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ANTITRUST MALAISE IN THE NEWSPAPER INDUSTRY: THE CHAINS CONTINUE TO GROW

GREGORY NEILL JONES

In recent years, the large corporations in industries of highly-concentrated ownership have become objects of scrutiny as a result of their vast economic power. Abuses of this power in the form of political slush funds, bribery of foreign officials, and exorbitant prices and profits have led many to call for an intensification of antitrust action both in the courts and in Congress.[1] Many of the abuses of "big business" are reported to the public as a result of the phenomenon known as investigative reporting—a process of combined independent investigation and subsequent reporting by members of the nation's press.[2] Indeed, the successes of investigative reporting in the recent past would lead many to believe that the health of the free American press is intact. It is ironic then, to find that the newspaper industry itself is in danger of becoming yet another scion of "big business."[3] Newspaper chains, nurtured with a limited immunity from the antitrust laws allowing monopoly at the local level,[4] continue to implement aggressive merger and acquisition programs. The result is an increasing trend toward concentration of ownership in the newspaper industry.

As this trend continues, the traditional service provided by newspapers, that of disseminating information and ideas from a variety of sources, is becoming the function of a relative few.[5] Freedom of the press, then, is threatened with encroachment not from the government but from vast corporations controlling large numbers of newspapers.

1. *E.g.*, H.R. 11,497, 94th Cong., 2d Sess. (1976) (bill to amend Clayton Act to preserve competition in petroleum marketing); S. 2761, 94th Cong., 1st Sess. (1975) (bill to effectuate competition in energy industries); S. 2028, 94th Cong., 1st Sess. (1975) (bill to amend Clayton Act strengthening agencies responsible for antitrust enforcement); H.R. 39, 94th Cong., 1st Sess. (1975) (bill to increase effectiveness of discovery in civil antitrust actions).

2. During the Watergate investigations, illegal political contributions from numerous large corporations were discovered partly as a consequence of diligent reporting efforts. Since then, bribery of several foreign public officials by some large U.S. firms has been revealed. *See generally* C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN (1974); *The Big Payoff*, TIME, Feb. 23, 1976, at 28.

3. *See* B. RUCKER, THE FIRST FREEDOM 20-27 (2d ed. 1968).

4. The Newspaper Preservation Act, 15 U.S.C. § 1801 (1970). The legislation allows certain competing newspapers to operate jointly owned presses, distribution systems and business departments while maintaining independent competing editorial departments.

5. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

Much has been written concerning the social impact of ownership concentration of newspapers at the local level.[6] The elimination of competing editorial voices at the local level is easily discernible as both an intrusion of the first amendment and a violation of antitrust policy. Little has been written, however, dealing with the problem of ownership concentration by large newspaper chains as it pertains to antitrust law. As newspaper chains continue to grow, the concentration of economic power and the attendant potential of first amendment infringement necessitate an examination of the adequacy of present law to fulfill antitrust policy effectively. In order to understand the problem adequately, it is necessary to review inherent industry traits and the judicial and congressional response to those traits which led to the concentration of ownership.

NEWSPAPERS AND ANTITRUST LAW

Intrinsic Newspaper Industry Traits

The newspaper industry is basically local in nature. While chains may own a scattering of newspapers across the nation, the business is essentially one of individual newspapers catering to the needs of a single locality. Though newspapers carry national news and advertising, the bulk of daily newspapers is devoted to those items of local importance.[7]

While newspaper publishing is a business of limited market scope, it requires high capital investment, development of an extensive distribution system and a labor-intensive reporting and sales force.[8] Once a newspaper is established, its revenues are a function of circulation. Of course, subscription income, comprising approximately 20 percent of revenues, is directly related to circulation. Advertising revenue levels, about 80 percent of revenues, are also directly affected by circulation levels since the advertiser is likely to advertise in that paper which has the greatest readership.[9] Although the newspaper business requires heavy investment in capital equipment, printing presses remain idle with the exception of the few hours each day during which papers are being printed.[10] As a result of this

6. *E.g.*, Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319 (1968); *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871 (1972); Note, *Monopoly Newspapers: Troubles in Paradise*, 7 SAN DIEGO L. REV. 268 (1970).

7. *See* Knox, *Antitrust Exemption for Newspapers: An Economic Analysis*, 1971 LAW & SOC. ORDER 3, 13.

8. B. RUCKER, THE FIRST FREEDOM 43 (2d ed. 1968).

9. Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 324 (1968). Advertising prices are based upon a rate for reaching a million readers per line. A newspaper's ability to compete for advertising is thus dependent upon its ability to attract readers. *Id.* at 324.

