THE NEWSPAPER PRESERVATION ACT:
WHY IT FAILS TO PRESERVE NEWSPAPERS

I. INTRODUCTION

In 1970, Congress enacted the Newspaper Preservation Act (NPA). The NPA was prompted by a concern that many cities were being served by only one newspaper, after competing papers had gone out of business. The stated purpose of Congress was to maintain independent and competing editorial voices. Newspapers in twenty-two cities had formed joint operating arrangements (JOAs) in order to keep the financially troubled competing paper alive, but such arrangements were declared to be in violation of the antitrust laws in Citizen Publishing Co. v. United States. In passing the NPA, Congress negated the effect of Citizen Publishing by granting an antitrust exemption to JOAs that met certain requirements.

Separate criteria for the exemption were established for JOAs that already were in effect and for those that wished to come into existence after the enact-

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4In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter . . . .

Id.

6Id. at 575-76.

Joint operating arrangements provide newspapers a method to reduce substantially their operating costs and thereby avoid potential losses by eliminating the duplication of manpower and machinery that attends maintaining a separate production capacity. Newspapers that enter joint arrangements combine the commercial aspects of their production while maintaining separate and independent news and editorial departments and policies. While some arrangements merely use joint production facilities, others are essentially a merger for commercial purposes of the newspapers and result in price fixing, profit pooling, and market allocation, activities normally considered violative of the antitrust laws.

Id.

7394 U.S. 131 (1969). The agreement between the two Tucson, Arizona dailies, the Star and the Citizen, was struck down because it contained provisions for illegal price-fixing, pooling of profits, and a division of fields. Id. at 135.

It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970 if at the
ment of the NPA. The exemption from the antitrust laws granted to the JOAs was limited in scope. Regulations promulgated under the NPA established a procedure for approval of a new JOA.

Regardless of this elaborate mechanism set up to save failing newspapers, there has been an alarming number of failures of big city papers in recent years: Washington, Philadelphia, Cleveland, and Buffalo lost newspapers since the middle of 1981 and became one-newspaper towns. In light of this apparent time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: Provided, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

Id. (emphasis in original).

§ 1803(b) (1982).

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

Id.

§ 1803(c) (1982).

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

Id.

The regulations under the Act provide for applications to the Justice Department, a 30 day period for comments following publication of a notice in the Federal Register that approval of an joint operating arrangement has been applied for, and a report by the Justice Department's Antitrust Division within the 30 day period with a recommendation to the Attorney General that he approve or disapprove the application or hold a hearing before an administrative law judge to resolve material issues of fact. In an additional 30 day period, interested persons may respond to the Antitrust Division's report or to other comments. The Attorney General is not bound by the recommendations of the Antitrust Division or the administrative law judge. Newspaper Preservation Act, 28 C.F.R. §§ 48.1-48.16 (1974).

Seattle Application, supra note 7, at 677 n.55.

failure of the NPA to achieve its stated purpose of "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States," this article attempts to answer two questions: How has the NPA been dealt with by the courts, and how effective has the NPA been in practice?

II. THE NEWSPAPER PRESERVATION ACT IN THE COURTS

A. The Constitutional Challenges: San Francisco and Honolulu

The JOAs of two cities, San Francisco and Honolulu, have been the targets of attack in the courts for years. The first major challenge to the NPA was made in Bay Guardian Co. v. Chronicle Publishing Co. Plaintiffs, publishers of a small bi-monthly newspaper, attacked the constitutionality of the NPA. The defendants were the publishers of the two newspapers in the San Francisco JOA and the jointly-owned subsidiary that did the printing. The JOA, in effect since 1965, made San Francisco the largest city with such an arrangement.

The court rejected the plaintiffs' contention that the NPA violated the first amendment guarantee of freedom of the press and their claim that the NPA was unconstitutionally overbroad. The plaintiff's three equal protection arguments were also unsuccessful. First, they argued that the NPA gave the defendants "a privileged economic status" and that the "compelling interest

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19 Id. at 1157. The court summarized the several prongs of the attack:

They contend that the defendants' monopoly position in the San Francisco market enables the defendants to destroy or weaken any potential competition. They contend that this monopoly position accounts for the continually declining quality of the editorial and news contents of both papers. They contend that the profit sharing, joint ad rates, and other cooperative aspects of the joint operating agreement enable the defendants to establish and perpetuate a stranglehold on the San Francisco newspaper market. The plaintiffs contend that the Act is unconstitutional because it unfairly encourages this journalistic monopoly.

Id.

20 Id. at 1157. The Examiner and the Chronicle had combined their circulation, business, production, and advertising functions in 1965. Antitrust Case Appeal Dropped, EDITOR & PUBLISHER, April 24, 1982, at 48.

21 Barnett, supra note 20, at 44.

22 Barnett, supra note 20, at 44.

23 Id. The court reasoned that the first amendment was not violated because the NPA "does not confer any license to monopolize," but rather "is merely a selective repeal of the antitrust laws." Id. Although the owner of one of the JOA papers had agreed to fold a second San Francisco paper it owned upon entering the JOA, the court found nothing in the NPA authorizing such action, so the NPA could not be said to have deprived the people of San Francisco of freedom of the press. Id.

