Critical Assumptions in Arguments for Maximum Price Fixing of Newspaper Circulation

Robert G. Picard is the editor of the Journal of Media Economics and professor of communications at California State University at Fullerton.

The ability of newspaper publishers to limit prices charged for newspaper subscriptions and single copy sales continues to be a contentious issue despite the 1968 Supreme Court ruling in Albrecht v. Herald Co., which concluded that such acts are per se violations of Section One of the Sherman Act. The Court relied upon previous rulings that minimum resale price maintenance was per se a violation and extended the prohibition to maximum price fixing of newspaper circulation prices.

During the 100th Congress the issue arose when newspaper organizations attempted to amend legislation codifying major judicial antitrust decisions into statute to keep Albrecht from being included. That effort continued in the 101st Congress. The newspaper associations hoped that their amendment would keep the Albrecht per se rule from being codified, in hopes

2. In Albrecht the Court adhered to its earlier view in Kiefer Steward Co. v. Joseph E. Seagrams & Sons, 340 U.S. 211, that the prohibitions on price fixing halts manufacturers from interfering with distributors' independent market judgments.
3. Amendment 2510 to S. 430, the Retail Competition Enforcement Act. The bill and its amendments failed to pass the Senate during the 100th Congress.
ROBERT G. PICARD

that the Supreme Court will later reconsider, reverse its decision, and mandate a rule of reason approach.

Legal and economic opponents of the *per se* rule argue in books and journals that *Albrecht* is based on faulty logic and analysis. Such opponents have argued that "few Supreme Court decisions have proved more anticompetitive," that "the Court's application of this prohibition to newspaper publishing...spawned a body of law that defeats the goals and purposes of the Sherman Act," and that the ruling has "detrimental economic effects" that harm consumers.\(^6\)

Opponents of the *Albrecht* decision and its subsequent application generally embrace the antitrust philosophies of the "Chicago School" or "Harvard School." These philosophies accept — to varying degrees — the view that antitrust policy and its application should be based solely on economic theory and industry structure, rather than inflexible policy that — regardless of its effect — halts any act or agreement that tends to monopolize or promote monopoly. The *Albrecht* decision has drawn the attention of both groups of critics because they claim it ignored theoretical economics and ruled that maximum price fixing, even though it may have price benefits for consumers, is prohibited by statute. Among the most notable have been Philip Areeda, Herbert Hovenkamp, Roger Blair, David Kaserman, and Jacqueline Dowd.

Critics of the decision have vigorously argued that it ignored the nature of competitive markets and the behavior of buyers and sellers in newspaper markets, and that permitting independent distributors to set retail prices harms both newspapers and consumers. Opponents to the *Albrecht* decision base their claims on the dual product nature of newspaper markets and assumptions about the structure and behavior of these markets.

I. DUAL PRODUCT NATURE OF NEWSPAPERS

Scholars recognize that the newspaper industry differs from many other industries because newspapers operate in a dual product market.\(^7\) Newspaper publishers create one tangible product but participate in two separate good and service markets. The performance in each market affects performance in the other.\(^8\)

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8. For an extensive discussion and analysis of the nature of the dual product market of newspapers, see chapter 2 in R. PICARD, MEDIA ECONOMICS: CONCEPTS AND ISSUES (1989).
Maximum Price Fixing of Newspaper Circulation

The first market in which newspapers participate is that for the media product. This content product is the information, advertising, and entertainment packaged and marketed in the form of the printed newspaper. How newspapers perform in this market is measured by circulation statistics or revenue from that circulation. The second market in which newspapers participate is the advertising market. Newspapers sell access to audiences to advertisers, and the amount charged advertisers is more dependent upon the sizes and characteristics of the audiences than the amount of advertising space purchased.

Because of the dual products, the size of circulation has an effect on advertising revenue and the amount of advertising lineage affects circulation revenue. This occurs because the desirability of a paper to advertisers generally increases as circulation increases and decreases as circulation decreases. The desirability of a paper to readers increases as advertising increases because it is an important information component of newspapers.