10. *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871, 895 (1972).

inefficient use of assets and the direct relationship between advertising rates and circulation, average unit costs decrease as circulation increases.[11]

Since newspapers are forced to operate in a market with a limited level of potential revenue, "head on head" competition rarely exists except in those markets of sufficient size to support two newspapers.[12] While some newspapers do compete in a few small cities,[13] most operate in what are known as "natural monopoly" areas.[14] Not all newspapers maintaining a monopoly position, however, can be said to be located in "natural monopoly" areas. To realize the significantly higher profits attainable in a monopoly situation, newspaper publishers, as policy, attempt to operate in non-competitive markets.[15] The policy of avoiding competition results in the utilization of anticompetitive techniques such as combination rates or joint-operating agreements.[16] Frequently, too, the policy will result in the utilization of illegal monopolistic practices.[17] These techniques, together with the capital

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11. *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871, 895 (1971); *see* EDITOR & PUBLISHER, Aug. 31, 1974, at 12.

12. B. RUCKER, THE FIRST FREEDOM 8 (2d ed. 1968). "Head on head" competition is defined as a morning (evening) newspaper competing with another morning (evening) newspaper in the same market area.

13. For example, Maysville, Ky. (Population—9,000), Murray, Ky. (population—15,000), and Hammond, Ind. (population—17,000) each have newspapers competing "head on head." *Id.* at 9.

14. *See* Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960); United States v. Harte-Hanks Newspapers, Inc., 170 F. Supp. 227, 228 (N.D. Tex. 1959). "Natural monopoly" has been defined as a

> monopoly resuiting [*sic*] from economies of scale, a relationship between the size of the market and the size of the most efficient firm such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business. In this situation, competition may exist for a time but only until bankruptcy or merger leaves the field to one firm . . . . [C]ompetition is self-destructive.

Ovitron Corp. v. General Motors Corp., 295 F. Supp. 373, 377 n.3 (S.D.N.Y. 1969).

15. *See* B. RUCKER, THE FIRST FREEDOM 43 (2d ed. 1968) (citing publishing magnate William R. Hearst, Jr.'s statement that a publisher could make five times the profit per year with monopoly ownership of a newspaper than with competitive ownership); EDITOR & PUBLISHER, July 6, 1974, at 23 (way to maintain high profit margins was to publish papers in growing markets and keep "head on head" competition at a minimum).

16. Generally, two newspapers existing in the same city (one published in the morning and one in the evening) may offer the advertiser a reduced rate if he places his advertisement in both papers. This rate is the combination rate. Often the newspapers require advertisers to use the combination rate and will not sell advertising space in the papers separately. Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 333-34 (1968). Combination rates were declared legal in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 627 (1953).

The Newspaper Preservation Act declared existing joint-operation agreements legal, and contained provisions allowing the formation of such arrangements in the future under limited conditions. Such arrangements effectively end competition for advertising. 15 U.S.C. § 1803 (1970). *See also Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871, 899-901 (1972).

17. *E.g.*, Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 388 (8th

investment necessary for newspaper ownership, have made entry into local newspaper markets by new publishers exceedingly difficult.[18]

The trend toward local market concentration has been recognized for years.[19] It is only within the past 20 years, however, that newspaper chains have become the dominant force in newspaper publishing.[20] Independently owned newspapers have difficulty coping with upward cost spirals and the capital investment necessary to acquire new computer-oriented technology. To the independent publisher, merging with a chain is often viewed as the best of several alternatives. Chain groups offer a combination of financial security and talented corporate management necessary to keep a newspaper in tune with advanced technology and improved quality. In order to accelerate growth, chains are eager to purchase an established newspaper, sometimes paying as much as $500,000 for a newspaper in a fairly strong market with a circulation of only 5,000 readers.[21] As a result, a small-town independent publisher may be offered virtual lifetime financial security in exchange for his newspaper. Under these circumstances it is not difficult to understand his willingness to sell to a chain.

Judicial Response to Newspaper Concentration

Since the newspaper industry is essentially local in nature, it is not surprising to find that all antitrust action against newspapers has been directed against anticompetitive practices occurring at the local level. For many years, though, it was argued that the freedom of the press guarantee of the first amendment protected newspapers from antitrust action.[22] That argument, however, was dispelled by the United States Supreme Court in *Associated Press v. United States*,[23] in which it was held that the first

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Cir. 1974) (holding competing newspaper "blanketing" market area of competitor with free newspapers in violation of law, but charging lesser price in market area of competition than in its own market is legal); Kansas City Star Co. v. United States, 240 F.2d 643, 658 (8th Cir. 1957) (attempting to force subscribers to buy morning-afternoon-Sunday newspaper package, and refusing to accept advertising from those who used competing media was illegal).

18. Knox, *Antitrust Exemptions for Newspapers: An Economic Analysis*, 1971 LAW & SOC. ORDER 3, 15. Other entry barriers are: (1) product differentiation advantages accruing to established newspapers; (2) absolute cost advantages; and (3) economies of scale advantages. *Id.* at 15. *See also* Ray, *Economic Forces as Factors in Daily Newspaper Concentration*, 29 JOURN. Q. 31, 34 (1952).

