

THE NEWSPAPER PRESERVATION ACT: AN INEFFECTIVE STEP IN THE RIGHT DIRECTION

Since 1909, the number of cities with at least two competing newspapers has sharply declined.¹ Many newspapers have been forced to suspend operations, switch to weekly publication, or merge with their competitor. This situation is primarily the result of social and economic developments since the turn of the century which have increasingly centered control of the newspaper industry in fewer and fewer hands.² As a result, the number of diverse and independent editorial voices available to the public has been greatly reduced.

To counter the forces which have left many cities with only one newspaper, joint newspaper operating arrangements were developed. Their purpose was twofold; (1) to reduce operating costs by combining the business aspects of newspaper production,³ and (2) to maintain editorial and reportorial independence. For nearly a third of a century, these arrangements encountered no government opposition. However, in 1965, the Department of Justice instituted an action against a joint newspaper operating arrangement in Tucson, Arizona. This action culminated in a Supreme Court decision that the arrangement was a violation of the antitrust laws.⁴ In response to this ruling, and in an effort to protect existing and future arrangements of this type, the Newspaper Preservation Act was passed to grant limited antitrust exemption to the newspaper industry.

¹ In 1909, 689 cities had competing newspapers, but by 1968 this number had fallen to 50. Roberts, *Antitrust Problems in the Newspaper Industry*, 82 Harv. L. Rev. 319, 319-20 (1968). In 1910, 6 out of 10 cities with newspapers had at least 2 newspapers. By 1960, this had become less than 2 out of 10. Today, 5 cities have 3 or more newspapers; 37 have 2 separately owned papers. Statement of Arthur B. Hanson, General Counsel, American Newspaper Publishers Association, Hearings on S.1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 43 (1967) [hereinafter cited as *Hearings on S.1312*].

² Among the factors contributing to declining competition, the most notable are: (1) a decline in the partisanship of the American press—few newspapers are started and kept alive for political reasons; (2) a growth in objective reporting which has created similarity among newspapers—in an effort to increase circulation, publishers strive to be as inoffensive as possible, and this is most effectively accomplished by objectivity; (3) the growth of the suburbs, which has stabilized the total number of newspapers by creating numerous one-newspaper towns while competition in the industry declines; (4) the growing competition from other media; and (5) the desire of advertisers for larger circulation. See Roberts, *supra* note 1, at 320-21, 328-30, 355.

³ This includes joint printing, distribution, clerical and administrative staffs, advertising departments, and allocation of markets.

⁴ In *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969), the Court held that the agreement violated antitrust prohibitions against price fixing under 15 U.S.C. § 1 (1964), monopolization under 15 U.S.C. § 2 (1964), and unlawful merger under 15 U.S.C. § 18 (1964). *Id.* at 135-37. The parties involved were the Citizens Publishing Co., Arden Publishing Co., and their jointly created and jointly owned company, Tucson Newspapers, Inc., which managed all the business departments of both papers except the news and editorial units.

It is the purpose of this comment to examine the nature of joint newspaper operating arrangements and their rejection by the Supreme Court. The legislative response to the situation, the Newspaper Preservation Act,⁵ will then be considered with special emphasis on the antitrust and constitutional questions which may be raised by its enactment.

I. JOINT NEWSPAPER OPERATING ARRANGEMENTS

Newspapers must compete in two areas at the same time; (1) editorially and reportorially, and (2) commercially for increased advertising and circulation. Both aspects are interrelated by a unique chain of interdependence. To compete effectively editorially and reportorially, a newspaper must staff these departments with talented personnel. This requires substantial funds to meet wage and salary demands. Within the newspaper industry, the primary source of these funds is the sale of advertising.⁶ Competition for advertising depends upon circulation since advertising prices are not based upon a flat rate per line, but on a charge for reaching a million readers with that line.⁷ Since advertising charges generally increase at a much slower rate than circulation size,⁸ the net effect is that the more readers a newspaper has, the lower its cost per line to the advertiser. Thus, a paper with greater circulation sales is usually more attractive to advertisers than smaller newspapers.

However, due to the parochial content⁹ of most papers, and the transportation problems involved in distribution, circulation is usually confined to the immediate metropolitan region, and the likelihood of expanding sales by enlarging the area of distribution is not good. As a result, the size of a newspaper's circulation is directly related to the population of the community in which it is located. The importance of this market factor is readily apparent to competing publications faced with rising production costs which create a need for increased advertising revenue. Since it is unlikely that the size of the market will grow, a publication with a smaller circulation size than its competitor usually faces a desperate situation.¹⁰ The smaller paper must

⁵ Pub. L. No. 91-353, 84 Stat. 466 (July 24, 1970).

⁶ Seventy-five percent of a newspaper's revenue comes from advertising. The remaining 25% comes from sales to its readers. 116 Cong. Rec. S864 (daily ed. Jan. 29, 1970) (remarks of Senator Inouye).

⁷ This is referred to as the "milline rate." Roberts, *supra* note 1, at 324.

⁸ Barber, *Newspaper Monopoly in New Orleans: The Lesson for Antitrust Policy*, 24 La. L. Rev. 503, 509-10.

⁹ With the exception of publications such as the Wall Street Journal and The New York Times, most newspapers must satisfy the public interest in local news at the community level. A paper cannot provide news events from too many communities without inadequately reporting that news or publishing a near book-size issue to inform the public properly. Thus, most newspapers are restricted to their immediate metropolitan area and most are read primarily by people in or near the city of publication. *Id.* at 540.

