this is a reasonable restraint of trade, even though there is literal price fixing, it engaged in a probing inquiry, and decided that, on balance, this thing was okay and it would be legal.

Thomas Lambert 11:57
Seven years later, we have a case called Sacony Vac, and this is another of the really famous antitrust decisions, we had exactly the same problem in a different industry. In this case, the industry was gasoline. There was what you called the stress gasoline, which basically basically results, because it's hard to turn off spit on these oil wells and so sometimes you just keep producing because it's too hard to shut down and restart. So we were producing gasoline at a point where you couldn't sell it for more than the cost of producing. That's a stress gas. And so the major oil producers, or gasoline producers, got together and got what they call dancing partners, each found an independent producer and agreed to buy up that producers excess gasoline on the condition that the independent not produce any more gasoline. So the idea was, we are going to collectively work to reduce the amount of gas available so as to drive a price now, the problem in Appalachian Cole since the county vacuum is exactly the same excess supply. In this case, though, the Court held no this is an illegal restraint, and this is we're not even going to engage in any analysis here. This just strikes us on its face as a restraint that is unreasonable and thus illegal.

Thomas Lambert 13:20
All right, so you put these cases together, and we get the first major distinction in section one jurisprudence, and that is distinction, the distinction between naked and ancillary restraints, If, if a restraint is profitable because it reduces output and drives up price. I mean, if that is what it is about trader strength that makes it a sensible business proposition, then it seems to be naked and it's per se illegal, automatically illegal. All right, so in Trenton potteries, the defendants couldn't really tell us a story about why they were fixing price, other than, you know, they could produce some output collusively drive out their pricing would be profitable for them. Same thing in saconi vacuum the oil case. The reason that that restraint made sense is because we were collectively reducing the total amount of output and driving up the price. In both of those cases, we have a naked restraint automatically per se illegal. So you'll hear people say a lot price fixing is per se illegal. I hate it when people say that, because it's true, but there are plenty of instances of price fixing that are not per se illegal. Trenton or Appalachian calls, one where we had a joint sales agent that was collectively marketing coal. There was price fixing in that case, Chicago Board of Trade, there was price fixing in that case, but it wasn't naked price fixing, alright? So naked means it makes no business sense, except for the fact that it reduces. Output and drives up price. Ancillary, an ancillary restraint is a restraint that makes business sense without reducing output and driving up price. It makes business sense because it actually is enhancing output, right? So if you look at the other two cases, the Appalachian coa, the one involving the joint sales agent for Appalachian coal. In that case, the point of the joint sales agent was to go out and market this particular type of coal as a fuel source, was actually to expand sales of Appalachian coal, not to reduce the supply of Appalachian coal and drive up price. Same thing, same thing. In the Board of Trade case, that restraint made sense, because its point was to bring everybody to the call session and make the call section session work more efficiently.

Thomas Lambert 15:51

All right, so the first thing you have to do whenever you're assessing an agreement among competitors is ask, is that particular agreement a naked agreement or an ancillary agreement. Are we doing this because we are somehow trying to expand output, or are we doing this because we're trying to reduce output and drive up price? Now it seems pretty clear to me that with respect to what you all are talking about, you're talking about an ancillary restraint. There may be aspects of, I don't know specifics of plan, but sometimes you can have a plan that is on the whole ancillary but there are some naked aspects to it. But for the most part, the suggestion here is we want to actually increase the output of these various news organizations, the sales of news content, etc, that would be an ancillary restraint. So that's good. All right, now the naked ancillary distinction just tells you whether you get per se treatment, which is automatically illegal, or you get evaluated under the rule of reason. If you're ancillary, you get evaluated under the rule of reason. That's not the end of the inquiry, though, once you fall under the rule of reason, then the court is going to look hard at the business practice and decide whether it is on the whole output enhancing or on the whole output reducing, right?

