

Information Access Alliance

Challenging anticompetitive behavior in academic publishing

by Mary M. Case

Libraries conduct business with numerous companies to acquire scholarly resources for their user communities. Over the last 10 to 15 years, however, many of these companies have been bought and sold, resulting in fewer and fewer publishers in the commercial marketplace.

For example, LexisNexis, Martindale Hubbell, Butterworth, Harcourt, Holt, Rinehart & Winston, Cahners, JAI Press, Chilton, CIS, Academic Press, BioMed Net, Engineering Information, Pergamon Press, Beilstein, Cell Press, Mosby, Churchill Livingstone, Saunders, and Elsevier Science, among other companies, are now all owned by Reed Elsevier.

Wolters Kluwer owns CCH, Aspen Publishing, Lippincott Williams and Wilkins, Waverly, SilverPlatter, and Ovid. In 2003, Wolters Kluwer sold Kluwer Academic Publishers to Candover and Cinven (a private partnership of British equity firms), which has merged Kluwer Academic with Springer-Verlag—also purchased in 2003 from Bertelsmann AG.

Another major publisher, Taylor and Francis, has been aggressively purchasing companies over the past decade, including Gordon and Breach, CRC Press, Garland, Carfax, Europa Publications, Lawrence Earlbaum, Marcel Dekker, Routledge, Frank Cass, and Swets & Zeitlinger.¹

Mergers and scholarly publishing

While mergers and acquisitions in publishing reflect a general global trend, librarians have been concerned with the growing concentration within scholarly publishing, especially as it has affected scientific, technical, and medical (STM) journals and legal serials publications. Enhanced revenue, improved efficiencies, and reduced costs are often mentioned by companies as the justification for mergers.

Within scholarly publishing, however, librarians have watched the number of companies shrink while prices rise and service declines. Individually, library associations in the United States have conveyed their concerns about major mergers to the Department of Justice. These included the 1991 purchase of Pergamon Press by Elsevier Science, the Thomson-West merger of 1996, the proposed merger of Reed Elsevier and Wolters Kluwer in 1997, and the purchase by Reed Elsevier of Harcourt General in 2001.

All of these transactions were allowed to proceed, although Thomson and West were required to divest a small number of journal titles that overlapped in content, and the Reed Elsevier/Wolters Kluwer deal was ultimately abandoned by the companies.

The beginning of 2002 brought expectations of additional mergers in the STM

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arena. Taylor and Francis made a hostile bid for Blackwell, creating dissension on the Blackwell Board. Wolters Kluwer announced its intention to sell Kluwer Academic, while rumors surfaced that Reed Elsevier and Wolters Kluwer would be revisiting their earlier merger plan.

IAA's mission

The Association of Research Libraries (ARL), recognizing that it was time for a new strategy in confronting mergers, invited colleagues from several other library organizations to discuss how to pool efforts on a more public-policy focused effort to bring attention to this issue. Out of these discussions in spring 2002, the Information Access Alliance (IAA) was born.²

IAA includes ALA, ACRL, American Association of Law Libraries, Medical Library Association, ARL, SPARC, and the Special Libraries Association. These seven organizations are concerned with the impact of anticompetitive behaviors by STM journal and legal serial publishers on libraries ability to provide students, faculty, researchers, health care workers, policymakers, and the public with important research information.

With the advice of legal counsel and a strategic communications firm, IAA designed a two-pronged strategy to challenge current antitrust policy. First, we needed to develop and test economic and legal arguments that would support an antitrust case against anticompetitive mergers and other practices, such as bundling; and second, we needed to build a network of informed, influential spokespersons from industry, public policy, law, and higher education who would be willing to engage the media, members of Congress, States Attorneys General, and the Department of Justice as mergers arose or other action was needed.

The white paper on publishing mergers

Our first step was to commission a white paper to provide the Department of Justice and members of Congress with important background information on the merger issue. Written by attorneys at Ropes and Gray, a legal firm used extensively by the library community for a variety of issues, the white paper was based primarily on the economic studies conducted by Mark McCabe on the impact of publisher mergers

on journal prices. McCabe, currently an assistant professor of economics at the Georgia Institute of Technology, had been an economist at the Department of Justice at the time of the proposed Reed Elsevier/Wolters Kluwer merger. McCabe was initially skeptical that this transaction would raise concerns under current antitrust guidelines. He was encouraged, however, by the attorney in charge of the case to investigate why librarians around the country were so upset by the high prices in this sector and so concerned by the prospect of this deal. If there was anticompetitive behavior by publishers resulting in the high prices, was there something unique about this market that could explain why and perhaps warrant a novel approach to antitrust analysis?