¹⁰ It is estimated that as the population of an area of distribution falls below 650,000, newspaper competition is nearly non-existent. *Id.* at 541.

increase its circulation size within a fixed market, but this requires the hiring of more talented personnel and establishing a more effective and efficient distribution system, thus presenting additional costs to the newspaper. These expenses must be met by an increase in advertising revenue, which in turn requires an increased circulation size. This circular dilemma has created a very serious problem. While the number of newspapers being published has remained relatively stable since 1945,¹¹ owing to the growth of the suburbs and the resultant one-newspaper towns, there has been a dangerous decline in the number of competing, diverse and independent editorial points of view available to the public.¹²

To meet the declining competition in the newspaper industry, joint newspaper operating arrangements were developed.¹³ Under this system, competing newspapers, cognizant of the market's inability to support them both individually, unite commercially in an effort to maintain editorial independence. Essentially, the parties to the arrangement create a jointly owned company to handle the printing, advertising and distribution requirements of both papers. In this way, the costs of unnecessary duplication are avoided and, by virtue of the sharing of advertising revenues, financial benefit accrues to the weaker partner. Consequently, notwithstanding economic conditions incapable of supporting more than one newspaper in a particular area, the public may still receive the benefit of diverse and independent editorial voices.¹⁴

II. ANTITRUST VIOLATIONS AND JUDICIAL RESPONSE

For over 30 years federal enforcement agencies, aware of these arrangements, were not concerned with their effects in the area of antitrust.¹⁵ Of the few proceedings instituted against newspapers by the Department of Justice prior to 1965, none were brought for unlawful merger under Section 7 of the Clayton Act,¹⁶ nor were any brought for monopolization in violation of Section 2 of the Sherman Act.¹⁷ That is, the mere existence of a joint operating arrangement—

¹¹ The total number of daily newspapers has remained relatively stable at 1750. Statement of Bryce W. Rucker, Professor of Journalism, Southern Illinois University, Hearings on S. 1312, *supra* note 1, at 282.

¹² See note 1 *supra*.

¹³ The first joint newspaper operating arrangement was formed in 1933 in Albuquerque, New Mexico. The parties there involved were The Journal Publishing Co., The New Mexico State Tribune, and The Albuquerque Publishing Co. In the period from 1933 until 1966, 22 joint arrangements were put into operation in 19 states. 1970 U.S. Code Cong. & Ad. News 2927.

¹⁴ From the production standpoint, a large portion of a newspaper's costs is incurred in getting the paper ready for print. Once the type is set and the presses are ready it makes little difference, in terms of production costs, how many copies are printed. Barber, *supra* note 8, at 539.

¹⁵ 116 Cong. Rec. S862 (daily ed. Jan. 29, 1970) (remarks of Senator Hruska).

¹⁶ 15 U.S.C. § 18 (1964).

¹⁷ 15 U.S.C. § 2 (1964).

though monopolistic in structure—did not result in antitrust litigation. Prosecutions were only for allegations of improper market conduct¹⁸—prosecutions for monopolistic practices, as opposed to prosecutions for being a monopoly. This may result partly because statutory standards are phrased in terms suggesting monopolistic practices,¹⁹ or possibly because antitrust officials generally felt that it was easier to win a case involving improper conduct than one which challenged a dominant market position.²⁰ Another suggested reason for the emphasis on market conduct is that the Department of Justice felt that if illicit exclusionary tactics were curtailed, normal market forces would allow most cities to maintain at least two competing newspapers,²¹ and, even if the desired competition was still not realized, there was no need for government interference since, historically, it was felt that the antitrust laws should not interfere with anyone “who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well.”²²

Distinct changes in antitrust enforcement have occurred in the last 25 or 30 years, however, and market power, though legitimate in itself, is no longer tolerated if it raises barriers to the growth or entry of competition.²³ Notwithstanding the transition of emphasis in antitrust enforcement during this period, suits by the Department of Justice against newspapers did not reflect this change, and joint operating arrangements continued without challenge for nearly a third of a century.²⁴ Since antitrust officials have a good deal of discretion with respect to the kinds of cases they prosecute, and similar discretion as to the business area within which to prosecute them,²⁵ they may have ignored the newspaper industry so as to avoid the sensitive area of government regulation of the press. The constitutional shadow which the First Amendment casts over the newspaper industry may have caused enforcement officials to question their chances for successfully prosecuting offending publications. And since there is simply not enough money to prosecute every possible case, the authorities generally institute proceedings which provide a reasonable certainty of

¹⁸ E.g., prosecutions were usually for forced combination rates to advertisers, *United States v. The Times-Picayune Publishing Co.*, 105 F. Supp. 670 (E.D. La. 1952), *rev'd* on other grounds, 345 U.S. 594 (1953); *The Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957); and for the use of exclusionary tactics, *United States v. Harte-Hanks Newspapers, Inc.*, 170 F. Supp. 227 (N.D. Texas 1959); *United States v. Lorain Journal Co.*, 92 F. Supp. 794 (N.D. Ohio 1950).

¹⁹ C. Kaysen and D. Turner, *Antitrust Policy* 240 (1959).

²⁰ See Mason, *The Current Status of the Monopoly Problem in the United States*, 62 *Harv. L. Rev.* 1265, 1284 (1949).

²¹ Barber, *supra* note 8, at 505.

²² 21 Cong. Rec. 3146-152, as quoted in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953).