Thomas Lambert 17:12
So quickly some I'll quickly summarize for you the four main Supreme Court cases that deal with application of the rule of reason. One of them, I think, is really on point for what you all are discussing. These cases all occurred around, began about 1978 and that was the year that Robert Bork published the book *The Antitrust Paradox*, which revolutionized the antitrust. He basically said to the Supreme Court, well, the whole body of law is paradoxical. It doesn't make any sense. Fix it, and they started fixing it. So as 1978 is considered to be the modern era of antitrust jurisprudence, the first of these cases is a case called Professional Engineers. In this case, the members of an engineering society had agreed to this ethical canon whereby they would not discuss price with clients until the clients had engaged an engineer. The idea here was they didn't want to compete with each other on price, basically because what they were purportedly concerned about was that prices would be driven so low that engineering firms would cut corners, and we'd have unsafe buildings.

Thomas Lambert 18:23
It's hard for me to articulate that without smirking. The Supreme Court said it doesn't take a rocket scientist to figure out, first of all, that this is just a mask for an attempt to avoid competing on price. But in any event, even if what you're telling us is absolutely the truth that your concern here is public safety, that doesn't count. All that we care about when we're applying the rule of reason is whether a restrained issue enhances competition, leads to more competition or leads to less competition, and you can equate competition with market output. If it leads to more market output, it's good. If it leads to less market output, it's not good. You can't question competition, though, if you want to say in this case, the engineers were saying competition itself is unreasonable because it leads to poorly designed buildings. That may be the case. But if that's the problem, you need to go to Congress and get an exception from the antitrust laws. Alright?

Thomas Lambert 19:32
The second case, and this is the one that everybody here should read, broadcast music, BMI versus ASCAP, or ASCAP versus United States, BMI and ASCAP. Everybody is probably familiar with their business, probably significantly more familiar than I am copyright holders folders with the copyrights to recordings. Can. To give BMI a non exclusive right to the copyright. BMI then acts kind of as the middleman. And when the radius, when a radio station wants to play a copyrighted work, it gets the license from BMI, rather than individually negotiating with all of the copyright holders. Right now, what BMI and ASCAP were doing is they were issuing blanket license, licenses for all of the songs in their repertoire. So a radio station could get a blanket license from BMI, could play everything in BMI repertoire, the BMI then would, you know, monitor the broadcasters, figure out how often each song was played, and then would pay, I mean, they received BMI received a portion of the profits of the broadcasters, or flat fee from the broadcasters. They would then pay each copyright holder based on the

number of times his or her copyright work was aired. Right? That involves literal price fixing, because the copyright holder, each copyright holder is being paid the same amount per airing of his recorded work. So Sweet Home Alabama gets paid the same as Rock Me Amadeus or whatever. So there's literal price fixing there.

Thomas Lambert 21:17
The Court held that this thing passes muster under the rule of reason, even though there is literal price fixing on a license to play copyrighted song for a single time. The reason the court said -- these are three very important things. First, this thing that BMI is doing greatly reduces transaction costs. Radio stations, you know, you used to have to go and, in theory, negotiate individually with copyright holders for the right to air their works. Now they can just go to this one centralized location, in addition the blanket license the court says creates really what is effectively a new product. I mean, the blanket license is greater than the sum of its parts. It's not, you know, it's better than just a whole bunch of individual licenses, because it's really easy to negotiate. You don't have to, you know, worry that you're going to place something that accidentally place something you don't have a license for, etc. And then the third thing the court said is this thing is, is especially okay because it's a non exclusive venture. The court said, Look, if this arrangement did have the effect of artificially raising the price for copyright licenses, then holders of individual copyrights could act outside of the venture. They could individually negotiate with radio stations. So VMI wasn't saying, you know, you if you want to license your work through us, you can only license through us. You can individually license with other radio stations if you want to apart from us. Right? That, I think, is a really this is a very helpful case for my understanding what, what you all are contemplating.

