

COMMENT

PARADOXES OF THE ASSOCIATED PRESS DECISION— A REPLY*

HOWARD ELLIS†

The recent use of the Sherman Act in a successful campaign by the Government to outlaw restrictions on membership in the Associated Press¹ may, as has been suggested by Mr. John Henry Lewin, presage an extension of the scope of both substantive sections² of the statute as hitherto understood by antitrust lawyers. However there are certain basic contradictions and inconsistencies in the decision³ which merit discussion.

This case never went to trial upon the disputed issues of fact. The proceeding was brought before a three-judge district court⁴ and judgment was entered on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The decision must therefore be viewed solely in the light of the admitted, agreed, or undisputed facts presented to the district court.

The district court had found in its formal Conclusions of Law that:

- IX. AP does not monopolize or dominate the furnishing of news reports, news pictures or features in the United States.
- X. AP does not monopolize or dominate access to the original sources of news.
- XI. AP does not monopolize or dominate transmission facilities for the gathering or distribution of news reports, news pictures, or features.

Of course AP did have a monopoly of its own news dispatches, just as The United Press and International News Service have a monopoly of their news dispatches, and just as a manufacturer of shoes has a monopoly of his own particular brand of shoes. But in the proceeding for summary judgment AP was not found to be a monopoly, and could not be found to be a monopoly in the face of disputed issues of fact. It follows therefore

* See Lewin, *The Associated Press Decision—An Extension of the Sherman Act?*, 13 *Univ. Chi. Rev.* 247 (1946).

† Member of the Illinois Bar and attorney for the Chicago Tribune and Robert R. McCormick, publisher of the Chicago Tribune, defendants in the antitrust proceedings against the Associated Press and its members.

¹ For brevity the Associated Press is referred to as AP.

² 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1-2 (1941).

³ *United States v. Associated Press*, 326 U.S. 1 (1945).

⁴ *United States v. Associated Press*, 52 F. Supp. 362 (N.Y., 1943).

that the charges made by the government that AP was a monopoly or a near monopoly must have been, and must now be, wholly eliminated from consideration.

Moreover, the district court did not find either that the sections of the AP by-laws which prevented service of AP news dispatches to nonmembers and which prevented AP members from furnishing spontaneous local news to any one not a member of AP, or that the agreement between AP and the Canadian Press under which AP secured exclusive right to receive the news reports of the Canadian Press and its members, were illegal in and of themselves. The district court held that these by-laws and this contract were illegal only when taken in connection with the restrictions on the admission of members into AP. It enjoined the observance of these by-laws and of this contract temporarily, pending AP's obedience to the decree enjoining the restrictions on membership.

Thus the AP restrictions on admission of members were the sole alleged illegality which could possibly have been considered a violation of the Sherman Act. These restrictions meant simply that AP would not accept into membership and serve any publisher in the field⁵ of a member save upon certain stipulated conditions. It was admitted that a member already in the field could, by invoking those conditions, make it more difficult for an applicant to acquire admission to AP in that field if such member did not approve of the admission of the applicant. The defendants, in argument, went even further and contended that AP could lawfully enter into unconditional agreements with its members (subscribers to its news services) that it would not under any circumstances furnish its services to any other newspaper in the field of a member without the consent of such member. There, stripped of calculated confusion, is the only real issue in the case: May a press association by contract protect the exclusivity value of its news dispatches?

Mr. Justice Frankfurter and the district court found themselves in a difficult position on this issue. The district court canvassed "settled instances" in which restrictive agreements have been held unlawful, but could not make the AP membership restrictions fit within any of such "settled instances." It proceeded to discuss the particular and unique nature of news reports, developing the so-called "full illumination" theory, outlined thus:

However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general inter-

⁵ The scope of the field of a member is limited not only to the community but to the type of paper published—that is, morning, evening, or Sunday.

ests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment. . . .⁶

Mr. Justice Frankfurter held to this concept boldly and consistently.⁷ The short of the theory is that any contractual restraint, although lawful in all other industries, is unlawful in this single industry—the only industry specifically protected by the Constitution against the perils of governmental encroachment. This is the first paradox.

The opinion of the Supreme Court, delivered by Mr. Justice Black, was not thus forthright. The majority apparently did not regard these membership restraints as illegal per se; but, purporting to apply the same principles applicable to goods, wares, and merchandise, held them to be “unreasonable,” and hence unlawful. In considering the fact of “reasonableness” the majority seem to have encountered certain difficulties of logic.

The majority opinion states time and time again, without qualification or explanation, that the district court found these restrictive covenants to “constitute restraints of trade,” thus conveying the impression that the district court found these covenants to be “unreasonable” and hence violative as in the ordinary case of fungible goods. It is questionable whether the district court actually made any such finding of fact. No such finding was necessary or appropriate to the theory adopted by that court. The majority opinion states several times that the entire case is to be considered in relation to the background of a scheme or plan designed by AP and its members and aimed at “stifling” competition between member and nonmember newspapers. But the district court, after oral argument, did not enter any such finding of fact. The majority opinion, even though passing upon a proceeding for summary judgment, found that the membership restrictions would have the “necessary effect” of restraining trade in violation of the Sherman Act. This the majority assumed to do exclusively on the basis of their (the by-laws’) terms and the background of facts which the appellants (AP and members) admitted. Yet the record contained affidavits of numerous publishers denying that the restrictive covenants had ever had such an effect in the past. Furthermore, the majority opinion assumed to find that the restrictive covenants would “necessarily” have an unlawful *future* effect, although unwilling and apparently unable to sustain a finding that they had any unlawful *past* effect. The majority concluded that restrictions not found to have had

⁶ United States v. Associated Press, 52 F. Supp. 362, 372 (N.Y., 1943).