Writers who oppose the Albrecht ruling comprehend this relationship and use it as the basis for asserting their claim that the ruling is economically flawed. These opponents, however, do not step beyond the theoretical statement of the relationship and apply it in specific market and demand situations. Legal-economic analyses in specific situations are also sparse due, in part, to the application of the per se rule that has allowed rulings without significant inquiry into the specific situations under consideration and their effects. In addition, opponents tend to cite case law that is based on litigation involving newspapers in markets with unusual amounts of inter- and intra-media competition, and testimony in those cases has provided some principles applicable in such markets but not in the majority of newspaper markets. These problems are compounded because that testimony and those legal arguments have for the most part ignored the body of scholarly research on media economics that has developed in the two decades since Albrecht.

Because most commentators on Albrecht rely on theoretical analysis and illustrate it with developments in competitive markets, they make inappropriate and false assumptions about the importance of the relationship between circulation and advertising and the nature of newspaper economics in most newspaper markets today.

II. ASSUMPTIONS OF OPPONENTS OF ALBRECHT

Opponents of Albrecht argue that when independent distributors increase circulation price, a corresponding decrease in circulation occurs and the attractiveness of the paper to advertisers is diminished.9 Newspapers thus

ROBERT G. PICARD

need to control distribution prices to keep distributors from raising prices. This benefits both newspapers and consumers, according to the argument. This view is based in classical competitive economic theory, untested assertions in supportive essays, and several critical assumptions that are largely unexamined or unrecognized in opponents’ discussions and analyses. These are:

1. Local newspaper competition exists.
2. Price elasticity of demand exists for circulation.
3. Distributors have a monopoly on their product.
4. There is a direct linkage between circulation level and advertising price.
5. Newspapers maximize revenue only by keeping circulation as high as possible.
6. Circulation revenue does not cover production costs.
7. Distributors operate with similar cost structures.
8. Newspaper distribution is a natural monopoly.

An examination of these assumptions, however, points out that they present significant difficulties when applied to the contemporary newspaper industry and antitrust analyses of the industry.

A. Local Newspaper Competition

The first assumption is that newspapers operate in markets in which interbrand competition exists. The assumption that newspapers compete with each other and are interchangeable is erroneous today. Although most commentators recognize local monopoly, they assert that newspapers must be concerned with the circulation spiral phenomenon, in which a less desirable paper loses circulation, followed by a loss in advertising, followed by a loss in circulation, etc. According to one expositor, “Any price increase may result in a loss of circulation and trigger the downward spiral that can quickly destroy a newspaper.”

This view is clearly inapplicable in most U.S. newspaper markets today because the circulation spiral phenomenon has been shown to exist only in markets with locally produced competitive daily newspapers. Readers’

10. Dowd, supra note 5, at 506.

72 December 1990
Maximum Price Fixing of Newspaper Circulation

ability to substitute one local newspaper for another because of a price increase or other factor reducing demand is very limited. Although 43 percent of cities with newspapers had a local competitor in 1920, only 2 percent of cities with newspapers had a local competitor in 1986. That number has been reduced to about 1.5 percent during the past three years. Although some local newspapers compete with nationally or regionally circulated newspapers for a small number of readers (often readers of both the local and a second national or regional newspaper), these other papers are not interchangeable or reasonable substitutes in terms of either the amount or quality of local news and local advertising, the primary content of daily newspapers.

B. Price Elasticity

The second, and perhaps most critical, assumption is that price elasticity of demand exists for newspaper circulation. This assumption is the basis of the argument that price increases by distributors harm newspapers, and it has led Hovenkamp to assert that “Even a small monopolist such as a newspaper carrier has the power to reduce output and raise price.” Blair and Kaserman argue that permitting maximum price fixing “restores the price and quantity that would result from competition at the distributor stage, therefore resulting in lower prices and greater consumption for the retail customer.” Another Albrecht critic cites evidence of elasticity in 1898 and 1966 to support her position.

Although these arguments might appear to be reasonable on the surface and fit well in a model of competitive newspaper economics, they are contradicted by contemporary research in media economics showing that demand industrywide has been inelastic during the past three decades and is becoming more inelastic as local newspaper monopolies increase. Research has also

12. Hovenkamp, supra note 4, at 265.
13. Blair and Kaserman, supra note 6, at 475.
indicated that consumer spending on media is stable over time and has the same characteristics as expenditures for staples such as housing and clothing.  