Thomas Lambert 23:07
Couple other quick, quick cases. One is the Maricopa County case. Physicians and insurance companies in Maricopa County, Arizona, adopted this plan where the physicians agreed to maximum prices for different services and the insurer insurers in exchange for the physicians agreement not to charge above a certain price, promise that they would pay 100% of all The physicians charges for their insurance. Now this is maximum price fixing, not minimum price fixing. You would think that that can really only help consumers credit. Court says we don't care when you're literally fixing prices, unless it's an ancillary restraint, it's going to be per se illegal, and this is a widely criticized decision, because this case is decided in 1982 pre HMO. The point of the restraint, basically, was to create some price competition in a market that, as we all know, doesn't have a lot of price competition. So probably this was a pro competitive restraint, but the Supreme Court made one point that's very important. It said, in this case, an agreement among the insurance company and the physician each individual decision saying we'll pay your patients fees if you adhere to the maximum price, that'd probably be okay, but what we had here is a horizontal agreement among physicians to set their prices. That agreement seems unnecessary to make this restraint make business sense, right?

Thomas Lambert 24:59
So that the takeaway lesson from that is you need to look at each agreement or restraint on an agreement by agreement basis, and ask, Do we really need this? Do we need this to make the venture work? If we do, then it's probably okay. If we don't, if there's a less restrictive alternative, then we need to go with that. It looks like what the Supreme Court was doing was knocking this down because the participants hadn't chosen the least restrictive alternative. We see the same thing in the NCAA case. I won't go into this because I'm going to have a couple minutes for questions, but essentially the court the takeaway lesson in that case is the same thing. NCAA had adopted these broadcast limitations that the member schools had. It wouldn't air more than a certain number of games, et cetera. Purported purpose was to encourage attendance at live games. And they said, Look, we're a network joint venture. That means that, basically, we have to have these agreements among competitors in order to produce the product we produce college football. And so our agreements are okay. And the court said, Well, yeah,

you do have to agree on a whole lot of things. You have to agree on the fact that that you only will have students on the teams that they can't be paid for what they're doing, that they actually have to go to school, that the field is going to be a certain size. There's, you know, you gotta agree on a whole lot of things, but you don't have to agree on broadcast limitations.

Thomas Lambert 26:30
So once again, we see the same principle, don't agree to any more than you need to agree to in order to make the venture work. Alright? So to summarize, I think these are the guiding principles that you can get from these Supreme Court decisions that should you should keep in the back of your mind as you're flushing this venture out first. And this, I think, is a non issue for this group. If the restraint is negative, then it's illegal. This, this, to me, is clearly not a naked restraint. The whole point here is to enhance output, not to reduce output, so you can charge super competitive prices. So I don't think that's that's going to be a problem. So we're in the world of the rule of reason. In applying the rule of reason, the key question, and this is what we get from professional engineers, is whether the restraint enhances or reduces competition. And competition can be roughly analogized to market output. If it enhances market output, there's more at the end of the day, it's good. If there's less at the end of the day, it's not good. This is important, I think, with respect to a project like this, where there are some output goals, some economic output goals, and maybe some non economic output goals. From an antitrust standpoint, we don't care about those other goals. You can't elevate democracy -- or whatever the other concerns might be -- over market output. It's just not allowed. Sorry.

Thomas Lambert 28:13
This, and this is the me here, once you're under the rule of reason, I'm pretty sure this, this venture would be, the restraint is more likely to pass muster to the extent that it reduces transaction costs, it facilitates the creation of a new product or service. Those are the lessons of BMI. Now important to see it needs to be reasonably necessary, and it needs to be the least restrictive alternatives. So you can't, you know, you can't say, oh, we've created a new product or service, but we've laden our joint venture agreement with all sorts of output constraining features that we don't really need in order to accomplish our goal. It needs to be as unrestrictive as possible. But to the extent it creates a new product or service, it's likely to pass muster. Third, it's it shouldn't be exclusive if you have a situation -- and I know there was some discussion of the AP digital digital registry this morning. Bill sent the Justice Department's Business Review letter on that, that venture. That's the letter where the Justice Department says, If you do this, as you describe to us, we don't, we won't sue you. One of the things that the DOJ emphasizes that is a non exclusive venture, so members that participate in that, that market, their output through this registry are free also to market their out their output independently, and that's important.