²³ This was the key issue in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

²⁴ See text at note 15 *supra*.

²⁵ Mason, *supra* note 20, at 1284.

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success in order to realize a return on their investment of time, personnel and resources.²⁶

However, in 1964, the Department of Justice began an investigation which culminated in an action against the parties to a joint newspaper operating arrangement in Tucson, Arizona.²⁷ In *Citizens Publishing Co. v. United States*,²⁸ the Supreme Court held that a joint operating arrangement between Tucson's only two daily newspapers of general circulation, The Star and The Citizen, constituted a price fixing, profit pooling and market control agreement, unlawful per se under Section 1 of the Sherman Act,²⁹ monopolization in violation of Section 2 of that Act,³⁰ and an unlawful merger prohibited by Section 7 of the Clayton Act.³¹ The Court emphasized that it was not condemning all forms of joint operation and, as a result, allowed the parties to the Tucson arrangement to modify their agreement so as to eliminate the price fixing, profit pooling and market control provisions. The Court required the newspapers to reestablish themselves as independent commercial competitors to avoid the unlawful merger aspect of their agreement. Thus, at the heart of the Court's opinion was an objection to joint advertising and circulation agreements which prevented commercial competition between the parties.³²

However, the per se application of antitrust law in *Citizens Publishing Co.* to curb the evils of newspaper monopolies was an ineffective approach to the problem. Since the real cause of newspaper monopolies is the interdependence of circulation, advertising revenue, rising costs and the restrictions imposed by a stable market size, mechanical application of the antitrust laws actually assists the trend of declining competition. Considering the dual competitive characteristic of the newspaper industry, the joint operating arrangements remove commercial competition to prolong editorial and reportorial competition. Application of the antitrust laws would require the parties to the arrangement either to separate, which would financially destroy the weaker member and remove its editorial voice from the community,

²⁶ Id. at n.44.

²⁷ See note 4 supra.

²⁸ 394 U.S. 131 (1969).

²⁹ 15 U.S.C. § 1 (1964).

³⁰ 15 U.S.C. § 2 (1964).

³¹ 15 U.S.C. § 18 (1964).

³² The case was remanded to the district court in order that the parties might modify the joint agreement to conform to the Supreme Court order. Reflecting that decision, the Department of Justice and the parties to the Tucson arrangement, under the supervision of the district court, resolved that the arrangement could do the following: (1) jointly use mechanical facilities; (2) share a joint circulation system, but each paper must maintain its own personnel; (3) publish a joint Sunday newspaper; (4) share a single business department with separate bookkeeping and billing; and (5) set up a joint rate structure permitting the sales force on both papers to establish a cost justified combination rate, but again, each paper must supply its own personnel. Note the emphasis on the advertising and circulation provisions that each paper be represented by its own people. (Other parts of the arrangement not relevant to this discussion are omitted.) 116 Cong. Rec. S874-78 (daily ed. Jan. 29, 1970).

or merge completely, which would also remove an editorial voice. Thus, the competitive efficiencies of large circulation size, particularly in light of its interaction with advertising revenue, indicate that the natural economic forces which are primarily responsible for newspaper monopolies are beyond the control of antitrust enforcement.

In *Citizens Publishing Co.*, the parties to the joint newspaper operating arrangement argued that the judicially created "failing company" doctrine provided a defense to their commercial merger.⁸³ This doctrine, traditionally applied as a defense only under Section 7 of the Clayton Act,⁸⁴ was first articulated in *International Shoe Co. v. Federal Trade Commission*.⁸⁵ There, the Supreme Court held that a merger between competitors is permitted if one of the companies is failing and can no longer be a vital competitive factor in the market. But the *Citizens Publishing Co.* Court held that the merger did not comply with the "failing company" doctrine since it was not shown that the Star was the only party interested in acquiring the Citizen, nor that the Citizen was unlikely to be successfully revitalized.⁸⁶ It is in this regard that the Court departed from its *International Shoe* holding and other "failing company" doctrine decisions because of its apparent rejection of the notion that the "failing company" is a single criterion exemption from antitrust. Earlier cases held that the defense was satisfied by showing that the acquired company was failing,⁸⁷ but *Citizens Publishing Co.* held that it must also be shown that the competitor was the only available purchaser, and that there was no possibility for the successful reorganization of the acquired company.⁸⁸

However, the application of the "failing company" test of hopeless insolvency, imminent receivership, and the absence of any purchaser other than the competitor cannot meet the needs of the newspaper industry. Because of the interdependence of circulation, advertising, and news and editorial quality, a newspaper could never be revitalized if it met the "failing company" sanctions. This is because a newspaper has no merchandise or inventory to offer another paper contemplating a merger or purchase.⁸⁹ All a newspaper can really offer a prospective buyer is its circulation which provides a base for acquiring advertising revenue. If a newspaper is judged as other industries under the "failing company" doctrine, its financial resources from advertising must nearly be extinct, thus precluding a circulation size of any significance. As a

⁸³ 394 U.S. at 136.

⁸⁴ Roberts, *supra* note 1, at 351.

⁸⁵ 280 U.S. 291, 302-03 (1930).

⁸⁶ 394 U.S. at 138.

⁸⁷ E.g., *Beegle v. Thomson*, 138 F.2d 875, 881 (7th Cir. 1943); *United States v. Maryland and Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C. 1958).

⁸⁸ 394 U.S. at 136-38.