Such data indicate that there is little reason to believe that reasonable price increases by newspapers or distributors will result in the sudden appearance of elasticity of demand. In fact, the relative inelasticity of demand has been a major impetus for one-third of the daily newspapers to increase their average single copy price by 40 percent, to 35 cents daily, in recent years.

In the overwhelming number of markets where local newspaper monopoly exists, the evidence indicates that publishers need not be as greatly concerned about circulation levels, except for ensuring that the market penetration of their paper is strong and not vulnerable to a new daily newspaper entering the market or that its penetration not be lower than the penetration offered by substitute media, such as weekly papers.

If price elasticity of demand for newspaper circulation exists, it will most likely be present in those few markets in which two or more local daily newspapers compete. In such situations, the interplay of circulation and advertising is critical because the newspaper with the largest circulation and highest market penetration receives a disproportionate amount of advertising revenue, even when the circulation differences are small.

C. Distributors Have Product Monopolies

Most commentators assume that independent distributors control the supply of the newspapers in their market. This occurs because newspapers

16. See McCombs, Mass Media in the Marketplace, 24 JOURNALISM MONOGRAPHS (1972); McCombs and Eyal, Spending on Mass Media in MASS COMM YEARBOOK 3 (1982); McCombs and Son, Patterns of Economic Support for Mass Media During a Decade of Electronic Innovation, presentation to the Association for Education in Journalism and Mass Communication (1986); and Fullerton, Technology Collides with Relative Constancy: The Pattern of Adoption for a New Medium, 1 J. MEDIA ECON. 75–85 (1988).
Maximum Price Fixing of Newspaper Circulation

have traditionally provided exclusive home delivery territories to distributors either through contract or practice. As one analysis asserts:

Under an exclusive territory scheme, each distributor has the exclusive privilege of distributing the producer's output in a specific geographic market. Consequently, there is no competition at the distribution level. In Albrecht, the newspaper publisher awarded exclusive territories to each of his distributors. This made each distributor a monopolist in its assigned territory.  

Because distributors are monopolists, critics argue that newspaper publishers must protect themselves. As Blair argues, "In order to prevent each distributor from exploiting its monopoly power, the publisher [in the Albrecht case] imposed maximum resale prices."  

The existence of an exclusive home delivery territory, however, does not make the distributor the sole purveyor of the product in that territory and presents problems to these assertions. Newspapers themselves normally operate dual distribution systems that provide intrabrand competition through single copy sales available in news racks and home delivery by the U.S. Postal Service. In some cases, newspapers operate distribution systems in which papers are hawked on street corners.

In addition, newspapers distribute papers through dealers — that is, merchants who retail copies in stores, restaurants, etc. The importance of these competing distribution systems should not be minimized. About 20 percent of the nation's newspaper circulation (approximately 12 million copies daily) are single copy sales.  

For some papers, the majority of their circulation is accounted for by single copy sales.

Newspaper readers who are dissatisfied with the price or service of home delivery can acquire the product through these other means at no loss of circulation revenue or total circulation level for the newspaper publisher. Such cross-elasticity of demand benefits both consumer and publisher. No harm is done to the advertising side because the newspaper reports its total paid circulation to advertisers and this figure is not affected by a switch from home delivery to some other form of distribution.

ROBERT G. PICARD

In addition to the limitations on the abilities of distributors to exploit their market power because of this dual distribution system, most newspaper distributors' ability to engineer profit is severely limited by small territories, the small number of customers in each territory, and the fact that they gain income from the sale of a single item rather than multiple items, as do most retailers.

D. Direct Relations Between Circulation and Advertising Price

Because of the relationship between circulation levels and advertising prices outlined above, it is argued that any decrease in circulation will result in papers being forced to lower advertising prices and, consequently, to suffer advertising revenue loss. One scholar has noted that "newspaper publishers suffer from reduced circulation not because of its effects on revenues derived from newspaper sales, but because of its effect on advertising rates....A newspaper whose circulation declines can expect its advertising revenue to decline."22

Although there is truth to this argument, it exists only in the long term. Newspapers tend to set their advertising rates annually, or less frequently, and rates are only infrequently adjusted for short-term fluctuations. In addition, research has shown that newspaper publishers almost never make advertising price decisions based on economic analysis, but most often set ad rates using target-return price strategies or, where appropriate, base prices on those of direct competitors.23

Although there is a relationship between circulation level and advertising rates, it is not directly equivalent. Advertising rates are more dependent upon industry norms for papers in certain circulation size categories, the local economy, and the type of advertising than specific circulation.