24 Id. The court stated that Congress could have been less "heavy-handed" in accomplishing its objectives but that neither the first nor the fifth amendment required it to be. Id. at 1159. The court did not see itself as a "super-legislature" that could re-evaluate the data Congress had relied upon. Id. In addition, the NPA did not impose any restrictions on the plaintiffs' ability to publish their paper and the NPA expressly forbade any predatory practices by the defendant JOA. Id.
test" should be applied because the first amendment was implicated.25 The court disagreed, distinguishing Williams v. Rhodes26 on the grounds that there was no explicit or implicit discrimination in the NPA and that the NPA did not regulate or restrict publishing.27 Secondly, the plaintiffs pointed out that the NPA imposed different standards for newspapers applying for a new JOA under the NPA than for those whose JOA had preexisted the enactment of the NPA.28 The court ruled that the plaintiffs lacked standing to make this argument.29 Thirdly, the plaintiffs, as publishers of a bi-monthly paper, argued that the NPA violated equal protection by granting the antitrust exemption only to newspapers that published once or more weekly.30 The court held that it was rational for Congress to make such a distinction.31 In addition, the court held that the NPA prevails over any inconsistent state antitrust law32 and that the NPA could constitutionally be applied to give the antitrust exemption to JOAs formed before its passage.33

Although they were successful in Bay Guardian, the owners of the San Francisco JOA papers faced more court challenges. Several lawsuits were settled in 1975.34 A later antitrust action was brought by the defunct Berkeley Barb, the Pacific Sun, and four employment agencies.35 After a hung jury in 1980,36 a jury verdict in 1981 found that the San Francisco JOA was proper under the NPA.37 Upon completion of the trial, the JOA newspapers sought to have the records of the trial sealed.38 After drawing criticism from other newspapers

23Id. at 1158.
24393 U.S. 23 (1968).
25344 F. Supp. at 1158.
27344 F. Supp. at 1158.
29344 F. Supp. at 1158.
30Id. at 1160. However, if the defendants engaged in conduct such as predatory pricing that was excluded from the limited antitrust exemption by 15 U.S.C. § 1803(c) (1982), then the state antitrust statute could be applied to such conduct. Id.
31344 F. Supp. at 1159. The court stated that this is not "retroactivity," but merely the result of Congress' repealing, through the NPA, of certain antitrust laws, so that conduct that would have been actionable before the NPA was passed is no longer actionable. Id.
32Barnett, supra note 20, at 45.
33Id.; Antitrust Case Appeal Dropped, supra note 21, at 48. The Pacific Sun was a suburban weekly newspaper which claimed that its San Francisco edition failed because of the JOA's combination advertising rates. Barnett, supra note 20, at 45. For a discussion of combination advertising rates, see infra text accompanying notes 143-146.
35Antitrust Case Appeal Dropped, supra note 21, at 48. The plaintiffs decided not to appeal. Id.
36San Francisco Dailies Move to Seal JOA Trial Records, supra note 36, at 9. The newspapers wanted the return of documents and all trial transcripts from both the 1980 and 1981 trials. Some of the documents they sought had been ruled confidential but others had been made part of the public record. Id.
and newspaper organizations, the JOA papers withdrew the motion.

The constitutionality of the NPA, which was upheld in Bay Guardian, was attacked again in Honolulu v. Hawaii Newspaper Agency. The plaintiff presented a two-fold argument: first, that the NPA itself was unconstitutional in that it abridged first amendment rights, violated equal protection, and was overbroad, and secondly that the defendants failed in any event to qualify for NPA protection.

The court did not accept plaintiff's contention that the first amendment was violated because the NPA permitted "an anticompetitive combination of newspapers" which discouraged and prevented new papers from starting in a JOA city. The first amendment would be violated, the court reasoned, only if the NPA "in some way restrains the freedom of the press in some direct fashion." Plaintiff's equal protection argument that the NPA treated pre-NPA JOAs differently than it treated applications for approval of a new JOA after passage of the NPA, was dismissed by the court because the differential treatment was "eminently fair." Similarly, the distinction in the NPA between papers published weekly or more often and those published less than weekly was held to be "clearly rational." In rejecting plaintiff's argument that the NPA was unconstitutional because of its overbreadth, the court explicitly relied on the result in Bay Guardian. The requirement in the NPA...
that the two papers maintain independent editorial policies was found not to offend the first amendment.

Having decided the constitutional issues in defendants' favor, the court denied all motions for summary judgment and set the case for trial on two issues: first, when the JOA was entered into in 1962, was the Advertiser in sufficiently poor financial condition to qualify for NPA protection; secondly, did laches bar the action?

After the first attempt at a trial ended in a hung jury, the next trial resulted in a ruling that the action violated the federal statute of limitations. In addition, defendants' motion for a directed verdict was granted. The Honolulu City Council decided not to appeal the dismissal of the suit. One result of the suit was that the Hawaii State Senate's Judiciary Committee began consideration of bills to repeal the state's antitrust exemption for JOAs, to require the JOA papers to file financing reports annually, and to prohibit the JOA papers from engaging in joint advertising and circulation.

B. Interpreting the Language of the Newspaper Preservation Act: Newspaper Guild v. Levi

In addition to bringing suits against newspaper agreements in particular cities, opponents of JOAs have also attacked regulations that the Justice Department has promulgated to implement the NPA. Section 4(b) of the NPA seems on its face to make it unlawful for anyone to start a new JOA without first obtaining the approval of the Attorney General. However, the Justice Depart-

7 MEDIA L. REP. (BNA) at 2500.
4 Id. at 2501. As to the issue of laches, the JOA was formed in 1962 yet the plaintiff did not file suit until 1979. Expert's Testimony Supports Joint Pact, EDITOR & PUBLISHER, July 31, 1982, at 10. The defendants claimed that the plaintiff brought the action out of "political spite." HUNG JURY: Trial Ends in Honolulu Joint Pact, EDITOR & PUBLISHER, August 7, 1982, at 14.
5 After hearing more than three weeks of testimony, the jury was "hopelessly deadlocked." HUNG JURY: Trial Ends in Honolulu Joint Pact, supra note 54, at 14. The judge had instructed the jury that the issue was whether the publisher of the Advertiser had sought to enter the JOA "on the good faith assumption and with a reasonable basis that such a move was critical to the advertiser's [sic] financial health." Id. The jury was told to "analyze the facts as they would have appeared to a reasonable informed observer in 1962." Id.
7 Id.
8 Honolulu Drops Antitrust Suit, EDITOR & PUBLISHER, May 7, 1983, at 46. After the City and County decided not to appeal, a group consisting of a former mayor, two state senators and others filed their own appeal. This "appeal was dropped because a judge ruled that, if it failed, the group would be liable for legal fees incurred by the newspapers." Hawaiian Newspaper Anti-trust Battle Lingers On, EDITOR & PUBLISHER, Nov. 26, 1983, at 22.
9 HAWAII REV. STAT. §§ 480-31-480-37 (1976). The language of the statute is very similar to that of the NPA, explicit reference is made to the NPA, and it is stated that "the public policy of this State is hereby declared to be in conformity with the public policy of the United States." Id. at § 480-31. The statute expressly mentions the Honolulu arrangement. Id. at § 480-31(4).
10 Honolulu City Council Moves to Settle JOA Suit, EDITOR & PUBLISHER, April 23, 1983, at 86.
11 See supra note 9 for the text of the statute.
ment proposed a regulation under the NPA that would state that JOAs could be entered into without prior approval of the Attorney General, although such approval would be necessary for exemption from the antitrust laws. When the proposal was promulgated as interim regulations, suit was brought against the Attorney General by the Newspaper Guild, contending that the regulations contradicted the language of the statute they were allegedly implementing. The district court agreed with the Newspaper Guild and held the regulations invalid.