⁸⁹ Although writers, editors, printers and other employees might be considered inventory, they are probably not strong selling points for a newspaper since the human element involved presents a good deal of uncertainty to the prospective buyer. He is not familiar with these personnel, and he can not even be assured that they will remain with the paper once it is sold.

result, a newspaper would only have its mechanical equipment to offer and little else.

III. THE NEWSPAPER PRESERVATION ACT

The Newspaper Preservation Act was enacted as a legislative response to the ruling in *Citizens Publishing Co.* in the public interest of maintaining editorial and reportorial independence and competition.⁴⁰ The Act declares that it is the public policy of the United States to preserve existing and future joint newspaper operating arrangements⁴¹ entered into in accordance with its provisions. To this end, Section 4(a)⁴² grants an antitrust exemption to joint arrangements

⁴⁰ The Act states:

Sec. 2. In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this Act.

1970 U.S. Code Cong. & Ad. News 2501.

⁴¹ A joint newspaper operating arrangement is defined as follows:

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

Section 3 of the Act continues by defining other relevant terms:

(3) The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary (sic) corporations, one or more newspaper publications.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

Id. at 2501-502.

⁴² Sec. 4. (a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to the effective date of this Act, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance

existing prior to the effective date of the Act if at the time the agreement was made only one of the newspapers involved "was likely to remain or become a financially sound publication." The reason for this is obvious—if competitors were likely to remain financially stable on an independent basis, then the need for a joint operating arrangement would not exist. It is reasonable to conclude that two "financially sound" papers would only desire to merge to achieve a monopolistic position. Such a situation would defeat the purpose of the Newspaper Preservation Act which is to preserve editorial competition otherwise precluded by "economic distress."

Section 4(b)⁴³ of the Act applies the antitrust exemption to joint arrangements created after the effective date of the Act. These prospective arrangements must obtain the prior written consent of the Attorney General of the United States before they will be given the benefit of the exemption. In considering the application for consent, the Attorney General must determine that not more than one of the newspaper publications involved is other than a "failing newspaper," and that the arrangement will effectuate the policy and purpose of the Act. In this regard, the Act defines a "failing newspaper" as "a newspaper publication which, regardless of its ownership or affiliations, is in *probable danger of financial failure*."⁴⁴ (Emphasis added.) This definition amends the "failing company" requirement of the hopeless insolvency of the acquired company—a requisite which, as has been shown above, fails to acknowledge the economic and market realities of the newspaper industry. The "failing newspaper" definition provides a flexible test for the courts to determine whether a newspaper is failing. The factors to be considered in making such an evaluation will vary with each individual situation,⁴⁵ thereby enabling the court

of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

Id. at 2502.

⁴³ Section 4(b) states:

It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this Act.

Id. at 2502.

⁴⁴ This quote is from § 3(5) which states in full: "The term 'failing newspaper' means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." Id.

⁴⁵ Suggested factors include:

first, net loss or declining net income; second, whether accounting ratios [show] instability . . . ;

....

Third, declining circulation trends; fourth, increasing cost trends, including

to recognize a paper's trend toward failure before that trend becomes irreversible.

The joint operating arrangement is treated as a full merger and, as an entity, is subject to the same antitrust prohibitions as one owner situations.⁴⁶ This provision is of importance to newspapers which must compete with joint arrangements. The Act assures them of a cause of action in the event of anti-competitive practices by the members of the arrangement. Section 4(c)⁴⁷ provides that the antitrust exemption does not include predatory pricing, predatory practices, or "other conduct . . . which would be unlawful under any Antitrust Law if engaged in by a single entity." The Act further provides, in Section 5(a),⁴⁸ that the parties to the joint arrangement in Tucson, Arizona, may reinstitute that agreement notwithstanding the ruling in *Citizens Publishing Co.*, and Section 5(b)⁴⁹ declares that the Act is retroactive and shall apply to the determination of any civil or criminal antitrust action pending in any district court of the United States on the date of enactment wherein it is alleged that a joint newspaper arrangement is unlawful under any antitrust law.

operational costs, circulation and subscription costs and solicitation costs; fifth, increasing advertising rates without corresponding increases in income; sixth, declining trends in the percentage of newspaper columns used for advertising purposes; seventh, factors showing strengthening of a competitor, including his increased circulation and advertising trends; eighth, price war conditions, promotional activities and premiums used as a means to maintain circulation or advertising, demonstrating inherent instability; ninth, instability and insecurity of personnel . . . ; tenth, the extent of investments required in fixed assets, equipment, and machinery; eleventh, demands on capital apart from newspaper operations; twelfth, adverse legal developments; and thirteenth, basic instability shown by the necessity of reliance upon the financial strength of stockholders or the financial capacity and operations of parent companies or other related newspaper publications rather than on the inherent strength of the paper itself.

116 Cong. Rec. S865 (daily ed. Jan. 29, 1970) (remarks of Senator Bennett).

⁴⁶ This point is made in Section 4(c) of the Act which states:

Nothing contained in the Act shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this Act, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

1970 U.S. Code Cong. & Ad. News 2502.

⁴⁷ Id.

⁴⁸ Sec. 5. (a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 4(a) hereof.

Id. at 2502.

⁴⁹ Sec. 5. . . . (b) The provisions of section 4 shall apply to the determination of any civil or criminal action pending in any district court of the United States on the date of enactment of this Act in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

Id. at 2503.