19. Nixon, *Trends in Daily Newspaper Ownership Since 1945*, 31 JOURN. Q. 3-4 (1954).

20. *See* B. RUCKER, THE FIRST FREEDOM 20-27 (2d ed. 1968).

21. EDITOR & PUBLISHER, Jan. 18, 1975, at 10-11. Large city newspapers are also sold at premium prices. For example, the Newhouse chain purchased the Picayune Company of New Orleans for $42 million. B. RUCKER, THE FIRST FREEDOM 12 (2d ed. 1968).

22. *See* Associated Press v. United States, 326 U.S. 1, 7 (1945).

23. *Id.*

amendment guarantee was intended to ensure the "widest possible dissemination of information from diverse and antagonistic sources."[24] An argument that this guarantee sanctioned the right to monopolize those "diverse and antagonistic sources" was viewed as antithetical to the intent of the first amendment.[25]

Unfortunately, once the newspaper industry was declared vulnerable to antitrust action, the Department of Justice did not adopt an aggressive antitrust program toward the industry. In fact, between 1945 and 1969 that organization had instituted fewer than a dozen antitrust actions against newspapers.[26]

Among the most notable of the antitrust cases is *United States v. Harte-Hanks Newspapers, Inc.*[27] In that case two independently owned newspapers in a city with a population of 17,000 had engaged in bitter competition which had resulted in losses for each newspaper of approximately $100,000. One of the newspapers subsequently merged with Harte-Hanks Newspapers, a chain of considerable size and financial strength. Unable to compete with the financial strength of the large chain, the other newspaper soon agreed to sell to Harte-Hanks. The Federal District Court for the Northern District of Texas held that the city was a natural monopoly newspaper market and, referring to newspapers as a "quasi public service," declared competition between newspapers in such instances not "necessarily desirable for . . . the public."[28]

For the most part, however, the government has been successful in its antitrust litigation against newspapers.[29] In *United States v. Times Mirror Co.*,[30] the parent company of the *Los Angeles Times* was forced to divest itself of the newly-acquired *San Bernadino Sun*. As a result of its acquisition, the Times Mirror Company had substantially increased its circulation coverage of San Bernadino County.[31] In addition, the acquisition had raised a barrier to entry into the publishing business in San Bernadino County that was almost impossible to overcome.[32] The court held the acquisition "particularly anticompetitive" where it enhanced barriers to entry and increased the difficulties of smaller firms already in the market.[33]

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24. *Id.* at 20.
25. *Id.* at 20.
26. B. RUCKER, THE FIRST FREEDOM 10-11 (2d ed. 1968).
27. 170 F. Supp. 227 (N.D. Tex. 1959).
28. *Id.* at 228.
29. *E.g.*, Lorain Journal v. United States, 342 U.S. 143 (1951); United States v. E.W. Scripps Co., 1968 Trade Cas. ¶ 72,586, at 86,034 (S.D. Ohio 1968).
30. 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968).
31. The chain increased its control of daily circulation levels from 10.6 percent to 54.8 percent; its morning circulation levels from 23.9 percent to 99.5 percent; and its Sunday circulation levels from 20.3 percent to 64.3 percent. *Id.* at 618.
32. *Id.* at 622.
33. *Id.* at 622. *See also* United States v. Thomson-Brush-Moore Newspapers, Inc.,

Perhaps the most far-reaching success in antitrust litigation against newspapers was in *Citizen Publishing Co. v. United States*,[34] where the United States Supreme Court held joint-operating agreements to be a violation of the Sherman Antitrust Act.[35] The opinion upheld the district court's finding that the joint-operating agreement resulted in price-fixing, profit-pooling and market control; as such, the agreement was declared illegal per se.[36] Justice Douglas stated that "[t]he joint-operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field."[37]

The *Citizen Publishing* case had a profound effect upon the newspaper industry. Attack upon joint-operating agreements threatened to force newspaper publishers to abandon a highly profitable mode of operation whereby only one printing facility, one distribution system and one business department were used to print two newspapers. In short, publishers were threatened with competition, avoidance of which was essential to the maintenance of high profits. Determined to avoid competition, however, publishers utilized yet another technique—lobbying for congressional action.[38]

Congressional Response: The Newspaper Preservation Act

Congress reacted to the particularly strong lobbying effort of large publishers by passing legislation legalizing joint-operating agreements.[39] Referred to by some independent publishers of smaller newspapers as legislation for "millionaire cry-baby publishers,"[40] the Newspaper Preservation Act declared existing joint-operating agreements legal, including the one found illegal in *Citizen Publishing Co. v. United States*.[41] In addition, provisions

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1967 Trade Cas. ¶ 72,295, at 84,734-35 (N.D. Ohio 1968) (where merger of two chains created monopoly in one city, resulting chain consented to divest itself of one newspaper operating in city); United States v. E.W. Scripps Co., 1968 Trade Cas. ¶ 72,586, at 86,034-36 (S.D. Ohio 1968) (where Scripps chain, in consent decree, agreed to divest itself of newspaper acquisition which gave chain virtual monopoly in one city).