In Newspaper Guild v. Levi, the United States Court of Appeals for the District of Columbia reversed that decision. The court rejected a literal reading of the “unlawful” language in section 4(b) of the NPA, holding that the legislative history of the NPA revealed that Congress did not intend to make unauthorized JOAs illegal, but simply to keep from them the antitrust exemption granted by the NPA. The court stated that the fact that the NPA did not provide any civil or criminal penalties for violation of section 4(b) suggested that Congress did not have in mind the creation of a “new substantive standard.”

Judge Tamm, dissenting, believed that “the broad language employed in section [4(b)] means exactly what it says: all new joint operating arrangements which do not receive prior approval are illegal, regardless of whether they would

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63The Attorney General was authorized by Congress to issue regulations under the NPA. H.R. REP. No. 1193, 91st Cong., 2d Sess. 11 (1970). See Recent Decisions, supra note 4, at 573, n.6.

64The Justice Department’s proposed rulemaking included this language: The Newspaper Preservation Act does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General. The Act and these regulations provide a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so. Joint newspaper operating arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws. 36 Fed. Reg. 20435 (1971).


66The Newspaper Guild is a union of white-collar newspaper employees. It opposed the regulations because JOAs supposedly caused a loss of jobs. Recent Decisions, supra note 4, at 573, n.8.

67Id. at 573.


70See supra note 9.

71539 F.2d at 758-761. The court’s holding is supported in Recent Decisions, supra note 4, at 591-596. The majority was correct in construing section 4(b) as establishing a mechanism which requires only those parties that wish the benefit of the exemption to receive prior approval. . . . [T]he restraint shown by the court in declining to infer a new substantive standard is sound because there is no evidence in the legislative history suggesting that Congress intended to prohibit arrangements which had never before been considered unlawful under the antitrust laws. Id. at 591-592.

72539 F.2d at 760. Although the court did not mention it, the Hawaii statute modeled on the NPA did expressly provide penalties for the violation of its equivalent of section 4(b), HAWAI REV. STAT. § 480-34(b) (1976). The statute provides that “[a]ny person who violates section 480-34(b), including any newspaper owner, failing newspaper, or joint newspaper operating arrangement shall be punished by a fine not exceeding $10,000 or by imprisonment not exceeding one year, or both.” § 480-36. Thus, under the Hawaii statute, failure to obtain consent of the state attorney general before starting a JOA means not only that the JOA is vulnerable to the antitrust laws, but also that a misdemeanor has been committed.
otherwise violate antitrust laws." The dissent claimed that the language of section 4(b) was "plain and unambiguous," while the majority found it to be ambiguous and in need of interpretation in light of the "object and policy" of Congress.75

C. Effect of the Newspaper Preservation Act on Advertising

The advertising policies of newspapers operating under JOAs have been another target of lawsuits. Three reported cases have involved advertisers who brought antitrust actions against newspapers because of their ad policies, with the newspapers raising the NPA as a defense.

In America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.,76 the Fort Wayne, Indiana JOA77 had adopted a policy that theaters showing X-rated or unrated adult films could advertise only their names and phone numbers.78 Plaintiffs, as owners of establishments showing such motion pictures, alleged that the JOA violated sections 1 and 2 of the Sherman Act79 and deprived plaintiffs of the first and fourteenth amendment rights of freedom of speech.80

In response to plaintiffs' claim that the advertising policy was the result of a conspiracy in restraint of trade in violation of section 1 of the Sherman Act, the court held that the JOA's policy was "not an unreasonable restraint of trade."81 Section 2 of the Sherman Act was not violated because, even if the JOA papers had monopolized trade, they were protected by the NPA antitrust exemption.82 In addition, since the advertising policy adopted by the JOA could be properly adopted by a single newspaper83 it did not become unlawful

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75 539 F.2d at 762-763 (Tamm, J., dissenting) (emphasis in original). The dissent's arguments and its view of the legislative history are discussed in Recent Decisions, supra note 4, at 587-591. The dissent "apparently began with the premise that Congress meant to use the language employed, and therefore accorded it a presumption of validity. Consequently, the dissent used the legislative history only to determine whether a sufficient basis existed in that history to uphold a literal interpretation of the language." Id. at 590-591.

76 539 F.2d at 761 (Tamm, J., dissenting).

77 Id. at 761.


79 The Fort Wayne JOA was entered into in 1950. Recent Decisions, supra note 4, at 575 n.15. It consisted of the News-Sentinel, the Journal-Gazette, and the commonly owned business agency, Fort Wayne Newspapers, Inc. 347 F. Supp. at 331.

80 347 F. Supp. at 331.


83 347 F. Supp. at 334. The court based its finding of "reasonableness" on the fact that the newspapers did not refuse to run plaintiffs' advertisements, but merely restricted the content of the ads. Id. at 333. However, the court did find that the JOA possessed "a unity of purpose sufficient to form a combination of conspiracy" even in light of the fact that the publisher of the News-Sentinel was also the president of Fort Wayne Newspapers, Inc. Id. at 332.