The antitrust exemption provided by the Act can be justified on the grounds of public policy. As pointed out by the Supreme Court in *Brown Shoe Co. v. United States*, there are mergers which should be upheld because of "countervailing competitive, economic, or social advantages."⁶⁰ Although commercial competition among newspapers is desirable since it promotes efficiency within the industry, it is not as important as the absolute necessity that they compete editorially and reportorially. As Justice Black has pointed out, the First Amendment guarantee of freedom of the press "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [in] that a free press is a condition of a free society."⁶¹ Unfortunately, the normal market forces operating within the newspaper industry usually preclude commercial competition and, in the absence of limited antitrust exemption, editorial competition as well. Thus, the public interest in the preservation of editorial and reportorial independence and competition warrants this exemption from antitrust laws. Such legislative antitrust exemption is not new, and is generally based upon the premise that in certain areas national interest or policy should take precedence over antitrust policy.⁶²

IV. CONSTITUTIONAL ISSUES

Although the exemption which the Newspaper Preservation Act provides is warranted, constitutional issues are presented which will undoubtedly become the basis for legal actions challenging the validity of the Act. Since the statute is retroactive,⁶³ it represents a legislative destruction of vested and pending causes of action, thus raising the issue of possible deprivation of property without due process of the law in violation of the Fifth Amendment. However, the Supreme Court does not give much weight to the fact that a cause of action is pending in litigation⁶⁴ or has been reduced to judgment.⁶⁵ Several cases have raised the question of whether incurring financial liability due to the retroactivity of a statute should be considered such a change of position

⁶⁰ 370 U.S. 294, 334 (1962).

⁶¹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The importance of diverse, quarrelsome and competitive editorial voices was highlighted in a political science study of the structure of the local government in Dade County (Miami), Florida, which concluded that a candidate for county office by virtue of support from both the Miami Herald and its competitor the Miami News, could guarantee himself a victory. Roberts, *supra* note 1, at 322.

⁶² Examples of other legislative antitrust exemptions include: exemptions allowing farmers to join together in cooperative associations [15 U.S.C. § 17 (1964)]; a labor policy exempting collective bargaining [29 U.S.C. § 101-15 (1964)]; exemptions to export associations of domestic competitors for the purpose of engaging in foreign trade [15 U.S.C. § 61-65 (1964)]; exemptions for a limited time to the insurance industry [15 U.S.C. § 1011-015 (1964)].

⁶³ Section 5 of the Act declares its retroactivity; see notes 48 and 49 *supra*.

⁶⁴ *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945).

⁶⁵ *Fleming v. Rhodes*, 331 U.S. 100 (1947).

in reliance on the law as to constitute a violation of due process.⁵⁶ However, in all of them the Supreme Court held that the retroactive statute was not contrary to the requirements of due process. Apparently, the Court believed that the expenses and changes of position involved provided an insufficient basis from which to attack the constitutionality of an otherwise valid statute.⁵⁷ In determining the constitutionality of federal legislation in light of the due process clause, the Supreme Court has recognized that although there are objections to retroactive statutes, the nature and strength of the public interest served may make retroactivity desirable in a particular case.⁵⁸ Thus, the Court has consistently held that not all retroactive statutes are unconstitutional, but only those believed to be unreasonable.⁵⁹ That the public interest is well served by diverse and independent editorial voices needs no further discussion. The importance of the competition of ideas is well documented in books, journals and court decisions. However, the immediacy and severity of declining competition among newspapers threatens this public interest, and if the congressional remedy is to meet the problem it must not only be prospective, but able to reach back as well to pending litigation wherein it is alleged that a joint newspaper arrangement is unlawful under antitrust law. It is unreasonable to deny certain joint newspaper operating arrangements the antitrust exemption of the Newspaper Preservation Act simply because an action was instituted against them prior to the effective date of the Act. This would be no more than precluding editorial competition to satisfy a right which no longer exists.

A second constitutional issue is presented by the fact that the Act ostensibly applies a stricter standard to joint arrangements created after the effective date of the Act.⁶⁰ This is arguably contrary to the guarantee of equal protection of the law. To comply with the statute, future arrangements must have the prior written approval of the Attorney General, whereas existing arrangements are not so bound. However, the Constitution only requires that any disparity in treatment caused by such classifications be *reasonable*.⁶¹ In this regard, a presumption in favor of the reasonableness is recognized by the Court if any state of facts can be conceived that would justify the classification.⁶² The record seems to provide a sufficient justification. While conducting hearings on the Newspaper Preservation Act, the House Antitrust Subcommittee requested all of the 22 existing joint newspaper

⁵⁶ E.g., *League v. Texas*, 184 U.S. 156 (1902); *United States v. Heinszen & Co.*, 206 U.S. 370 (1907); *Graham and Foster v. Goodcell*, 282 U.S. 409 (1931).

⁵⁷ 282 U.S. at 428.

⁵⁸ See *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945), and *League v. Texas*, 184 U.S. 156 (1902).

⁵⁹ *Id.*

⁶⁰ The Newspaper Preservation Act was made law on July 24, 1970. 1970 U.S. Code Cong. & Ad. News 2501-503.