34. 394 U.S. 131 (1969).

35. *Id.* at 140; *see* 15 U.S.C. § 1 (1970).

36. Citizen Publishing Co. v. United States, 394 U.S. 131, 134 (1969). Where agreements between companies are illegal in themselves under the Sherman Antitrust Act, no showing of unreasonable restraint or competitive abuses is necessary. Such agreements are illegal per se. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

37. Citizen Publishing Co. v. United States, 394 U.S. 131, 136 (1969).

38. *See generally Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 158 (1969); *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 41, 263, 589 (1967); Ardoin, *A Comparison of Newspapers Under Joint-Printing Contracts*, 50 JOURN. Q. 340 (1973).

39. Newspaper Preservation Act, 15 U.S.C. § 1801 (1970).

40. *Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 29 (1969).

41. 394 U.S. 131 (1969); *see* 18 U.S.C. § 1804 (1970).

for future joint-operating agreements, under certain circumstances, were included in the Act.[42]

While the Newspaper Preservation Act has been thoroughly reviewed and criticized,[43] several important facts should be noted. First, the Act sanctions price-fixing, profit-pooling, and market control found to be illegal per se in *Citizen Publishing*.[44] The legalization of otherwise illegal anticompetitive practices, together with inherent market factors, makes entry into a market impossible where a joint-operating arrangement is in effect. Second, the Act provides that where a joint-operating agreement is in effect, it shall not be the basis of any final judgment in any civil or criminal action for antitrust violations.[45] Thus, the Newspaper Preservation Act provides an absolute defense to anticompetitive practices which were once illegal,[46] and the avowed purpose of the Act, to preserve independent editorial voices,[47] might be undermined by actually leading to reduced competition.[48]

CHAIN OWNERSHIP AND ANTITRUST

Growth of the Newspaper Chains

Since 1960, chain ownership of newspapers has increased dramatically.[49] Chains own 19 of the 25 largest daily newspapers in the country and control over 60 percent of total newspaper circulation in the United States.[50]

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42. 15 U.S.C. § 1803 (1970). Newspapers must apply to the Justice Department for consent prior to entering into a joint-operating agreement. To be eligible to enter into such an agreement, one of the newspapers must be a "failing newspaper" (that is, in probable danger of financial failure), while only one of the newspapers may be financially sound. *Id.*; *see* Newspaper Guild v. Saxbe, 1974-2 Trade Cas. ¶ 75,169, at 97,231 (D.D.C. 1974) (holding prior consent by Justice Department mandatory under Newspaper Preservation Act); Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155, 1160 (N.D. Cal. 1972) (declaring Newspaper Preservation Act constitutional); Dept. of Justice Newspaper Preservation Act Reg., 28 C.F.R. § 48.1 (1975).

43. Note, *Newspaper Preservation Act: A Critique*, 46 IND. L.J. 392 (1971); Comment, *The Newspaper Preservation Act*, 32 U. PITT. L. REV. 347 (1971).

44. Newspaper Preservation Act, 15 U.S.C. § 1804 (1970).

45. *Id.* §§ 1803, 1804 (1970). This dichotomy between the antitrust laws and the Newspaper Preservation Act has been discussed:

> The antitrust laws confer jurisdiction; the Newspaper Act destroys or limits jurisdiction. Accordingly, an attack upon the Newspaper Act is an attack on a vacuum, an attack upon a withdrawal of the Court's jurisdiction.

Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76, 79-80 (N.D. Cal. 1972).

46. Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76, 82 (N.D. Cal. 1972).

47. 15 U.S.C. § 1801 (1970).

48. *See* Knox, *Antitrust Exemptions for Newspapers: An Economic Analysis*, 1971 LAW & SOC. ORDER 3, 17-18 (1971).

49. B. RUCKER, THE FIRST FREEDOM 20 (2d ed. 1968); *see* EDITOR & PUBLISHER, Jan. 18, 1975, at 10 (estimating 80 dailies and 100 weeklies involved in ownership transfers in 1974).