It has also been argued that newspapers face the most intense competition in the national newspaper advertising market and that high elasticity of demand will be found in this market, whereas elasticity is low in the local ad market.24 According to proponents of maximum price fixing, newspapers thus need to control circulation price so that circulation level changes do not induce changes in national advertising demand. This assertion, however, is not borne out by research; inelasticity has, in fact, been shown for the national newspaper advertising market.25

Maximum Price Fixing of Newspaper Circulation

E. Revenue Maximized by High Circulation

A number of critics of limitations on maximum vertical price fixing argue that newspapers maximize revenue only by keeping circulation as high as possible. This view is illustrated by such assertions as: “A newspaper cannot increase its profits by raising the price of its papers or by reducing its circulation,”26 and “Generally...a newspaper publisher will not find it profitable to reduce circulation in order to make monopoly profits from the sale of newspapers.”27

This assumption is clearly wrong and is refuted by theory and practice. Newspapers engage in profit engineering that maximizes their revenue by lowering circulation to achieve optimal output levels. This practice has been explored by researchers who reveal the methods employed by and benefits to newspapers doing so.28 Opponents of Albrecht, apparently unaware of such developments, overstate the importance of circulation level and understate the ability and extent to which publishers can and do control and reduce circulation levels.

F. Circulation Is a Loss Leader

The sixth assumption that must be considered is the assumption that circulation revenue does not cover production costs, and that newspapers carry circulation at a loss in order to keep circulation levels high. “A newspaper does not make its profits from selling papers,”29 according to Dowd. This view is echoed by Areeda and Hovenkamp, who assert that “in many cases, circulation revenue does not even cover the cost of newsprint.”30

This assumption of loss on the circulation product is not borne out by facts. Only 16 percent of the cost of producing the paper is attributable to nonadvertising content.31 Circulation revenue, however, accounts for about 25 percent of the average newspaper’s revenue. These figures clearly indicate that circulation makes a significant contribution to the operating margin of a paper and provides a return on sales of about 55 percent. The assertion that circulation revenue doesn’t cover newsprint cost is generally true, but

26. Dowd, supra note 5, at 497.
27. Hovenkamp, supra note 22, at 457.
29. Dowd, supra note 5, at 483.

Communications and the Law 77
leads to the wrong conclusion because of improper cost analysis and allocation. In most papers, at least two-thirds to three-quarters of the paper is advertising; thus the cost of newsprint used for advertising copy must be allocated as an advertising rather than a circulation cost. When this is done, circulation revenue more than pays for the newsprint costs allocated for that product.

G. Distributors’ Costs Are Similar

Basic to the argument of critics is the view that operating costs for distributors are similar and that all distributors should be able to deliver for similar marginal and average costs and operate successfully at a price level set by the newspapers. In this view, any distributor charging above the level established by the paper is guilty of exploiting their market by “price gouging.”

The assumption of commentators who adhere to the optimum monopoly price theory is that distribution is a monopoly and there is a single price at which a monopolist can maximize profits. Newspapers can determine this price and set it as a maximum resale price, thus ensuring that their profits are maximized. Bohling illustrates the view in noting that maximum price fixing would “eliminate high cost retailers who would be replaced by more efficient retailers capable of surviving on narrower profit margins....if the profit margin is too thin the manufacturer would not be able to find substitute retailers and would be required to raise the maximum price.”

Application of the assumption that there is a single maximizing price, and the corollary assumption that cost structures for distributors should be similar, is not easily made to the newspaper industry generally. Distributors use a variety of delivery modes with varying associated costs. Some distributors deliver on foot, some on bicycle, and some by car. In addition, differences in sizes of territories and distribution densities in the territories affect costs. Thus, the distributors’ returns on sales vary widely, and in some cases price increases may be appropriate to keep return incentives comparable. Independent distributors working within their territories are in a far better position to analyze the costs of operating their business and set prices to achieve an appropriate revenue level than are the newspapers.