After talking with many librarians, McCabe noted that libraries differed from individual purchasers who constitute the typical market in consumer transactions. Rather than choosing between two or more competing products from multiple providers (e.g., Coke, Pepsi, and RC), libraries seek to collect as many journal titles as possible from as many different providers as their budgets allow. This feature of the library as market, along with libraries tendency not to cancel a subscription once it is started, allows publishers to establish their prices across their entire collection of journals.

To oversimplify, publishers can increase prices such that the anticipated loss due to cancellations will be more than offset by the revenue from the higher prices. The more titles a publisher has, the higher are its optimal prices because the greater size allows the publisher to internalize or capture more of the revenue that a price increase generates across the universe of competing journals.

For example, suppose there is a set of journal titles from different publishers with similar cost per use value. If one or more of the publishers raise the price of their titles, then the remaining publishers can increase their prices almost as much, without being overly concerned about cancellations. It is this best response by the second set of remaining publishers (raising their prices almost as high) that creates the incentive for firms to increase the size of their portfolios through mergers and acquisitions.

As McCabe states in his findings, [P]rices are indeed positively related to firm portfolio

size, and [. . .] mergers result in significant price increases.³ This was true even though many of the publishers had relatively modest numbers of journals. This finding calls into question the current merger guidelines that suggest that a newly merged company would need to have at least a 35- to 40-percent share of the market before pricing effects would be measurable. Given McCabe's findings that mergers of relatively modest size can produce significant pricing effects, IAA, in its white paper, urged the Department of Justice to reconsider its guidelines as applied to this industry.⁴

In fact, IAA had just completed its first version of the white paper when Bertelsmann AG announced its decision to sell BertelsmannSpringer to Candover and Cinven. Candover and Cinven, as noted above, planned to merge the newly acquired company with Kluwer Academic Publishers, thereby creating the second largest STM publisher in the world, after only Elsevier Science.

Though we had not solicited extensive comments on the paper, we decided that it was imperative to send the Department of Justice a document and letter of concern noting the pattern of price increases that had resulted from previous mergers. Despite our arguments, the Department of Justice approved the deal in August 2003.

An international issue

Because scholarly publishing is a multinational enterprise, competition authorities in other countries also review mergers. For example, the United Kingdom Competition Commission reviewed the 2001 purchase of Harcourt by Reed Elsevier, while the European Commission reviewed the 2003 purchase of BertelsmannSpringer by Candover and Cinven. Library organizations in the United States have worked closely with colleagues in England and Europe to exchange information and strategies in making library concerns known to the appropriate authorities. While the two cases noted above were approved,⁵ the U.K. investigation acknowledged the concerns raised by the library community and suggested that further examination of the STM journals market by the Office of Fair Trading (OFT) may be appropriate. OFT did in fact conduct a study in which it acknowledged that the STM journals

market was not working well. Given the potential for emerging technologies to improve competition, the OFT determined that government intervention was not appropriate at the time. OFT indicated, however, that it would monitor this market.⁶ IAA will continue to coordinate its efforts with its counterparts in Europe.

An international workshop

With the sale of Bertelsmann behind us, IAA is now focused on convening an international invitational workshop on antitrust issues in academic publishing. Over the past few years, a number of economists and legal scholars have joined McCabe in analyzing aspects of this industry. Studies on pricing, consortial purchasing, and bundling have been undertaken. The event will bring together these researchers, along with other legal scholars, antitrust attorneys, economists, antitrust regulators, librarians, and publishers, not only to vet the analysis included in the white paper, but also to identify alternative theories of competitive and consumer harm. We hope the workshop will catalyze significant additional research on academic publishing and begin to build a literature in both law and economics on which future regulators and judges can draw. This event is tentatively planned for fall 2004.

We are particularly pleased to be cosponsoring the workshop with the American Antitrust Institute (AAI). In beginning to identify legal scholars with a potential interest in our issues, we discovered a number of individuals who were all affiliated with AAI. AAI is an independent Washington-based non-profit education, research, and advocacy organization. [Its] mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. The AAI perceives itself as post-Chicago centrists dedicated to the vigorous use of antitrust as a vital component of national and international competition policy.⁷ We have already benefited from the advice and counsel of AAI leadership.

Once the foundation of our argument is set, IAA will begin to build its network of key spokespersons. We will call on the library community to help us identify corporate leaders whose businesses were developed from or

depend on research conducted in universities; public officials who recognize the importance of access to research information and its impact on the health and welfare of the country; college and university presidents willing to articulate the harm that anticompetitive practices cause in inhibiting access to important research information; and members of Congress or State Attorneys General who may be willing to hold hearings or contact the Department of Justice.