84 Id. at 334.

85 Id. In support of this statement, the court cited, inter alia, Associates and Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971) and Chicago Joint Bd., Amal. Clothing Workers of America v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970). Id.
simply because two jointly-operated newspapers adopted it. The court rejected plaintiffs' freedom of speech claim because the JOA was not acting "under color of state law" and thus was not liable in an action brought under 42 U.S.C. § 1983.

In *Newspaper Printing Corp. v. Galbreath*, the Nashville, Tennessee JOA newspapers had refused to accept classified advertising from the plaintiff unless he used entire words instead of abbreviations. Echoing the court in *America's Best Cinema*, the Supreme Court of Tennessee held that because the policy of rejecting ads that did not meet certain requirements would not be an antitrust violation if engaged in by a single paper, it was not unlawful for a JOA. The advertising policy did not constitute "predatory pricing" or "predatory practice," which are exceptions to the NPA antitrust exemption, because "predatory" means "action aimed at competitors rather than the 'gouging' of consumers."

However, the NPA is not always a successful defense. The defendant newspapers did not prevail in *Sun Communications, Inc. v. Waters Publications, Inc.* Plaintiff had brought an antitrust action, claiming that there was discrimination in defendant's advertising rates which charged members of a certain merchants' association less than other advertisers. The defendant moved to dismiss the action on the basis of the NPA antitrust exemption. The court denied the motion because there was no showing that the arrangement, entered into in 1975, had the prior approval of the Attorney General necessary for the antitrust exemption to take effect.

"*347 F. Supp. at 334. The NPA excludes from its antitrust exemption any conduct "which would be unlawful under any antitrust law if engaged in by a single entity." 15 U.S.C. § 1803(c) (1982). See supra note 10. The court drew a "negative implication" from this statutory language "that if a practice or conduct would be lawful if engaged in by a single newspaper entity, such conduct shall not become unlawful by the mere fact that two newspapers are operating under a qualifying joint newspaper agreement." 347 F. Supp. at 334.

*347 F. Supp. at 335.

*Id. The court stated that the monopoly conferred under the NPA was a product of the federal government, not of the state. Id.*

*580 S.W.2d 777 (Tenn. 1979), cert. denied, 444 U.S. 870 (1979).*

*Id. at 778.*

*See supra note 84 and accompanying text.*

*580 S.W.2d at 781-82.*

*15 U.S.C. § 1803(c) (1982).*

*580 S.W.2d at 781.*

*466 F. Supp. 387 (W.D. Mo. 1979).*


*466 F. Supp. at 389.*

*Id.*

*Id. at 389-90. The court thus implicitly followed the holding in *Newspaper Guild*, wherein the prior approval of the Attorney General was said to be necessary for the antitrust exemption, although not for the legality of the JOA. See supra note 71 and accompanying text.*
D. Requirement of a Good-Faith Effort to Sell the Failing Newspaper: Seattle

In order to qualify for the NPA antitrust exemption, one of the two newspapers in the proposed JOA must be a "failing newspaper." In applying the NPA standards to applications for the Attorney General's approval, the question has arisen "whether a correct definition of 'failing newspaper' must include a consideration of the existence of willing buyers." That is, may a newspaper receive this special treatment by the government if there is a possibility of selling the paper to a third party rather than entering into an agreement with the competing paper? This was the focus of the most recent court challenge of a JOA.

When the two Seattle, Washington daily newspapers filed an application for approval of a JOA, the Antitrust Division of the Justice Department contended that the application should be denied because there were willing purchasers for the "failing" paper. The Antitrust Division argued that the phrase "in probable danger of financial failure" was intended by Congress to require a showing by the newspapers that alternatives short of a JOA, such as selling the "failing" paper, would not allow the paper to survive.

The administrative law judge presiding at the public hearing on the application by the Seattle newspapers recommended that the Attorney General approve the application, even though he found that the Post-Intelligencer probably could have been sold to someone who could keep the paper in business. The Attorney General did approve the application, ruling that

915 U.S.C. § 1803(b) (1982). See supra note 9. The NPA defines a "failing newspaper" to be "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5) (1982). As to JOAs that were in operation before the NPA was enacted, it is not necessary that one of the papers be a "failing newspaper," but only that "not more than one of the newspaper publications involved... was likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a) (1982). See Comm. for an Independent P-I v. Smith, 549 F. Supp. 985, 991 n.3 (W.D. Wash. 1982), aff'd in part, rev'd in part sub nom. Comm. for an Independent P-I v. Hearst Corp., 704 F.2d 467 (9th Cir. 1983). As to the contention that the setting of different standards for pre- and post-NPA JOAs violates the equal protection clause, see supra notes 28, 29, 48, 49 and accompanying text.

9The Times and the Post-Intelligencer (P-I), both of which are controlled by large, successful newspaper chains, filed the application on March 27, 1981. Seattle Application, supra note 7, at 680.

10Id. at 683. There was evidence that at least six persons had made inquiries concerning purchase of the "failing" Post-Intelligencer. Hearst Corp., 704 F.2d at 475 (9th Cir. 1983).


12Seattle Application, supra note 7, at 683-85. This view is based on the belief that Congress intended to apply the same balancing test (benefits to the community versus anti-competitive effects) as was used in the Bank Merger Act, 12 U.S.C. § 1828(c)(5)(B) (1982), as interpreted in United States v. Third National Bank, 390 U.S. 171 (1968). Id. at 684-85.

13A description of the hearing and of the procedure followed by the Justice Department in ruling on JOA applications is found in Smith, 549 F. Supp. at 987-88. See supra note 11.

14Seattle Application, supra note 7, at 682-83.