⁷ United States v. Associated Press, 326 U.S. 1, 28 (1945).

unlawful effects for forty-four years *in the past* must "necessarily" have unlawful effects *in the future*. This is the second paradox.

What then was this inherent illegality which the majority discovered upon consideration of a decree entered upon motion for summary judgment, despite paucity of supporting evidence and hotly disputed issues of fact? Perhaps the following statement furnishes a clue:

It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members gives many newspapers a competitive advantage over their rivals. Conversely, a newspaper without AP service is more than likely to be at a competitive disadvantage. The District Court stated that it was to secure this advantage over rivals that the By-Laws existed. It is true that the record shows that some competing papers have gotten along without AP news, but morning newspapers, which control 97% of the total circulation in the United States, have AP news service. And the District Court's unchallenged finding was that "AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence."⁸

Did the majority thus announce an entirely new rule of law applicable apparently to all enterprises and all industries; namely that when a business organization becomes large—"a vast intricately reticulated organization, the largest of its kind"—it must thereupon serve all comers or it will be found guilty of violation of the Sherman Act? It would follow that International Harvester Company cannot by agreement assure any dealer that he will be the only dealer served by International Harvester Company in his community; that Mutual Broadcasting Company cannot make a contract with an affiliate agreeing that such affiliate will be the sole outlet for the network in his community; that General Motors cannot arrange to have an exclusive dealer in a community. It would follow that whenever a producer or distributor of any article becomes large—how large is not indicated—such producer or distributor must furnish such article to all persons who desire to become dealers in that article; must accept all such dealers on equal terms; and must serve all such dealers at reasonable rates. It would follow that AP cannot agree to furnish its news dispatches exclusively to its own members unless as a practical matter AP will furnish its news dispatches to all who apply for membership. The majority thus permits AP to serve its own members, provided it serve everyone. This is the third paradox.

The majority opinion forces AP to accept all who apply for membership. If AP enjoys the superiority and "indispensability" attributed to it

⁸ *Ibid.*, at 17.

by the government, its membership will be vastly increased. Thus in order to prevent monopoly, as outlawed by the Sherman Act, this decision compels AP to travel the road to monopoly. This is the fourth paradox.

Finally, the majority opinion, in the language of Mr. Justice Roberts, requires AP "to operate under the tutelage of the court."⁹ Freedom of the press is thus to be guaranteed by direct and continuing governmental supervision. This is the final paradox.

It is worthy of note that of the eight justices who heard the case only four concurred in the majority opinion of Mr. Justice Black. One of these four, Mr. Justice Douglas, also filed a concurring opinion. In still another opinion, Mr. Justice Frankfurter concurred in the result, apparently for the reasons set forth by the district court. Dissenting opinions were filed by Mr. Justice Roberts and by Mr. Justice Murphy, with the Chief Justice joining in the dissent of Mr. Justice Roberts. In the district court Judge Swan dissented from the opinion of the court, which was written by Judge Learned Hand and concurred in by Judge Augustus N. Hand. The fact that eight justices found it necessary to file five opinions would seem to indicate that the Supreme Court itself could not easily fit the activities of the Associated Press into the pattern of illegal restraints fashioned by former decisions. An examination of the findings of fact, conclusions of law, and opinion of the district court, and an analysis of the five opinions filed in the Supreme Court, discloses abundant reasons for the "travail"¹⁰ of the justices.

It appears that this case must be regarded as a confused, and confusing, attempt to impose upon a single organization in a particular field of endeavor the status of a "quasi-public utility," in disregard of the nature of the proceeding before the district court and in contradiction of established interpretations of the Sherman Act and of common rules of logic. Mr. Justice Roberts in his dissent made a succinct summarization:

The court's opinion, under the guise of enforcing the Sherman Act, in fact renders AP a public utility subject to the duty to serve all on equal terms. This must be so, despite the disavowal of any such ground of decision. The District Court made this public utility theory the sole basis of decision, because it was unable to find support for a conclusion that AP either intended or attempted to, or in fact did, unreasonably re-

⁹ *Ibid.*, at 48.

¹⁰ Mr. Lewin introduces his article thus: "The activities of the Associated Press which were finally condemned can so easily be fitted into the pattern of illegal restraints fashioned by former decisions that the marvel is that they could have escaped with immunity so long and that their dispatch should have involved such travail and contrariness of view by the judges which passed upon them." Lewin, *The Associated Press Decision—An Extension of the Sherman Act?*, 13 *Univ. Chi. L. Rev.* 247 (1946).

strain trade or monopolize or attempt to monopolize all or any part of any branch of trade within the decisions of this court interpreting and applying the Sherman Act. Realizing the lack of support for any other, the government urges that the District Court's ground of decision is sound and that this court should adopt it.

Suffice it to say that it is a novel application of the Sherman Act to treat it as legislation converting an organization which neither restrains trade nor monopolizes it, nor holds itself out to serve the public generally, into a public utility because it furnishes a new sort of illumination—literary as contrasted with physical—by pronouncing a fiat that the interest of consumers—the reading public—not that of competing news agencies or newspaper publishers—requires equal service to all newspapers on the part of AP and that a court of equity, in the guise of an injunction, shall write the requisite regulatory statute. This is government by injunction with a vengeance.¹¹

¹¹ *United States v. Associated Press*, 326 U.S. 1, 34 (1945).