⁶¹ Cf. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

⁶² *Id.*

operating arrangements to furnish extensive contractual and financial data.⁶³ All of the participants complied with the request. The subcommittee used this information to understand the nature and characteristics of joint operating arrangements. The data was also used as a guide in molding the provisions of the Newspaper Preservation Act. Since it is now public knowledge that in each of the 22 existing arrangements no more than one of the parties involved was "likely to remain or become a financially sound publication" at the inception of the agreement, and since congressional investigation has shown that the agreements comport with the purpose and policy of the Act, it is unreasonable to subject these arrangements to a redetermination of these facts by the Attorney General. Thus, it is submitted that the disparity of treatment between joint arrangements existing prior to enactment of the Newspaper Preservation Act and those subsequently created is reasonable and, therefore, constitutional.

Since the Act sanctions the use of combination advertising rates by joint arrangements,⁶⁴ the question arises whether this preempts advertising revenue otherwise available to newspapers not party to the arrangement, in violation of the equal protection and due process guarantees. To effect such a preemption, the members of the joint arrangement would have to compel advertisers to purchase space in all of its papers, thereby discouraging or disabling advertisers from purchasing space in non-member papers. This is most effectively accomplished by using disproportionate combination advertising rates. For example, if a joint arrangement charges \$1.25 per line for advertising in its morning paper, \$1.25 per line for its evening paper, and a combination rate of only \$1.40 per line to advertise in both papers, advertisers are compelled, as a practical matter, to take advantage of the latter rate. Such disproportionate rates do not reflect newspaper costs, but rather indicate an attempt to preclude advertisers from using only one of the papers. The ultimate effect would be to preclude adver-

⁶³ This information included:

(1) copies of all contractual documents among the parties that define the structure and scope of activities in the joint operating arrangement; and (2) information that will reflect the financial condition of the parties at the time the joint arrangement was entered into, and comparable information for the last three operating years.

The financial information requested includes balance sheets and detailed profit and loss income statements for the newspapers involved.

The information was to be certified by a responsible officer of the publisher and a request was made by the subcommittee that the reports be audited by a Certified Public Accountant. 1970 U.S. Code Cong. & Ad. News 2930-931.

⁶⁴ This sanction is found in the definition of a "joint operating arrangement" as found in § 3(2) of the Act, note 41 *supra*. Generally a joint newspaper operating arrangement is entered into by a morning and an evening paper. The arrangement offers a rate to advertisers for each paper individually, and additionally, offers a single rate for advertising in both papers at a nominal saving to the advertiser. This latter rate is referred to as a "combination rate." For example, if the arrangement charged advertisers \$1.25 per line to advertise in the morning paper and \$1.25 per line for the evening paper, a combination rate of \$2.30 might be legally charged to advertise in both papers.

tisers from using papers not party to the arrangement. This exclusionary tactic is not tolerated by the Act wherein Section 4(c) prohibits predatory pricing and predatory practices by joint arrangements. Reasonable combination advertising rates which reflect publishing costs are permitted. They are not exclusionary since they only offer small savings and, thus, do not discourage advertisers from considering other newspapers.

Although the Act adequately prohibits exclusionary and other illicit conduct by joint arrangements against other competing newspapers, the question has been raised whether it precludes the entry of new publications or inhibits the development of newly created papers. In *Bay Guardian v. Chronicle Publishing Co.*,⁶⁶ presently *lis pendens*, and the first constitutional challenge to the Newspaper Preservation Act, a monthly news and editorial publication alleged that it was unconstitutionally precluded by the Act from competing with the parties to a San Francisco joint newspaper operating arrangement. The plaintiff publication argued that from its inception it has been unable to achieve its goal of daily publication due to a lack of revenue caused by advertisers' attraction to the combination rates offered by the arrangement and the unfair advantage of combined distribution efficiencies. If editorial competition is a matter of public interest and national policy, the monthly publication insisted, then the Newspaper Preservation Act is unconstitutional since it defeats that policy by permitting activity which precludes competition in violation of the First Amendment guarantee of freedom of the press. This argument is based upon the premise that economic and market forces will naturally sustain competition between completely independent newspapers. However, with the exception of a very few cities, this is not true. A case in point is that of the New York Daily Mirror, published in New York City. The Mirror, while practically identical to its competitor, the New York Daily News, retained the second largest circulation size in the country, but died for lack of advertisers.⁶⁶ The Mirror fell victim to natural market forces, not unfair competitive practices. The Newspaper Preservation Act does not sanction activity which precludes competition, rather it sustains competition in situations where it otherwise could not exist. The Act not only protects against illicit conduct by joint newspaper operating arrangements, it also guards against collusive intent in the creation of the arrangement—situations where successful and competing newspapers desire the benefits of a joint operating arrangement and agree that one of the publications should intentionally "fail" in order to meet the requirements of the Act. Such a conspiracy is contrary to the policy and purpose of the statute, and is merely an

⁶⁵ C-70-1613-GSL (N.D. Cal., filed July 30, 1970).

⁶⁶ Statement of Dr. Harry Kelber, Professor of Social Sciences at the New York Institute of Technology, Hearings on S.1312. Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 2, at 938 (1967). [hereinafter cited as hearings on S. 1312].

attempt at monopoly in a market which is conducive to newspaper competition. Section 4(b) requires the Attorney General to investigate prospective joint agreements to insure that they will effectuate the policy and purpose of the Act. If this inquiry reveals collusive activity, then his consent to the joint agreement will not be given. Thus, it is submitted that the Act provides an adequate safeguard to insure that jointly operated newspapers cannot, by virtue of that arrangement, engage in unfair practices detrimental to other papers.