15Id. The approval came on June 15, 1982. Id. Under the arrangement approved by the Attorney General, each paper was to pay its own newsroom costs, while the Times would receive 66% of future revenues and the Post-Intelligence, 34%. Attorney General Approves Joint Operation in Seattle, EDITOR & PUBLISHER, June 19, 1982, at 11.
the "failing newspaper" test did not require the absence of willing purchasers.\footnote{Seattle Application, supra note 7, at 683. The Attorney General's decision was supported by one observer who wrote: The language of the Act does not refer to alternative purchasers . . . . Congress reasoned that the owner of a newspaper in financial difficulty must be able to act promptly; any delay while the owner searches for an alternative purchaser or awaits the results of a reorganization or bankruptcy proceeding may be too late to preserve the newspaper's editorial voice. Id. at 685-86.}

The Attorney General's decision was declared invalid in Committee for an Independent P-I v. Smith.\footnote{549 F. Supp. 985 (W.D. Wash. 1982).} The district court held that approval of a JOA "cannot be granted without exploring the alternative of sale to a noncompetitor."\footnote{The court stated that: Hearts [the owner of the "failing" newspaper] is not obligated to seek out buyers. Nevertheless, where there are ready and willing buyers who present themselves, if Hearts wishes to obtain the benefits of the JOA, it must carry the burden of demonstrating that none of those buyers could continue to operate the P-I as an independent daily. Id. at 993.}

Although this result cheered the plaintiffs, who were concerned about the loss of jobs that a JOA would entail,\footnote{A JOA would mean the loss of 200 jobs at the Post-Intelligencer. Court to Speed Appeal on Joint Seattle Papers, Editor & Publisher, Sept. 18, 1982, at 14. The plaintiffs were employees of the Post-Intelligencer, publishers of suburban newspapers, and advertisers. Seattle JOA Cleared by Federal Appeals Court, Editor & Publisher, April 30, 1983, at 28.} and although it had support on policy grounds,\footnote{Barnett, supra note 20, at 47. Especially after two publishers have made their deal to end competition and are seeking the Justice Department's approval, it is hardly surprising that the "failing" paper pulls its competitive punches and develops a terminal case of P&L disease, the better to look pathetic before the tribunal that rewards failure. The only effective remedy for this, in future hearings under the NPA, would be . . . a requirement of good faith efforts to sell the allegedly failing paper. Id.} this part of the court's decision was reversed in Committee for an Independent P-I v. Hearst Corp.\footnote{704 F.2d 467 (9th Cir. 1983).} The court of appeals held that while the existence of willing buyers was relevant, Hearst had "met its burden of showing that the alleged alternatives did not offer a solution to the P-I's difficulties."\footnote{Id. at 475.} This was accomplished by a showing that Hearst had managed the Post-Intelligencer reasonably and that financial failure would be inevitable no matter who bought the paper.\footnote{Id. at 479.} By holding that the existence of purchasers is "relevant," the court admitted that it was in "substantial agreement"\footnote{Id. at 478.} with the district court on the law to be applied, and disagreed only as to the particular facts in the case.\footnote{Id.}

After the court of appeals decision was announced, the two Seattle papers
declared that they would begin their JOA. The plaintiffs appealed to the United States Supreme Court, but the Court declined, without comment, to hear arguments.

Although the court of appeals approved the JOA application of the Seattle papers, the opinion opened up the possibility of a future application being denied because of the existence of willing buyers of the “failing” newspaper. This is the first glimmer of hope for opponents of JOAs, who have consistently failed in their court challenges, from Bay Guardian to Newspaper Guild to Hawaii Newspaper Agency. Once a JOA has come into existence, as in San Francisco and Honolulu, it has been upheld in the courts. The Seattle case shows that perhaps a proposed JOA can be successfully challenged before it begins operation.

III. The Newspaper Preservation Act in Practice

A. The Declining Number of Newspapers and the “Downward Spiral”

Even though JOAs and the NPA have generally survived legal challenges, many non-legal issues remain. How effective has the NPA been in preventing the folding of newspapers? When JOAs are formed, how beneficial are they for the newspapers involved? For employees of those papers? For publishers of rival papers? For the public in general?

A threshold question in evaluating the effectiveness of a means to preserve newspapers is whether the number of papers in the United States is increasing or decreasing. According to the Newspaper Advertising Bureau, although twelve dailies had folded between 1980 and 1982, twenty-five new dailies were started in the same period. Between 1910 and 1968, however, there was a dramatic drop from 2,202 dailies to 1,749. Regardless of the total number of dailies, there has been a marked decline in the number of cities that are served by commercially competing, separately owned dailies. In approximately 100 of the cities that do have two dailies, both are owned by the same company. The net result is that only twenty-nine cities have two or more papers that are not

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111 Seattle Dailies Set JOA for May 23, EDITOR & PUBLISHER, May 14, 1983, at 17. The Times, formerly an all-day paper, would stop its morning edition except for Saturday. The Sunday Times would contain six pages of Post-Intelligencer editorial and features. The Times would take over the advertising, production, and distribution of both papers. Id.

112 Id.

113 Id.

114 Id.

115 Newspaper Advertising Bureau, Setting the Record Straight, EDITOR & PUBLISHER, May 8, 1982, at 44. As of 1982, more than 1,700 daily newspapers were published in more than 1,550 cities. The number of dailies has been approximately the same since World War II. Id.

116 Seattle Application, supra note 7, at 669 n.5 (citing Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 105, 198 app.). The increase in the number of dailies by seven from 1978 to 1979 was primarily due to already established papers publishing daily instead of less frequently, rather than the establishment of new papers. Id. at 692-93 n.160.

117 Id. at 671.

either commonly owned or operating under a JOA.\textsuperscript{124}

Because many papers have failed or merged since enactment of the NPA in 1970, while only four papers have putatively been saved by the NPA during this period,\textsuperscript{125} the view has been expressed that the NPA is ineffective.\textsuperscript{126}

One explanation for the ineffectiveness of the NPA lies in the theory behind it. The NPA is an attempt to counter the "downward spiral" or "vicious cycle" syndrome.\textsuperscript{127} The idea behind the NPA was to permit the failing paper to enter a JOA before this process had gone too far to be reversed.\textsuperscript{128}

It has been argued, however, that once one newspaper achieves dominance in circulation and then advertising, the end of the competing paper is inevitable.\textsuperscript{129} When a newspaper has entered the "downward spiral," its financially healthier rival may prefer to let it fail rather than negotiate a JOA.\textsuperscript{130}

\section*{B. The Approval Process Takes Time}

Another reason given for the failure of the NPA to save newspapers is that the Justice Department approval process takes too long. While the failing newspaper is losing millions of dollars, the process takes between one and two years.\textsuperscript{131} The publishers of the \textit{Chattanooga Times}, claiming that their newspaper

\textsuperscript{124}Id.