All members of IAA are devoted to finding alternative models of scholarly communication. All are promoting efforts to move to an open access environment. But we all also know that it may be several years before the current systems are transformed. In the meantime, Taylor and Francis continues its aggressive acquisitions campaign, and Candoover and Cinven have indicated their desire to purchase a third scholarly publisher. If our efforts can stop or even slow the pace of mergers of STM and legal publishers, we can perhaps constrain price increases in some small measure and allow libraries to allocate resources to support new models of scholarly publishing.

Notes

1. For details on the merger activity of ten major academic publishers, see Mary H. Munroe, *The Academic Publishing Industry: A Story of Merger and Acquisition*. Available online at www.niulib.niu.edu/publishers/.

2. For further information, see the IAA Web site at www.informationaccess.org/.

3. Mark J. McCabe, *The Impact of Publisher Mergers on Journal Prices: A Preliminary Report*, ARL 200 (October 1998): 5. Available online at www.arl.org/newsltr/200/mccabe.html.

4. For more details with citations to McCabe's work, see the IAA white paper: Thomas M. Sisman, David J. Carter, and the Information Access Alliance, *Publisher Mergers: a Consumer-Based Approach to Antitrust Analysis*, June 2003. Available online at www.informationaccess.org/WhitePaperV2Final.pdf.

5. Because the merger investigation process in Europe is far more open than in the United States (where the proceedings are largely confidential), reports from both of these merger analyses are available online. The reports make for interesting reading, although much proprietary information provided by the

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companies is purged from the public record. United Kingdom, Competition Commission, Reed Elsevier plc and Harcourt General, Inc.: A Report on the Proposed Merger, July 2001. Available online at www.competition-commission.org.uk/rep_pub/reports/2001/457reed.htm; and, European Commission, Case No. COMP/M.3197 *Candover/Cinven/Bertlesmann-Springer*: Regulation

(EEC) No. 4064/89 Merger Procedure, July 29, 2003. Available online at europa.eu.int/comm/competition/mergers/cases/decisions/m3197_en.pdf.

6. Office of Fair Trading, *The Market for Scientific, Technical and Medical Journals: A Statement by the OFT*, OFT396, Sept. 2002. Available online at www.offt.gov.uk/news/publications/leaflet+ordering.htm.

7. For more information, see the AAI Web site at www.antitrustinstitute.org/. ■

(*Internet Resources*,” cont. from page 320) links to all major airlines, hotel chains, railroads, shuttle services, and other useful travel sites. Access: <http://www.u.edu/~hastyd/lcp.html>.

Librarian’s Datebook. This site consists simply of a chronological listing of library-related conferences and workshops scheduled between the current year and 2014. Whenever possible, links are provided to conference or workshop Web sites. The listing is international in scope and includes virtual as well as in-person opportunities. Access: <http://www.hsl.unc.edu/libcal.htm>.

The Mentor Program: Share What You Know. This site provides a list of print and Web resources on mentoring as well as links to organizations that offer mentoring services. The information could be used to set up a program or to participate in a mentoring relationship. Access: <http://www.libs.uga.edu/mentor/resources.html#Web>.

Papersinvited. Papersinvited is a subscription-based database of Calls for Papers in numerous disciplines. One of the areas of specialization that can be searched in the database is Generalities, Library Science & Journalism. The calls are from a variety of sources, including journals, conferences, and universities. A paid subscription allows the user to personalize many of the database features. Access: <http://www.papersinvited.com>.

The Researching Librarian—Web Resources Helpful for Librarians Doing Research. This site is designed to assist academic librarians who have publication requirements for promotions and/or tenure. The focus is on providing links to tools for conducting research in librarianship and information science. There is also a section of links to conference proceedings, which can be use-

ful for seeing the format and content of past papers. Access: <http://www.researchinglibrarian.com/index.html>.

Retirement planning

Choose to Save: Education Program. Sponsored by the Employee Benefit Research Institute and the American Savings Education Council, this site promotes the concept of saving as a vital component of financial security. The information is organized by age group, e.g., *Tools for Adults Ages 40–59*, and provides links to more than 100 online calculators. Access: <http://www.choosetosave.org/tools/index.htm>.

CNN/Money: Retirement. This commercial site offers a simple retirement calculator with topical articles for retirement planning. The articles are succinct and provide a good starting point. Access: <http://money.cnn.com/retirement/>.

FirstGov for Seniors. Provides a lengthy list of resources for seniors, including a number of items related to education and volunteer opportunities particularly geared toward retirees. Access: <http://www.rstgov.gov/Topics/Seniors.shtml>.

Retirement Living—The Gateway to Resources for Senior Living. A site about all aspects of life after employment. Subsections range from links to retirement communities, state tax information, and services directories. Access: <http://www.retirementliving.com/index.html>.

TIAA-CREF Web Center. Primarily designed for TIAA-CREF customers to manage their accounts, however, the general information on investment and retirement planning resources are useful to anyone. Access: <http://www.tiaa-cref.org/>. ■