32. Dowd, supra note 5, at 494.

78 December 1990
Maximum Price Fixing of Newspaper Circulation

H. Newspaper Delivery Is a Natural Monopoly

Some observers argue that newspaper distribution routes should be considered natural monopolies. Hovenkamp, for example, argues that:

[M]any natural monopolies are not recognized as such and are treated no differently than competitive firms. Newspapers [and] newspaper delivery routes...may be natural monopolies. Failure to recognize this fact has occasionally led courts astray in their analysis of antitrust problems in those markets. 34

Natural monopolies exist in situations in which long-run average cost curves and marginal cost curves constantly continue downward as output increases. 35 If economies continue beyond the demand curve, a market is considered a natural monopoly. 36

In such a situation, increasing economies of scale over the entire range of production increase return for added production. As production of a firm increases in a natural monopoly, its costs decrease. It thus gains the power to drive competitors or keep potential competitors out of the market. As a result, a single firm will tend to monopolize the industry.

Natural monopolies tend to exist for products that have high fixed costs and face inelastic demand, such as utilities. 37 The tendency toward monopoly is promoted because the largest firm, enjoying increasing returns, is able to control prices to attract consumers because the product is heterogeneous and substitutable and cost is the only factor in consumer choice. Thus, smaller competitors are naturally disadvantaged and leave the market.

If newspaper distribution is to be considered a natural monopoly, it must be shown that (1) high fixed costs exist; (2) inelastic demand exists; (3) the product is heterogeneous and substitutable; (4) cost, not quality, is the deciding factor in consumer choice; and (5) average cost and marginal cost continue sloping downward for the distributor.

If one analyzes newspaper distribution, one discovers that independent distributorships do not evidence the range of elements that describe natural monopoly. Distributors have relatively low fixed costs because distribution does not require land, buildings, or significant equipment. Consumer demand

34. HOVENKAMP, supra note 4, at 33; see Hovenkamp, supra note 22, at 452-453 for a discussion of why he believes distribution may be a natural monopoly.
ROBERT G. PICARD

for the product is generally inelastic, as shown above (critics of Albrecht try to show inelastic demand here as a means of promoting their argument of natural monopoly, but they argue that demand is elastic when they wish to show that price increases by distributors harm publishers). The newspaper product sold to customers is heterogeneous and substitutable by the same newspaper product available through news rack, dealer, and mail delivery, but only rarely heterogeneous when compared to other newspapers that may be available in the market. The extent to which cost and quality converge to affect demand must be measured in specific markets, but there is evidence that the service quality is an important factor industrywide, that demand is affected by delivery time, location, and condition of the newspaper at delivery, and that consumers are willing to pay for good or extra service.\textsuperscript{38}

The issue of whether long-run average and marginal costs continue downward over the range of quantity is crucial.

The primary contributor to distributors' costs is the wholesale price of the newspaper. This cost is set by the paper and remains stable across the quantity range. Discounts for quantity rarely exist and, when they do, are unattainable for most distributors because of the sizes of their territories. Distribution territories are typically small, and the average newspaper has one carrier for each one hundred subscribers.\textsuperscript{39} Adult independent distributors typically serve routes ranging from 200 to 600 customers, and youth carriers usually have routes ranging from 20 to 100 customers.\textsuperscript{40} A recent study of circulation found that the average wholesale-to-retail price mark-up by independent distributors was only 39.5 percent for a weekly subscription,\textsuperscript{41} revealing the relative dominance of wholesale price as a distributor's cost.

In addition to the stable wholesale cost, distributors face incidental and transportation costs. Incidental business expenses typically include costs for rubber bands, plastic distribution bags, bonding, and insurance. As with the cost of acquiring papers from the publisher, these costs tend to be stable across the range of distribution quantity because the limited sizes of routes inhibit economies of scale in the purchase of supplies for a distributor.