Bill Densmore 29:50
And I should say also you heard Randy [Picht] say earlier, he emphasized the fact that the registry will be open to non members. And I think you can read between the lines, you'll know why the AP is saying that, among other reasons.

Thomas Lambert 30:05
It's also the best. And this is something that was that was mentioned in the AP letter. If ventures who are collectively selling their output through, you know, a joint clearing house or whatever -- if they individually can set the terms for the stuff that they're selling. Now something that the Justice Department emphasized in the AP Business Review letter -- that in the digital registry, the providers of content were going to be the ones who determine for themselves how much they would charge for that conduct content. And the last thing is, and this is, anytime you have a market where entry is easy, coming into the market in response to inflated prices is easy to do, then antitrust regulators are much less suspicious. And I believe that your industry is one where we have a pretty easy entry, and so that's

that's kind of a good sign. Now, those are the basic principles. I'm happy to answer any questions now about the specifics of this plan that I know very little about,

Unidentified Speaker 31:14
And we appreciate your clean bill of health.

Bill Densmore 31:18
I have a question myself, and that is where we all understand the sensitivity about anything that has to do with pricing or service terms and that kind of stuff. But if you are the railroads and you agree on a certain width railroad track to facilitate commerce, or if we, if elements that we've been talking about today have come to agreements on some technology standards or some some rules about how you package things in order to move them around the web. Where would you, how would you say? Would that feel safe to you?

Thomas Lambert 31:55
Yes. I mean, with caveat, have a lawyer look at it first. But I mean, standard setting is basically what you're talking about. Anytime you have a network joint venture, you have to set some standards. Standard setting is, is usually pro competitive. And I'll tell you, there's a David Balto -- who was Assistant Attorney General in the antitrust division several years ago -- has a speech where he talks about antitrust in standard setting. (See, "Standard Setting in a Network Economy," https://www.ftc.gov/news-events/news/speeches/standard-setting-network-economy) If you Google Balto antitrust standard setting, it should come up and he goes through the specifics on that, but I mean standard setting greatly reduces transaction costs and frequently facilitates, you know, more output, being able to market to a wide group of people, and so it's generally okay under the antitrust laws. The caveat is that, on occasion, firms will engage in standard setting, you know, purportedly engage in standard setting, in basically, in order to avoid competing with each other. So, you know, there are consumers that are demanding a particular feature, and the firms kind of don't really want to provide that feature, and so they'll say, Oh, we're going to have standard that eliminates that feature. That's that's not going to be absolutely okay. Now, if they can articulate that adding the feature would somehow impact interoperability, or something like that, then it's a different story entirely. But standard setting can be a mask for a decision just not to compete with each other, because competition is hard.

Unidentified Speaker 33:50
Yeah, so a big question. But the so with the web, with the internet, isn't the definition of the markets we're dealing with here itself change so that, I mean, for example, so in the news industry, newspapers are competing against Google, against Apple, etc. Does that change? The should change the nature of it?

Thomas Lambert 34:11
Well, I think you're right. And I mean, I think that is something that makes this look much less scary when a court applies the rule of reason the starting point, one of the starting points is always to look at the structure of the market in which the restraint is occurring. Markets with a handful of players that are quite large, where entry is difficult are easy to cartelize. Markets that are quite large with many, many diffuse players, where entry is easy are very difficult to cartilize, and so it's much less likely the restraint in the latter sort of market would be deemed to run afoul of the rule. Of reason, and with technological I mean technology drives market definition. So as technology has changed, I think that you're exactly right, that the market here has expanded to include lots of things besides traditional newspapers. And so we've got a much less concentrated market where entry is much easier, and so any sort of a joint venture is going to look less scary.

Speaker 2 35:30

Yeah. So one of the many ideas out there that's being bloated, as far as how monetized content to have a carve out for a period of time, 36 months, has been thrown out there for the industry to get together and essentially fix prices and then come at come into the market at once with an understanding and essentially a standard setting across across the board. I think, based on what you told us, that doesn't seem as though that would be likely. But I want to ask question context of the Major League Baseball carve out that exists so as what was, what were the circumstances in 1922 that made that palatable, versus the baseball's exception from exemptions in the antitrust laws?