The statute also requires that editorial policies of the parties to a joint arrangement be independently⁶⁷ determined, and Section 4(b)⁶⁸ contemplates that the Attorney General will promulgate such regulations as are appropriate for the discharge of his responsibility to effectuate the policy and purposes of the Act. It is necessary to inquire whether this authorizes governmental inquiry into the process by which editorial policies are determined in violation of the First Amendment guarantee of freedom of the press.⁶⁹ It is generally understood that freedom of the press is not an absolute right. In *Fleming v. Lowell Sun Co.*,⁷⁰ a newspaper was required to produce books, records, documents and papers in connection with an investigation by the Department of Labor. The federal district court held that the newspaper industry is not immune from government regulation of incidents of the business that do not restrict its freedom to publish. The issue, then, is whether the Act imposes a "prior restraint" upon publication. In this regard, the statute does not authorize the Attorney General to make inquiry into the manner in which *editorial policies* are determined, but rather, the manner in which *editorial departments* are kept independent of one another, that is, an investigation of the organizational structure of the joint operation. Thus, it is submitted that such authorized inquiry and regulation involve the incidents of the newspaper business and do not impose a prior restraint upon publication.

V. INADEQUACY OF THE ACT—AND AN ALTERNATIVE

Although the Newspaper Preservation Act acknowledges the dangers inherent in declining newspaper competition, it does not adequately meet the problem it was intended to alleviate. The statute is merely an attempt to sustain existing competition without attacking the economic forces⁷¹ creating the concentration of power in the newspaper industry. Since too few cities enjoy editorial and reportorial competition today,⁷²

⁶⁷ This declaration is found in § 3(2), note 41 *supra*.

⁶⁸ See note 43 *supra*.

⁶⁹ This argument was raised in the Brief for Plaintiff at 27-28, *Bay Guardian v. Chronicle Publishing Co.*, note 65 *supra*.

⁷⁰ 36 F. Supp. 320 (D. Mass. 1940).

⁷¹ See note 2 *supra* for an enumeration of the basic economic forces involved.

⁷² [D]espite the vital task that in our society the press performs, the number of daily newspapers in the United States is at its lowest point since the century's turn: in 1951 1,773 daily newspapers served 1,443 American cities, compared with 2,600 dailies published in 1,207 cities in 1909. Moreover, while 598 new

the public interest is little served by maintaining the present competitive level. Making it easier for newspapers to enter into the field of active competition is the only proper means of rectifying the situation and satisfying the real need—an increase in competition.

To effectuate the desired "ease of entry" into the newspaper industry, potential entrants need more than a printing press and an initial investment. They need an assurance that the market will be able to support them and not preclude access to a source of revenue. The present economic realities of the newspaper industry require that advertising be that source.

[A] newspaper's economic strength depends largely on its advertising revenues, which in turn depend on readership. Since readership depends on content, which includes advertising as well as news matter, the process is almost a vicious cycle: a drop in advertising dollars means a drop in money that can be spent for promotion and editorial content, which leads in turn to a drop in circulation, which leads to a further drop in advertising, and so forth.⁷³

In other industries, a new corporation begins as a small entity receiving revenue from the sale of its product. With this money it is able to improve, grow and become successful. If its earnings should prove insufficient for survival, then the corporation may change its product, market, or both to regain financial stability. In any event, its success or failure is the result of its own efforts. But the newspaper industry faces a different situation. Its source of financial livelihood accrues from the sale of advertising space, not the sale of its product. A newspaper needs revenue to develop into a successful publication and, therefore, must turn to advertisers for support. Advertisers, however, are attracted to large circulation size. Thus, a newspaper cannot afford to begin as a small entity. If it is to survive, it must enter the market with an impressive circulation. In short, a newspaper must begin as a success to appeal to advertisers who control the financial destiny of the industry.

Consequently, in order to increase newspaper competition, legislation is required which will mitigate reliance upon advertising as the "staff of life." It is submitted that a progressive tax on newspaper

dailies braved the field between 1929 and 1950, 373 of these suspended publication during that period—less than half of the new entrants survived. Concurrently, daily newspaper competition within individual cities has grown nearly extinct: in 1951, 81% of all daily newspaper cities had only one daily newspaper; 11% more had 2 or more publications, but a single publisher controlled both or all. In that year, therefore, only 8% of daily newspaper cities enjoyed the clash of opinion which competition among publishers of their daily press could provide.

Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 603 (1953). See also note 1 *supra* which indicates this trend has continued to the present time.

⁷³ Statement of Thurston Twigg-Smith, President and Publisher of the Honolulu Advertiser, Hearings on S.1312, *supra* note 66, at 613.

advertising revenue would have such an effect.⁷⁴ By raising the tax rate on each dollar of advertising revenue above an established marginal rate, the financial return to the paper would decrease as advertising sales increased. Using arbitrary figures to demonstrate this point, the tax rate might be 15 percent for the first \$10,000 of advertising revenue, 60 percent for additional revenue up to \$60,000, and 80 percent on all revenue above \$60,000. Thus, if a newspaper earned \$100,000 of advertising revenue in a tax year, the publication's return would be \$36,500 after taxes were applied at the progressive rate, whereas under the existing tax schedule the paper would be left with \$58,500.⁷⁵ If advertising played a smaller supportive role, more newspaper operational costs would have to be passed on to the reading public. This raises the danger that increased newspaper cost will discourage the public and cause them to turn exclusively to television and radio for their news. However, as one authority has pointed out, these other media are primarily entertainment oriented and cannot give the lasting or in-depth news coverage which newspapers provide.⁷⁶ Further, it is submitted that since a progressive tax on advertising revenue would encourage and enable new publications to engage in competition in the various metropolitan areas, a new field would be opened to private enterprise wherein fewer newspaper costs would have to be passed on to the public. Increased newspaper competition would present a lucrative opportunity for the creation of an industry to handle the printing requirements of all newspapers within each metropolitan area. Since these firms would specialize in volume printing, it is reasonable to expect that they would invest in research to devise more efficient and inexpensive printing techniques. This would represent a cost saving to the newspapers, and, therefore, reduce the costs that would be passed on to the public. Thus, it seems doubtful that an increased newspaper cost will substantially affect newspaper sales. And in this way, a more equitable basis for competition would evolve. Newspapers would financially depend upon, and have to appeal to, readers who could be