Transportation costs vary by route, depending on delivery method and the presence of density economies. For small routes served by foot or bicycle transportation — which represent the majority of independent distribution

\textsuperscript{38} See, e.g., Newman, In Praise of Independent Route Dealers, EDITOR & PUBLISHER 7 (July 29, 1989) and Radolf, Improve Service to Readers, Advertisers, EDITOR & PUBLISHER 43, 47 (May 6, 1989).
\textsuperscript{39} THORN, NEWSPAPER CIRCULATION 239 (1987).
\textsuperscript{40} Id. at 241.
\textsuperscript{41} See Picard, Most Papers Use Independent Distributors, INT'L CIRC. MGRS. ASSN. UPDATE 7–9 (September 1987).
Maximum Price Fixing of Newspaper Circulation

Table 1

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<thead>
<tr>
<th>Natural Monopoly Factor</th>
<th>Exists in Newspaper Distribution</th>
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<tr>
<td>High fixed costs</td>
<td>No</td>
</tr>
<tr>
<td>Inelastic demand</td>
<td>Yes (in local monopolies)</td>
</tr>
<tr>
<td>Heterogeneous Product</td>
<td>Yes (for same paper)</td>
</tr>
<tr>
<td>Price is only demand consideration</td>
<td>No*</td>
</tr>
<tr>
<td>Constantly declining average and marginal cost</td>
<td>Probably not*</td>
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*Demand and costs vary from route to route, even for distributors of the same paper. Industrywide indicators and practices, however, suggest that these do not exist throughout much of the industry and that natural monopoly status is thus questionable.

routes — costs are rarely included by the contractor in return calculations. For distribution using automobiles, average and marginal costs can be more easily observed, and probably decline, but few distributors use their vehicles only for distribution, so the costs must be apportioned between personal and distribution use. In most cases, the distributors would have owned and maintained the vehicle even without the distribution route, so its contribution to costs will be minimal and should include only operation and maintenance costs directly associated with distribution.

Given these cost realities, can average and marginal costs be expected to decline so significantly and constantly on the average distribution route that they provide pervasive and persistent economies of scale that must lead to the conclusion that distribution is a natural monopoly? The answer is "No." However, there may be routes (most likely large routes requiring motor vehicle distribution) in which such conditions and natural monopoly may be shown to exist, but these would represent a minority of distribution routes. Thus, an analysis of cost factors on specific routes would have to be made to determine whether they are natural monopolies.

If one compares the factors that typically promote natural monopolies with those existing in newspaper distribution, it becomes clear that one cannot assert with great certainty that newspaper distribution is a natural monopoly (see Table 1).

Those who argue that distribution is a natural monopoly will not find much support for their position in the markets in which local newspaper
competing papers operate separate distribution systems, or in the thousands of markets where nationally circulated papers such as the Wall Street Journal, New York Times, and USA Today each use distributors different from the locally published daily newspaper and each other.

The apparent erroneousness of the eight assumptions and their applicability to most newspaper situations today thus harms the arguments of the opponents of the Albrecht decision that the dual product interplay allows the ruling to harm newspapers. There are few, exceptional newspaper markets in which such assumptions may apply. Industrywide, however, these assumptions and their generalizations are unsupported and, when contemporary facts are explored, actually refute the arguments of supporters of maximum vertical price fixing. If such opponents would like to support rather than refute their own arguments over the merits of the rule, they must do so with specific market analyses that support their assumptions. As the discussion above indicates, however, such data will undoubtedly be the narrow exceptions, not broadly applicable but appropriate to a few markets.

III. EFFECTS OF MAXIMUM PRICE FIXING AND ITS ABROGATION

Maximum vertical price fixing of a newspaper’s circulation prices affects three different interests: the paper itself, independent distributors, and consumers. It also has social costs and benefits as well.

Such resale price maintenance allows the publisher to control price and engage in profit engineering if the firm desires. If elasticity exists in a market, increased circulation and circulation revenue will result.

Price fixing affects distributors by reducing revenue or potential revenue obtainable above maximum price. This decreased or limited income may make it more difficult for an independent distributor to stay in business and reduces the incentive to provide quality service to individual consumers.

Consumers receive a financial benefit from maximum price fixing in that the cost of receiving the newspaper is kept lower. The lower cost may also result in a lowering of services received from the distributor, however. Because the customer purchases both the newspaper product and delivery services from the distributor, consumer welfare cannot be measured only in terms of price. This is especially true in the case of special delivery services that may be purchased at an additional price from some distributors.