Thomas Lambert 36:11
It's one of the craziest things in American law. It's not a statutory matter. Congress did not create that exemption. The US Supreme Court did, and then it went up to the Supreme Court in a case called flood versus Coon, which is one of the muddiest decisions in history, where the court talks about America or baseball being, you know, the national pastime and special and all that kind of stuff. I wouldn't rely on anything like that from the Roberts court.

Speaker 2 36:44
institutions in American institutions. You said democracy and blah, blah, blah would not be, would not be factors in case. But obviously

Thomas Lambert 36:51
there's precedent. Well, yes, I mean, it's, it's like a lightning bolt out of nowhere, and it's crazy. Now, if you wanted to, if one wanted to get this sort of exemption from the antitrust laws, you wouldn't get it from the court. You'd go to Congress and get it. You're much more likely to get it there. And I forgot who I was talking to about the Yes,

Speaker 3 37:12
newspaper Preservation Act of 19

Thomas Lambert 37:15
seven. Okay, I'm not familiar with this statute, but

Speaker 3 37:18
exemption from section one of chairmans for joint operating agreements from newspapers with the consent.

Thomas Lambert 37:25
DOJ, So, apparently there is some semblance of this sort of thing out there, although it sounds like it might be kind of limited.

Thomas Lambert 37:34
Other questions, quick question, is there such a thing as creating your own market, and is that considered expansion of markets? Or is that considered collusion? Have you managed to create something that is sort of a subsection or side market? Is that considered a good thing, or is that considered limiting or anywhere near that, speaking in terms of going off of the World Wide Web, but still being on the internet and having something else that's more proprietary, right?

Thomas Lambert 38:06
I don't know enough details here, but what it sounds like you're describing to me is it's creating a new product or service. I mean, if you get competitors that come together and cooperate to create something that didn't previously exist and that could not be created absent concerted activity, and that is almost certainly legal. That's that's good. I mean, that's what the blanket license was with BMI and ASCAP. You

know, those are really very useful things that couldn't be created an absent cooperation. And the Course says, Hey, this is good. You just created something entirely new. We like that.

Speaker 2 38:53
Where the total is more valuable than the sum of the parts?

Thomas Lambert 38:56
Right, right, right,

38:59
Which isn't that what Google is using to do the digitization of all the books, because there's a cooperative agreement to do that, you've got to say that what we're producing is better. So is that what they're using to develop that product?

Thomas Lambert 39:16
I'm going to refrain from answering that question, because this is, this is one of the antitrust topics that I've kind of avoided. I was waiting till the summer when I had a chance to really sit down and pour over the Google Book settlement and figure out the nuances of loss. I don't really want to opine on that, but what you just said strikes me as right, having not looked at it very hard.

Bill Densmore 39:41
Tom I know you've got another date that was four minutes ago. So if anybody else has a key question, ask it quickly. But I can definitely put you in touch with him if you want to follow up some follow up time later.

Thomas Lambert 39:55
Thank you. Applause.

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1. Author of How to Regulate (2017) Cambridge University Press
2. https://www.amazon.com/How-Regulate-Policymakers-Thomas-Lambert/dp/1316508005
3. https://en.wikipedia.org/wiki/Thom_Lambert
4. https://www.justice.gov/archives/atr/thomas-lambert-biography
5. https://law.missouri.edu/directory/thom-lambert/
6. https://kemperawards.missouri.edu/fellow/thom-lambert/
7. https://truthonthemarket.com/author/tlambert1/
8. https://democrats-judiciary.house.gov/sites/evo-subsites/democrats-judiciary.house.gov/files/migrated/UploadedFiles/Attachment_to_Submission_from_Thomas_Lambert.pdf
9. https://lawreview.uchicago.edu/sites/default/files/Lambert_0.pdf
10. https://scholarship.law.missouri.edu/facpubs/index.9.html

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