50. B. RUCKER, THE FIRST FREEDOM 20-23, 234 (2d ed. 1968).

Significantly, of the 22 joint-operating arrangements sanctioned by the Newspaper Preservation Act, chains participated in 15 of those arrangements.[51]

Chain groups, of course, are always seeking new acquisitions as the ideal mode of expansion.[52] While the larger chains own over a dozen dailies,[53] each newspaper is usually said to be an "autonomous subsidiary" of the group.[54] Although lip service is paid to the idea that each local publisher is wholly independent, it is difficult to visualize corporate management of the chains as having no significant editorial effect on the newspaper.[55] Of course, even if it was suspected that chain management exercised complete control over the editorial policies of each local newspaper, there is nothing the government could do to assure editorial independence. This is true for the obvious reason that the first amendment precludes government intervention in the editorial policies of newspapers. In fact, recent cases have held that newspapers are not even obligated to accept editorial advertising that does not meet with the approval of the publisher.[56]

Antitrust Action Against Chains

Certainly, the most effective way of ensuring editorial independence is to maintain competition between newspapers.[57] The Department of Justice has again instituted several suits against newspaper chains, but they are aimed only at monopolies created at the local level.[58] Aside from *United States v. Harte-Hanks Newspapers, Inc.*,[59] the government has been largely successful in this litigation. In one recent case, for example, the government sought to prevent two large chains from merging because a local monopoly situation would result in one area of the country.[60] The Federal District

51. H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 3547 (1970).

52. *See* EDITOR & PUBLISHER, July 6, 1974, at 23.

53. B. RUCKER, THE FIRST FREEDOM 233 (2d ed. 1968).

54. EDITOR & PUBLISHER, June 29, 1974, at 36; June 6, 1974, at 23.

55. *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871, 896-97 (1972) (noting that all 19 Scripps-Howard papers announced on same date to support Richard Nixon's presidency bid; Hearst chain followed the same week).

It should be pointed out, also, that the Newspaper Preservation Act stipulates that newspapers participating in joint-operating arrangements must maintain independent reportorial and editorial departments. 15 U.S.C. § 1802(2) (1970).

56. *E.g.*, Chicago Joint Bd. v. Chicago Tribune Co., 435 F.2d 470, 478 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 1973 Trade Cas. ¶ 74,369 (N.D. Ill. 1973).

57. It has been found that newspapers operating under joint printing arrangements do not maintain different news voices. Ardoin, *A Comparison of Newspapers Under Joint Printing Contracts*, 50 JOURN. Q. 340, 347 (1973).

58. United States v. Thomson-Brush-Moore Newspapers, Inc., 1967 Trade Cas. ¶ 72,295, at 84,734 (N.D. Ohio 1968); United States v. E.W. Scripps Co., 1968 Trade Cas. ¶ 72,586, at 86,034 (S.D. Ohio 1968).

59. 170 F. Supp. 227 (N.D. Tex. 1959).

60. United States v. Thomson-Brush-Moore Newspapers, Inc., 1967 Trade Cas. ¶ 72,295, at 84,734 (N.D. Ohio 1968).

Court for the Northern District of Ohio, however, simply ordered the chain to divest itself of one of the newspapers in that area, thereby alleviating the monopoly situation.[61] In *United States v. The Lima News*,[62] the Justice Department sought to force Freedom Newspapers, Inc. to divest itself of *The Lima News*, a monopoly newspaper, alleging that the chain conspired to restrain interstate trade by intentionally operating the paper at losses subsidized by the chain. Freedom Newspapers successfully forced a competing newspaper to cease publication by the use of this loss-subsidy policy. A consent decree was entered by the Ohio Federal District Court enjoining Freedom Newspapers from operating at a loss with the purpose of eliminating a competitor *in the event* a competing newspaper started publication.[63]

The *Lima News* decree is disturbing because the act of monopolizing was allowed. Although the chain was enjoined from further anticompetitive acts, the fact remains that the chain now enjoys a monopoly position in that market area. That the Justice Department agreed to the decree indicates its willingness to allow chains to monopolize a market where the monopoly is the result of the failure of one of the competing newspapers.[64]

This willingness, coupled with the "natural monopoly" theory, has been included in principle in the Newspaper Preservation Act. Consequently, chains may find it relatively easy to monopolize certain markets. If the chain buys into a competitive market, it can operate at costs substantially below those of its competitor. If the result is the competitor's failure, the chain has created a monopoly market. But even if the competitor is in "probable danger of financial failure,"[65] the chain may enter into a joint-operating agreement with the competitor thereby effectively eliminating competition. Thus, unless a chain acquires a "head on head" competing newspaper, it appears that it will have little difficulty in establishing itself in non-competitive markets.

Beleagured publishers, however, are not completely helpless. Section 4 of the Clayton Act provides individuals or corporations with a civil remedy for antitrust violations.[66] Any person injured in his business by reason of an antitrust violation of a competitor may recover treble damages from the

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61. *Id.* at 84,735.

62. 1965 Trade Cas. ¶ 71,609, at 81,746 (N.D. Ohio 1965).

63. The decree provided that for a period of one year after first publication of a competing newspaper, or until the paper reached a circulation level of 10,000 for three months, the chain was enjoined from reducing subscription or advertising rates. *Id.* at 81,747. *But see* United States v. E.W. Scripps Co., 1968 Trade Cas. ¶ 72,586, at 86,034 (S.D. Ohio 1968) (where chain acquired competing paper, court ordered divestiture).