\textsuperscript{125}See infra text accompanying note 171.

\textsuperscript{126}Seattle Application, supra note 7, at 692. The alleged failings of the NPA were summarized in this manner: "The Newspaper Preservation Act is thus narrowly focused on preserving existing joint operating newspapers. By hindering establishment of new newspapers, decreasing editorial independence of the joint operating partners, and failing to prevent many newspaper failures and mergers, the Act fails to achieve its purpose of maintaining editorial competition." \textit{Id.} at 693.

\textsuperscript{127}Id. at 671. Once a newspaper falls behind its competitor in advertising and circulation, its disadvantage snowballs. Advertisers prefer the paper with the larger circulation. This preference, in turn, leads to less revenue for the weaker paper. The resulting lower quality of that paper causes a further loss in circulation, which further decreases advertising revenue. This process results in a "natural monopoly." \textit{Id.} at 671-672.

\textsuperscript{128}Hearst Corp., 704 F.2d at 474, Rule 4.3(a). Congress intended to give an opportunity to form a JOA at a point "prior to the time the financially troubled newspaper is on its deathbed." \textit{Id.}

\textsuperscript{129}Stargazers, \textit{COLUM. JOURNALISM REV.}, Sept.-Oct., 1981, at 24. "Thomas Winship, editor of \textit{The Boston Globe}, commented: 'It seems to be a sad, immutable statistic that failing metropolitan papers don't turn around.'" \textit{Id.}

\textsuperscript{130}Seattle Application, supra note 7, at 675 n.42. A recent example of one newspaper's declining too far on the "downward spiral" to be able to negotiate with its rival for a JOA is the case in Philadelphia. "[Bulletin Executive Editor Craig] Ammerman remarked that the Bulletin approached Knight-Ridder for a third time in January about a joint operating arrangement with Philadelphia Newspapers, Inc., Publisher of the Daily News and \textit{Philadelphia Inquirer}. 'Knight-Ridder said no,' he stated." Radolf, \textit{Philadelphia: The Death of the Bulletin}, \textit{EDITOR & PUBLISHER}, Feb. 6, 1982, at 14. After the Bulletin folded, the Inquirer admitted that the resulting lack of competition might lead to "an erosion of the sort of probing and responsible news coverage and variety of public debate that a competitive newspaper market helps to ensure." Weiss, supra note 13, at 47.

Similarly, in Cleveland the owner of the foundering Press appealed five times to the owners of the \textit{Plain Dealer} to enter into a JOA but was turned down. Akron Beacon Journal, Jan. 16, 1984, at A6, col. 6.

\textsuperscript{131}Buffalo Courier-Express \textit{Faces Sept. 19 Closing}, \textit{EDITOR & PUBLISHER}, Sept. 11, 1982, at 13. The owners of the failing \textit{Courier-Express}, which was losing $8.6 million a year, considered forming a JOA with the rival \textit{Buffalo News}. The \textit{Courier-Express} owners "ruled this out because they could not afford to underwrite the losses for the length of time it would take for such a move to be considered and approved by the Attorney General." \textit{Id.} The \textit{Courier-Express} did fold. See supra note 15. The Cincinnati JOA application was filed in 1977 and approved two years later, after hearings before an administrative law judge. Seattle Application, supra note 7, at 680.
could not survive for that period, implemented the proposed JOA with the competitive News-Free Press before the Attorney General gave his approval.\textsuperscript{132} The Attorney General later approved the JOA except for those elements that had been put into operation prior to his approval.\textsuperscript{133}

A related problem with the NPA procedure is that court challenges to the proposed JOA take time while the failing paper is losing money.\textsuperscript{134} Even if the JOA can survive these attacks and actually begin operation, there is the possibility of later court challenges, which involve significant litigation costs.\textsuperscript{135}

C. The Newspaper Preservation Act Fosters Monopolies

The "downward spiral," the long process of approval, and the cost of litigation present great obstacles for foundering papers that desire to enter into JOAs. But the difficulty of entering into a JOA is only one aspect of the failure of the NPA. The other is the doubtful desirability of JOAs themselves, especially from the viewpoint of newspaper employees who may lose their jobs\textsuperscript{136} and rival publishers who must compete with the JOA.\textsuperscript{137}

Newspaper owners want what the publisher of the San Francisco Examiner labelled "the golden carrot of togetherness."\textsuperscript{138} It is alleged that the owner of one of the Cincinnati papers deliberately caused it to fail in order to gain the advantages that approval of a JOA brings.\textsuperscript{139}

Once a JOA is entered, it becomes almost impossible for any new paper to be started in that market.\textsuperscript{140} The already difficult task of beginning a

\textsuperscript{132}Barnett, \textit{Fast Shuffle in Chattanooga}, \textit{COLUM. JOURNALISM REV.}, Nov.-Dec. 1980, at 65. The Times was losing $35,000 a week and allegedly could last only two to three weeks. The publishers asked for "temporary approval" of a JOA. When the Antitrust Division of the Justice Department recommended that the request be denied, the Times, without notifying the Justice Department, closed its presses, fired its production staff, ended its Sunday edition, and entered into a JOA with the News-Free Press. \textit{Id.} at 65, 67.

\textsuperscript{133}Seattle Application, supra note 7, at 680. The two papers had been operated under a JOA between 1942 and 1966. After the JOA was terminated in 1966, both papers lost money. \textit{Id.} When the Attorney General approved the new JOA without a hearing in 1980, he found the Times to be a failing paper. The Chattanooga Times is owned by the owners of the New York Times. Barnett, supra note 132, at 65, 69.