42. More support may be in the fact that joint operating papers use joint distribution systems. The number of locally competitive papers using separate systems and joint operating papers is about equal, however.
Maximum Price Fixing of Newspaper Circulation

All three groups are also affected if maximum price fixing is not permitted. The newspaper publisher loses the ability to control resale price of the newspaper product. If elasticity of demand exists, the paper may suffer losses in circulation and circulation revenue. If newspaper sales are inelastic in the market, the publisher will not be significantly harmed by distributors’ setting prices on their own.

When distributors are able to set their own prices, some may seek to maximize their profit, but most will adhere to suggested prices if industry trends are an indicator. If elasticity of demand exists, distributors who might raise prices have a small range of prices from which to choose, given the limited number of potential purchasers in distributors’ territories and that distributors are much more dependent upon circulation in their individual territories than the newspaper. Whether or not elasticity exists, distributors can increase their return, maintaining or increasing the incentives of private enterprise.

Consumers are affected by the abrogation of maximum prices because they may pay a higher price. This effect is critics’ strongest argument against Albrecht, but it is interesting to note that newspapers do not evidence this consumer orientation when they choose to raise their suggested prices or prices on papers available through their own distribution systems.

In weighing the effects and the benefits of protecting the producer, the consumer, the distributor, or some combination thereof, the ideological biases of an individual’s antitrust philosophy come into play. One must also consider not only the short-term effects but the long-term effects of maximum price fixing. Resale price maintenance may protect consumers in the short term but harm them in the long term by increasing monopolistic control. Most commentators’ biases toward antitrust policy protecting only the consumer, or the consumer and newspaper, have been clear in their opposition to Albrecht. This author does not intend to engage in a philosophical argument with such critics but wishes to point out that a variety of options exist for newspapers faced with distributors who exceed suggested retail prices.

IV. OPTIONS TO MAXIMUM PRICE FIXING

Most critics have asserted that newspapers faced with retailers raising prices have few options. Dowd has argued that “the only option left by Albrecht is for the newspaper to integrate vertically and deliver the papers with its own employees.” 43 Hovenkamp has argued that such integration is the “best available alternative.” 44

43. Dowd, supra note 5, at 494.
44. Hovenkamp, supra note 4, at 198.
ROBERT G. PICARD

These commentators, however, ignore the fact that few newspapers have done so because they wish to avoid the extensive capital, compensation, tax, and insurance costs that would arise by switching delivery to newspaper employees, and because distribution using delivery agents also makes the paper responsible for some of those costs and lacks the incentives of independent distributorships and the control of employee distributorships.

Today, more than three-quarters of all newspapers continue to use independent distributors, and the majority of those who have shifted to internal or agent distribution have done so as part of an effort to make newspaper sales and collection, rather than distribution, an internal operation.45

The fact that newspapers have not rushed to control maximum price by changing distribution points out that a variety of other options exist. Even if a newspaper exists in a market with local newspaper competition, price elasticity of demand, and other factors that make it desirable to keep circulation prices low, it can do so without engaging in price fixing activities that directly contravene existing antitrust interpretation. These options are far preferable to resale price maintenance and do not require vertical integration.

Newspapers help adjust the returns on sales of various distributors by adjusting wholesale price law by providing subsidies on routes where cost factors make it more expensive to provide service. Such subsidies, which already are offered by many newspapers, make it more likely that distributors will observe suggested retail prices.

In addition, newspapers faced with distributors exceeding the suggested price can provide customers with rebates or discount coupons. These could be inserted in newspapers on routes exceeding the price desired by the newspaper and would be redeemable by the distributor. Consumers are well acquainted with discount coupons and rebates in other industries and such a tactic would engender considerable goodwill among the customers.

Publishers can also ensure that the routes remain relatively small and thus more attractive to youth carriers or adults who are supplementing other incomes and are more likely to voluntarily adhere to suggested resale prices. In addition, smaller routes that do not require automotive and other expenses that lower profit rapidly can provide a better rate of return to distributors. This removes the need for some distributors to increase price to cover higher costs.