64. When the monopoly position has been attained as a result of acquisition, however, the judgments have called for divestiture. United States v. Times Mirror Co., 274 F. Supp. 606, 623-24 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968); United States v. E.W. Scripps Co., 1968 Trade Cas. ¶ 72,586, at 86,035-36 (S.D. Ohio 1968).

65. Newspaper Preservation Act, 15 U.S.C. § 1802(5) (1970).

66. Clayton Act § 4, 15 U.S.C. § 15 (1970).

competitor.[67] Civil antitrust litigation, however, tends to be prolonged, expensive and, in the newspaper industry, unsuccessful.[68] The causative links between the anticompetitive acts and actual injury are extremely difficult to prove. Circulation decreases may be the result of many variables, the anticompetitive acts being perhaps only one. The result is, more often than not, proof of antitrust violations but not of damages. Frequently, then, only nominal damages are awarded.[69]

The Nature of Antitrust: Mechanism for Slowing Chain Growth?

In reviewing antitrust litigation, it becomes apparent why chain growth has been attacked by the government on a local level rather than on a level of national ownership concentration. It is infinitely easier to identify and prove a monpoly situation at the local level than to identify and prove with reasonable probability that as a result of ownership concentration by a national firm, competition has been substantially reduced.[70] As already noted, however, the antitrust policy of this country has succeeded in assuring only that a newspaper does not gain monopoly status by acquisition of its competitors, a policy which has not succeeded in controlling concentration at the local level.[71] In essence, then, the newspaper industry is an aggregation of individual newspapers operating in monopoly markets. Eventually, however, chain growth will reach a point where additional growth will result in a substantial lessening of competition. Thus, the continuing growth of newspaper chains due to acquisitions and mergers will probably lead to action against chains on the basis of concentration of ownership on a national level. Broad diversification of information sources must be maintained in this country, and it can be persuasively argued that once the level of concentra-

67. Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (purpose of Clayton Act § 4, allowing treble damages, is to provide private enforcement weapon that will deter violation of antitrust laws).

68. *See* Scott Publishing Co. v. Columbia Basin Publishers, Inc., 293 F.2d 15, 20 (9th Cir. 1961) (900 exhibits and 7000 pages—no damages); Siegfried v. Kansas City Star Co., 193 F. Supp. 427, 428 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1 (8th Cir.), *cert. denied*, 369 U.S. 819 (1962) (11 pre-trial conferences, 944 page record and three years of litigation—nominal damages).

69. Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 388 (8th Cir. 1974) (newspaper "blanketing" market area with free newspapers found to be violation of antitrust law; but plaintiff could not prove causal relationship between "blanketing" and injury); Siegfried v. Kansas City Star Co., 298 F.2d 1, 7 (8th Cir.), *cert. denied*, 369 U.S. 819 (1962) (the *Star* had been previously convicted in criminal antitrust action, but plaintiff could not prove loss of profits as result of monopolization).

70. *See* Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927, 930-32 (1968).

71. *Compare* United States v. Times Mirror Co., 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968) *with* United States v. The Lima News, 1965 Trade Cas. ¶ 71,609, at 81,747-48 (N.D. Ohio 1965) *and* United States v. Harte-Hanks Newspapers, Inc., 170 F. Supp. 227 (N.D. Tex. 1959).

tion is recognized by those with the power to remedy the situation, the chains will be almost invulnerable to attack. It is within the public interest to halt the steady trend of ownership concentration before chains reach a position of dominance analogous to those corporations in the oil or automobile industries.

Repression of freedom of the press by private interests as a result of concentration of ownership in national chains calls for examination of Section 7 of the Clayton Act.[72] That section provides that no corporation shall acquire or merge with another "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[73]

In determining the legality of mergers or acquisitions, the courts have developed a systematic approach. Before the competitive effect in a market can be determined, it is first necessary to identify the market.[74] The market is defined both in terms of its product dimension (line of commerce) and its geographic dimension (section of the country).[75] Once the relevant market is identified, the courts then determine if the effect of a particular merger "may be substantially to lessen competition" in the relevant market.[76] The broad language of the Clayton Act gives the courts considerable flexibility in determining whether the result of a merger may be anticompetitive.[77] In general, where there exists a reasonable probability that competition will be substantially lessened, the merger will be found to be in violation of Section 7 of the Clayton Act.[78]

Where there is a merger of direct competitors, or a horizontal merger, a more exacting standard might be applied. In a horizontal merger, the larger the market share held by the acquiring firm, the greater the likelihood that the acquisition will move it toward, or further entrench it in, a position of dominance or of shared market power.[79] Consequently, courts will often

72. 15 U.S.C. § 18 (1970).