\textsuperscript{134}At the Ninth Circuit hearing on the appeal of the Seattle district court decision, the attorney for the Hearst Corporation stated, "[w]hile these arguments are going on the patient is dying. The Post-Intelligencer is losing $200,000 a week." Stein, Arguments Presented in Seattle JOA Appeal, \textit{EDITOR & PUBLISHER}, Dec. 25, 1982, at 11.

\textsuperscript{135}The antitrust challenge to the Honolulu JOA had cost the plaintiff $550,000 in legal expenses by the time it decided not to appeal dismissal of the suit. Honolulu Drops Antitrust Suit, supra note 58, at 46.

\textsuperscript{136}When two papers form a JOA and merge their non-editorial operations, many redundant jobs are eliminated. See supra note 110.

\textsuperscript{137}See infra text accompanying notes 140, 141 & 145.

\textsuperscript{138}Barnett, supra note 20, at 47.

\textsuperscript{139}\textit{Id.} The Scripps-Howard chain had owned both the Post and the Enquirer from 1956 until 1971, when it signed a consent decree with the Justice Department to sell the Enquirer. Scripps allegedly had a goal beginning in 1971 of entering into a JOA with the Enquirer's new owners, so it set out to turn the Post into a "failing newspaper." This was accomplished in part by refusing to start a Sunday Post and refusing to match the Enquirer's price increase. The process has been described as "self-immolation." \textit{Id.} at 42-43.

\textsuperscript{140}Seattle Application, supra note 7, at 689-690.
newspaper is made worse by having to compete with the cost savings and economies of scale possessed by the JOA papers as a result of combining their production and distribution activities.  

The NPA thus acts to encourage monopolies. An important device used by the JOA papers to become a monopoly is the combination advertising rate, with which any fledgling paper attempting to start in the market could not hope to compete. Commonly, the stronger of the two JOA papers will raise its advertising rates, then the JOA will offer space in both papers for only slightly more than it would cost to advertise in the stronger paper alone. Most advertisers will take advantage of the combination rate, and then not have any money left to advertise in a third newspaper. There is some question that this “ploy” may constitute “predatory pricing” and thus not be exempted from antitrust laws by the NPA.

The NPA has been of great benefit to newspaper chains. The language and the legislative history of the NPA reveal that the protection of the Act was intended to apply to chain-owned papers. One critic maintains that the NPA, instead of “increasing the number of separate newspaper owners has subsidized the elimination of separate newspaper owners” in favor of chains. Even if a newspaper’s chain owner is financially sound, the particular paper may be “failing” and thus qualify for a JOA.

D. JOA Is Not a Guarantee of Success

Although newspaper owners eagerly seek the rewards of a JOA, entering into such an arrangement does not ensure eternal financial success, nor does

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141 Id. An argument has been made that recent improvements in the technology of newspaper production (e.g., computer typesetting and offset printing) have lowered costs dramatically and thus have improved the possibility that a new paper can afford to start in a JOA city and revive competition. Barnett, supra note 20, at 40. Since 1941, however, no new general circulation daily has been successfully started in a city of over 200,000 people. Seattle Application, supra note 7, at 671.

142 Barnett, supra note 20, at 40. Ten years after the act’s passage, the forty-four ‘original’ papers have indeed been ‘preserved,’ though there is no way of telling whether the act was needed to accomplish this for any of them. What the act has surely done for these papers is make all their owners a good deal richer, at the expense of advertisers and media competitors, and it has helped them smother whatever newspaper competition still exists or might revive in their territories.

143 Id.

144 Id. “To the extent that they suppress competition, combination rates are not protected by the Newspaper Preservation Act.” Id. See supra note 10 for 15 U.S.C. § 1803(c) (1982).

145 Fifteen of the 44 papers covered by pre-NPA JOAs were owned by chains when the Act was passed. By 1980, seven more of those had been acquired by chains. Barnett, supra note 20, at 40.

146 Seattle Application, supra note 7, at 678.

147 Barnett, supra note 20, at 41.

148 See Hearst Corp., 704 F.2d at 480, Rule 4.3(a) where it was held that the financial strength of the chain was irrelevant to whether one of its papers could gain the benefits of a JOA.
it necessarily keep the owners of both papers content forever. The Anchorage, Alaska JOA, the first to be approved under the NPA, was so one-sided that the News sued the Times and the JOA was terminated after only five years.151 One partner in the Columbus, Ohio JOA, the Dispatch, has notified the Citizen-Journal of its intention to terminate the existing agreement when it expires at the end of 1985.152

At least one JOA has been financially unsuccessful. The two papers in the St. Louis, Missouri pact, the Post-Dispatch and the Globe-Democrat, lost a combined total of eleven million dollars between 1978 and 1981.153 On November 7, 1983, the Newhouse family, owners of the morning Globe-Democrat, announced their intention to cease publication on December 31 and thereafter to publish the Post-Dispatch jointly with the owners of that paper.154 This would be the first JOA paper to fold.155 The Justice Department asserted that it must approve any shutdown of a JOA paper156 and that a two-pronged test must be satisfied before the paper could fold: the paper “could not be returned to profitability under present management”157 and there existed no suitable buyer.158 The Department told the Globe-Democrat to continue publishing while negotiations for a sale were continuing.159 A buyer was found for the paper160 although the Newhouse family was selling only the Globe-

151Barnett, The Anchorage “Failure,” COLUM. JOURNALISM REV., May-June 1980, at 42. One interesting aspect of the Anchorage JOA is that the original agreement submitted for the Attorney General’s approval had contained a clause requiring the owners of the two papers “to maintain as far as practicable the present quality, character and reputation of their respective newspapers and to preserve their respective identities and characteristics.” Seattle Application, supra note 7, at 679-80, n.65. The papers had to delete this provision before approval was granted, because the Antitrust Division asserted that the provision conflicted with the NPA requirement that each paper determine its editorial and reportorial policies independently. Id.

In comparison, the Honolulu JOA agreement, entered into before passage of the NPA, contained a provision that the two papers would maintain their separate identities. The district court judge, aware of the Anchorage precedent, held that the language was proper in the Honolulu accord because Congress had established a different standard for JOAs that were entered into prior to enactment of the NPA. Honolulu v. Hawaii Newspaper Agency, 7 MEDIA L. REP. (BNA) 2495, 2500 (D. Hawaii Oct. 5, 1981).