Publishers concerned about elasticity can promote competition by news rack sales, dealers, mail delivery, and street hawkers whenever dealers exceed suggested price. These promotions and competition will help promote

45. Picard, supra note 41.

84 December 1990

HeinOnline -- 12 Comm. & L. 84 1990
Maximum Price Fixing of Newspaper Circulation

price competition and the benefits of lowered price to consumers. Publishers could also opt to set up a dual home delivery distribution system when distributors exceed suggested price, but they would need to take care to ensure that it does not create an impermissible nonprice vertical restraint.

Blair and Kaserman have noted that a newspaper may also require performance standards in the form of sales quotas as a means of keeping a distributorship. They note that protective legislation has restricted such standards in some industries but the newspaper industry is not among them. Hovenkamp has suggested that contestable delivery routes awarded based on resale price bids can be used, although with some risk of antitrust litigation.

V. SUMMARY

In light of the exploration of the important assumptions made by opponents of the Albrecht decision, it is clear that most do not today apply to the newspaper industry as a whole but may have applicability in a few newspaper markets. Their arguments are thus not persuasive enough to overcome the application of the per se rule to maximum vertical price fixing in the industry.

The per se rule is applicable in cases in which agreements are so clearly anticompetitive that there is no need to evaluate their rationale or effects, but it is also applied to situations in which knowledge and evidence about a practice — independent from the instant case — have clearly demonstrated anticompetitive effects.

In the case of maximum vertical price fixing of newspaper circulation, available evidence reveals that such a practice is detrimental and anticompetitive in nearly all newspaper markets, that there is no reasonable rationale for doing so in markets in which local daily newspaper circulation and advertising monopolies exist, and that publishers have a wide variety of less anticompetitive alternatives to the practice. Thus, there is sufficient reason to apply the per se rule in nearly every newspaper case involving maximum resale price maintenance.

In a few exceptional cases, such as in the few markets in which two local papers engage in direct competition, a rule of reason approach may be desirable. The need to consider these uncommon situations in a different manner, however, does not require discarding of the per se rule in the overwhelming majority of newspaper situations where it is appropriately applied.

46. Blair and Kaserman, supra note 6, at 478–479.
47. Hovenkamp, supra note 22, at 461–462.
ROBERT G. PICARD

Despite the fact that critics generalize in their assumptions, they may be correct in some of their economic analyses of newspapers surrounding the Albrecht situation. The St. Louis market, in which the case arose, contained two locally published and reasonably substitutable newspapers, the Globe-Democrat and the Post-Dispatch. The amount of competition between the papers, however, is questionable, because the two papers operated under a joint operating agreement that ended commercial competition. In the agreement, they shared production, advertising, and circulation departments, and costs of operation. The extent to which they engaged in price fixing, combination advertising, profit pooling, and market allocation under the agreement would significantly affect factors of demand elasticity and potential harm done by circulation changes. The court did not address these issues in Albrecht because it applied the per se rule, and these issues have escaped the discussion of commentators on the case.

The critics may also have been correct in their application of some assumptions to several subsequent cases. Paschall v. Kansas City Star,48 and Newberry v. Washington Post Co.,49 for example, involved papers in Kansas City, Missouri, and Washington, DC, where local competition existed, some elasticity of demand might be expected, and some of the alleged harm of maximum price fixing to the newspapers may have existed.

The arguments made by critics of Albrecht, however, have been much too broad in terms of application to the newspaper industry as a whole, and they have provided almost no evidence of their assertions based on anything but theory. The use of such assertions may be evidence that these commentators are less concerned about its application to the newspaper industry than the ruling’s application in other industries. Because the ruling involved the newspaper industry, however, the critics are forced to argue newspaper economics and do so by using the situations in a small minority segment of the industry. The Albrecht ruling may be appropriately applied to cases involving newspapers in the majority of markets that appear to be affected differently from the economic assertions made by most opponents to the application of the per se rule to maximum price fixing.

There are a variety of protective alternatives available to newspaper publishers in markets in which they have some reason to be concerned about the effect of price increases made by independent contractors. These alternatives are far less monopolistic than asserting and maintaining a maximum resale price and generally do not make the paper vulnerable to antitrust litigation. Newspaper publishers should explore such alternatives before engaging in more significant and perilous efforts to control maximum resale price.


86 December 1990