73. *Id.*

74. A "market" is any grouping of sales in which each of the firms whose sales are included in the merger enjoys some competitive advantage with those firms whose sales are not included in the merger. Merger Guidelines of Dept. of Justice, 1 TRADE REG. REP. ¶ 4510 (1975).

75. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963).

76. *Id.* at 362.

77. *See* Curly's Dairy, Inc. v. Dairy Cooperative Ass'n, 202 F. Supp. 481, 484 (D. Ore. 1962) (relevant competitive market is not ordinarily susceptible to metes and bounds definition); Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927, 930-31 (1968).

78. United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 592 (1957); THE ATT'Y GEN'S. NAT'l COMM. TO STUDY THE ANTITRUST LAWS 118 (1955).

79. Merger Guidelines of Dept. of Justice, 1 TRADE REG. REP. ¶ 4510 (1975). The Department of Justice enforcement policy with respect to horizontal mergers has four purposes: (1) to prevent eliminating, as an independent business entity, any company likely to have been a substantial competitive influence in a market; (2) to prevent any company or small group of companies from obtaining a position of dominance in a

rely heavily on the change in percentage of market share in determining the competitive effect of a horizontal merger.[80]

Any merger or acquisition involving newspapers would be considered, of course, a horizontal merger. There is little doubt that the line of commerce for newspaper chains is the production of newspapers for readers at various localities.[81] Newspapers gather information, both news and advertising, and distribute it to readers. Thus, newspapers compete in two fronts—for the advertising dollar and for readers. The basic problem of section 7 enforcement against newspaper chains lies in the fact that newspapers do not compete for advertising and readership on a national level. Absence of an apparent national market makes it difficult to define the geographic dimension necessary to bring action against the chains pursuant to Section 7 of the Clayton Act.[82] Thus, where an acquisition or merger of newspaper chains results in a substantial lessening of competition in any section of the country, the remedy invariably has been to force the chain to divest itself of one of the newspaper properties in the locality in which the monopoly exists rather than to invalidate the merger.[83]

The Justice Department did make an attempt to broaden the relevant market area for newspapers in *United States v. Times Mirror Co.*[84] The Department sought an injunction prohibiting the Times Mirror Company from acquiring a newspaper property anywhere in southern California. The court agreed that it was proper to examine the trend of concentration not just in the market area of the acquired newspaper, but also in the larger area of southern California. As evidence of this trend, the court pointed out that four large chains accounted for 71 percent of all weekday newspaper

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market; (3) to prevent significant increases in concentration in a market; and (4) to preserve significant possibilities for eventual deconcentration in a concentrated market. *Id.*

80. *See* United States v. Von's Grocery Co., 384 U.S. 270, 277-78 (1966); United States v. Times Mirror Co., 274 F. Supp. 606, 618 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968). *See also* Merger Guidelines of Dept. of Justice, 1 TRADE REG. REP. ¶ 4510 (1975).

81. It should be noted that newspaper chains also own broadcast properties. Federal regulations, however, prohibit licensing of FM radio stations to owners of a newspaper in the same area. FCC Reg., 47 C.F.R. § 73.240(a)(1) (1975). In addition, proposed regulations would prohibit newspapers from ownership of any broadcast property in the same market area. Proposed FCC Reg. 70-311, 35 Fed. Reg. 5963 (1970). Of course, ownership of broadcast properties in areas other than newspaper market areas simply provides chains with further concentration and control of media on a national level.

82. Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927, 931-32 (1968) (noting that unless there is provable economic effect in identifiable market, no action can be taken under section 7 to prevent merger).

83. *E.g.*, United States v. Thomson-Brush-Moore Newspapers, Inc., 1967 Trade Cas. ¶ 72,295, at 84,735 (N.D. Ohio 1968); United States v. E.W. Scripps Co., 1968 Trade Cas. ¶ 72,586, at 86,035-36 (S.D. Ohio 1968).

84. 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968).

circulation in southern California. In denying the injunction, however, the court held that the government failed to prove that an acquisition somewhere else in southern California might have the effect of substantially lessening competition.[85]

The absence of a discernible economic anticompetitive effect of chain mergers at the national level has resulted in the merging of several large newspaper chains.[86] Most notable was the merger between Knight Newspapers Inc. and Ridder Publications Inc., finalized in November 1974.[87] The merger fused two regional groups—Knight, primarily in the east and south, and Ridder, mainly in the west and midwest—into a chain of national holdings. Knight-Ridder Newspapers, Inc. now owns 52 newspapers with an average daily circulation of nearly four million readers. Its annual revenue from advertising and circulation approaches $500 million.[88]

The Knight-Ridder merger made that chain the dominant newspaper owner in the nation. While this was a horizontal merger, there was no ascertainable geographic area in which a determination of the competitive effects of the merger could be made. Since the merger resulted in no local market overlap, it is effectively insulated from any litigation under the Clayton Act.[89]

Of course, it can be argued that the traditional geographic dimension of relevant market must be extended to deal with the chain's ownership concentration. If the chain's line of commerce is analyzed from the viewpoint of total national circulation, not merely circulation at the local level, it would seem that the chain would be vulnerable to a section 7 attack. It can be argued that Knight-Ridder's market share of national readership might substantially lessen competition among the purveyors of news. This argument, of course, is very tenuous and would likely fail as a result of inadequate proof.[90]

While there are no economic rationales under present law to attack the merger, an attack could certainly be based on policy considerations.[91] For

85. *Id.* at 620-21.

86. Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927, 932 (1968). The Thomson-Brush-Moore merger involved 35 newspapers. *Id.* at 932. The Newhouse chain (22 newspapers) recently purchased 25 percent of the outstanding shares of Booth Newspapers (eight newspapers and *Parade* magazine). The Wall Street Journal, Feb. 27, 1976, at 8, col. 1.

87. In order for the merger to be effectuated, Knight and Ridder agreed to divestiture of their broadcasting companies, and the FCC approved the divestiture plan. EDITOR & PUBLISHER, Nov. 16, 1974, at 12. Had the FCC not approved the plan, it could have stopped the merger. FCC Reg., 47 C.F.R. § 0.281 (1974).

88. EDITOR & PUBLISHER, Nov. 16, 1974, at 12-13.

89. *See* Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927, 931 (1968).

90. *See* United States v. Times Mirror Co., 274 F. Supp. 606, 620 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968).

91. Argument has been made, however, that the intent of Congress in passing

example, a recent empirical study found that consumers receive no benefits from the economics of scale derived as newspapers changed from independent to chain ownership.[92] In fact, it appeared from this study that concentration of ownership resulted in higher prices and lower quality.[93]

This says nothing, of course, of the obvious problem of concentration of editorial viewpoint as a result of the merger. Freedom of the press, as guaranteed by the first amendment, traditionally has been viewed as freedom from government control. As chains continue to gain control over the newspaper industry, however, it becomes apparent that it makes little difference if the source of encroachment on first amendment rights is from government or large corporation. As Mr. Justice Black wrote over 30 years ago, "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[94]

CONCLUSION

There have been many suggestions offered as solutions to the problem of chain ownership of newspapers. Some, in suggesting the application of the "fairness doctrine" to newspapers, have assumed that concentration will continue in the industry to the point that newspapers are analogous to broadcasters.[95] The government controls broadcasting because of the scarcity of available frequencies and the varied demands for use of the airwaves.[96] The argument is that newspapers will reach such a point of concentration that the government will step in to assure coverage of varying viewpoints.[97]

One state senator from Hawaii recently proposed placing that state's two newspapers under the control of the Hawaii Public Utilities Commission. The two newspapers participate in a joint-operating arrangement and have been reaping profits which the senator considers "excessive." One of the papers was recently merged into the Gannett chain. The merger was followed by

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antitrust laws was to maintain an organization of small business units because great industrial consolidations are inherently undesirable. United States v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945). *But see* United States v. Swift & Co., 286 U.S. 106, 116 (1932) (holding that mere size does not violate the antitrust laws, but size does present opportunity for abuse).

92. Grotta, *Consolidation of Newspapers: What Happens to the Consumer?*, 48 JOURN. Q. 245, 249 (1971).

93. *Id.* at 250.

94. Associated Press v. United States, 326 U.S. 1, 20 (1945).

95. The "fairness doctrine" is defined as the equal opportunity of access requirement that public issues be presented with fair coverage of competing views. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 378 (1969).

96. *Id.* at 396.

97. *See Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871, 904-905 (1972); Note, *Newspaper Regulation and the Public Interest: The Unmasking of a Myth*, 32 U. PITT. L. REV. 595, 600-601 (1971).

staff cut-backs and elimination of service to neighboring islands. The senator, in making his proposal, objected to the newspapers' "excessive and too frequent rate increases" for advertising.[98]

The extremity of these proposals points out the severity of the problem. Under existing antitrust laws there is little the government can do to halt the concentration of ownership by large newspaper chains. If the trend is to be stopped, it will have to be a result of congressional action. Specifically, Congress should provide guidelines for the definition of the geographic dimension of relevant market areas as it pertains to newspaper chains. The political power of the newspaper chain lobby, however, presents a difficult obstacle to overcome in gaining support for such legislation. The lobby did, after all, have sufficient strength to expedite passage of the Newspaper Preservation Act.[99] Lessening of competition in the newspaper industry, nevertheless, threatens freedom of the press. Threats to a constitutional guarantee as fundamental as that provided by the first amendment should result in necessary and overdue congressional action.

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98. EDITOR & PUBLISHER, Jan. 25, 1975, at 9.

99. *See generally Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 158 (1969); *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 41, 263, 589 (1967).