152Joint Operating Agreement May be Terminated in Ohio, EDITOR & PUBLISHER, June 25, 1983, at 10. The papers have begun talks concerning the possibility of extending the JOA with modifications. Id. The Columbus JOA has been in effect since 1959. Id.

153Massing, The Missouri Compromise, COLUM. JOURNALISM REV., Nov.-Dec. 1981, at 35. In contrast, for the period 1966-1976, the average pre-tax annual profit of the San Francisco JOA papers was $2.6 million for the Examiner and $3.7 million for the Chronicle. Barnett, supra note 20, at 47. According to Randolph A. Hearst, the Examiner was the most profitable Hearst paper as of 1980. Id.


155Id.

156Id.


158Id.

159Three Potential Buyers for St. Louis Daily Surface, EDITOR & PUBLISHER, Dec. 17, 1983, at 18. The Department itself screened potential buyers and selected three finalists. Id.

160Akron Beacon Journal, Jan. 16, 1984, at A7, col. 5, 6. The sale was not without incident, however. Negotiations with the eventual buyer broker off because of a dispute over severance rights of employees. A lawsuit was brought against the owners of both papers in the JOA by the mayor of St. Louis (later joined by the Attorney is Missouri), charging collusion and lack of a real effort to sell the paper. Negotiations were soon reopened. The suit was dropped when the sale was consummated. Id.
Democrat, not their half interest in the JOA.161

E. Life After JOA

In St. Louis, a paper formerly buoyed up by a JOA now apparently must try to make it on its own. In Anchorage, a paper in similar straits did survive. The dissolution of the Anchorage JOA has not proved fatal to the weaker of the two newspapers, suggesting that the JOA may not have been necessary. When the News and the Times agreed in October, 1978, to terminate the agreement as of April 1, 1979, the News was faced with the prospect of going it alone with no production facilities, no Sunday edition, and low circulation and advertising.162 Yet the new owner of the News was able to install presses and hire a production staff before the April 1 deadline, and increased circulation from 12,000 to 30,000 by December, 1979.163 The success was attributed to the revolution in newspaper technology, which has lowered the start-up cost of a newspaper.164

F. Growth Within a JOA

Even if the JOA is not dissolved, the situation need not be static. There is room for growth even while maintaining a JOA, as illustrated by the recent developments in Salt Lake City, Utah. When the Deseret News and the Tribune entered into a JOA in 1953, it was agreed that only the Tribune would publish a Sunday edition.165 After twenty-seven months of negotiation, the papers entered into a new thirty-year JOA, which allows the Deseret News to publish on Sunday, as well as to advertise and conduct a circulation campaign on its own.166 The Salt Lake City JOA has thus become the only one with two Saturday and two Sunday papers.167 The Sunday Deseret News is doing well, with its circulation ahead of the weekday editions.168

Whether there is any room for growth within JOAs as newspaper technology advances even further has not been determined. The NPA defines "newspaper publication" as "a publication printed on newsprint paper."169 Five publishers of JOA newspapers are considering the question of whether

161 Several Parties Show Interest in St. Louis Daily, supra note 157, at 17.
162 Barnett, supra note 151, at 42.
163 Id.
164 Id. See supra note 141.
167 Publishing First Made in Salt Lake City, EDITOR & PUBLISHER, Feb. 5, 1983, at 11. In marked contrast is San Francisco, where the JOA publishes a joint Sunday edition. One critic has commented: Widley known as "The Hermaphrodite," San Francisco's Sunday newspaper is one of the oddest products in American journalism. Few of its readers have any ideas who produces which section, and many of them would be surprised to know that it is the Examiner, the frail lady of the evening, that prepares the main news. Reinhardt, Doesn't Everybody Hate the Chronicle?, COLUM. JOURNALISM REV., Jan.-Feb. 1982, at 25, 30.
168 Lindley, supra note 166, at 16.
the NPA must be amended in order for them to enter into ventures in electronic publishing.170

IV. CONCLUSION

The effect that the NPA will have on the future is open to question. The recent Seattle application was only the fourth attempt by newspapers to form a JOA since the passage of the NPA in 1970.171

The reason that the NPA has failed to save the many large metropolitan papers that have folded since its enactment is not the courts' treatment of the Act. As Bay Guardian, Hawaii Newspaper Agency, and Newspaper Guild illustrate, courts have generally upheld the NPA scheme. The problem, rather, lies in the philosophy behind the NPA and the procedure it has set up. If a paper cannot come under the protection of the NPA until it has entered the "downward spiral," it is too late.172 The more successful competing paper has no incentive to help its failing crosstown rival. Why go to the trouble of forming a JOA when it will soon become a monopoly paper anyway?173 Add to this the fact that the approval process takes time while the failing paper is losing millions of dollars,174 and it becomes clear why so many newspapers have failed instead of forming JOAs with competitors.

The NPA thus fails to achieve the stated goal of Congress to maintain independent, competing voices in the press.175 It is a failure of tactics, since the procedures established do not allow most foundering papers to enter into a JOA in time. It is also a failure of strategy, since the choice of JOAs as the method of saving troubled newspapers is unsound. JOAs, in practice, foster monopolies and chains, not independent voices.

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171 Seattle Application, supra note 7, at 680.
172 See supra notes 127-129 and accompanying text. It is already too late because the paper must prove it is already "failing." 15 U.S.C. § 1803(b) (1982). JOAs that pre-dated the enactment of the NPA have a much easier standard to meet: the troubled paper need only have been "not likely to remain or become a financially sound publication" as of the date the JOA was entered into. 15 U.S.C. § 1803(a) (1982). See supra notes 5, 55 & 98. If the NPA were amended to apply this latter standard to proposed JOAs, perhaps foundering papers would be able to negotiate with their competitors before it was too late.
173 See supra note 130 and accompanying text.
174 See supra note 131 and accompanying text.
175 See supra note 3.