⁷⁴ Although many authorities have considered the use of taxes to impede declining competition in the newspaper industry—e.g., 2 Z. Chafee, *Government and Mass Communications* 697 (1947)—the suggestion for a progressive tax on newspaper advertising revenue has been made by Richard Barber. See Barber, *Newspaper Monopoly in New Orleans: The Lesson for Antitrust Policy*, 24 *La. L. Rev.* 503, 553.

⁷⁵ These figures are intended merely to provide an example of how a progressive tax would operate, and should not be construed as a recommendation for the actual amounts to be used in a progressive scale. These figures could only be determined after in-depth government research on the question. The tax figure at the progressive rate was computed as follows: 15% of \$10,000 which equals \$1,500; 60% of \$50,000 which equals \$30,000; 80% of \$40,000 which equals \$32,000; the total of these amounts is \$63,500. Deducting this from \$100,000, the paper is left with \$36,500 (exclusive of the normal surtax rate). The tax figure at the existing rate was computed in accordance with the Internal Revenue Code as follows: 22% of \$100,000 which equals \$22,000, plus a surtax of 26% of \$75,000 which equals \$19,500. The total tax is \$41,500 and the newspaper is left with \$58,500. *Int. Rev. Code* of 1954, § 11.

⁷⁶ Roberts, *Antitrust Problems in the Newspaper Industry*, 82 *Harv. L. Rev.* 319, 320-21 (1968).

attracted by a change in the product, instead of advertisers who could not. While the policy of objectively presenting news would continue to strike a note of similarity among publications, other aspects of newspaper content could be effectively used by publishers to distinguish competing papers.

The implementation of a progressive tax program would necessitate a modification of the Newspaper Preservation Act. Since the suggested tax on advertising revenue would cause publications to become more public oriented and pass more of their operating costs on to the readers, the parties to a joint newspaper operating arrangement would enjoy a production cost advantage over their non-member competitors which would no longer be justified by uncontrollable market forces. Thus, joint-arrangement newspapers could offer a quality product at a lower cost to the public. To avoid the inequities of this situation, the Newspaper Preservation Act would have to be modified to require all joint newspaper operating arrangements to admit their non-member competitors to the joint agreement. In this way, the primary purpose of the joint arrangement would no longer be to generate revenue for failing publications, but rather to reduce costs in order to alleviate some of the burden which the public would have to bear. Thus, the need for a joint advertising department and combination advertising rates would no longer be necessary.

A progressive tax on newspaper advertising revenue would be consistent with the First Amendment right to freedom of the press. It would not act as a prior restraint on publication, rather, it would merely mitigate the industry's emphasis on one source of revenue in order to effectuate public policy of paramount importance. Further, the Supreme Court has implied that a tax on newspaper advertising is valid and does not necessarily limit the circulation of information to which the public is entitled.⁷⁷ In short, a progressive tax would constitute a direct attack upon the economic and market forces that are responsible for declining competition in the newspaper industry. By removing the obstacle which dependence on advertising revenue creates, and thereby providing a more equitable basis for competition, the present mortality rate within the industry should decline. In addition, potential entrants would be encouraged to engage in competition since they would not be denied revenue by forces beyond their control.

CONCLUSION

The Newspaper Preservation Act indicates congressional awareness of a problem within the newspaper industry—a problem that

⁷⁷ *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). In this case, a state license tax imposed on owners of newspapers for the privilege of charging for advertising, and measured by a percentage of gross receipts from such advertising, but applicable only to newspapers with a circulation of 20,000 or more per week, was held unconstitutional as limiting the circulation of information to which the public is entitled. However, the thrust of the Court's objection was that the tax was not measured or limited by the value of advertising. The tax was measured alone by the circulation of the publication in which the advertising appeared.

threatens the competition of ideas in our society. Because of the dual competitive nature of newspapers, antitrust surveillance can only aggravate an already troubled situation. However, this legislation, providing limited antitrust exemption, can only slow down the anti-competitive trend; it cannot eliminate it. This is because the Act does not recognize or counter the adverse effect which reliance upon advertising revenue has on newspaper competition.

A progressive tax on newspaper advertising revenue would reduce the industry's reliance on advertising as a source of financial livelihood. As a result, newspapers would have to become public oriented. Newspapers would have to pass off more of their operating costs to the public by raising the price per issue. This, however, should not adversely affect sales, and would have the beneficial effect of providing a more equitable basis for competition, and thereby encourage new membership in the industry. However, until legislation is passed which will strike at the cause of decline, the Newspaper Preservation Act is an adequate compromise to maintain the present level of competition and assure continued diversity of opinion to that portion of the public which presently receives it.

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