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### Concentrated Media is Something We Can't Ignore: A Response to Speaker Pelosi

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**Concentrated Media is Something We Can't Ignore:  
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**Maurice E. Stucke**

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## Commentary: Maurice E. Stucke

### **CONCENTRATED MEDIA IS SOMETHING WE CAN'T IGNORE: A RESPONSE TO SPEAKER PELOSI**

In addition to the Working Paper Series, the American Antitrust Institute offers its Senior Fellows and other invitees the opportunity to present their views about important issues facing antitrust policy and antitrust enforcement. Persons interested in responding to these Commentaries should contact directly the author.

#### COMMENTARY

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### **CONCENTRATED MEDIA IS SOMETHING WE CAN'T IGNORE: A RESPONSE TO SPEAKER PELOSI**

*Maurice E. Stucke*\*

On March 17, 2009, Hearst Corporation's *San Francisco Chronicle* reported, "House Speaker Nancy Pelosi, worried about the fate of The Chronicle and other financially struggling newspapers, urged the Justice Department Monday to consider giving Bay Area papers more leeway to merge or consolidate business operations to stay afloat."<sup>1</sup> The House Speaker asked

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<sup>1</sup> Zachary Coile, *Pelosi Goes To Bat To Keep Bay Area Papers Alive*, S.F. CHRONICLE,

the U.S. Department of Justice to take a broader view of media competition in the Bay Area. As the article reports,

“I am confident that the Antitrust Division, in assessing any concerns that any proposed mergers or other arrangements in the San Francisco area might reduce competition, will take into appropriate account, as relevant, not only the number of daily and weekly newspapers in the Bay Area, but also the other sources of news and advertising outlets available in the electronic and digital age, so that the conclusions reached reflect current market realities,” Pelosi wrote. “This is consistent with antitrust enforcement in recent years under both Republican and Democratic administrations. And the result will be to allow free market forces to preserve as many news sources, as many viewpoints, and as many jobs as possible.”

The Attorney General Eric H. Holder, Jr. responded, “I think it's important for this nation to maintain a healthy newspaper industry. So to the extent that we have to look at our enforcement policies and conform them to the realities that that industry faces, that's something that I'm going to be willing to do.”<sup>2</sup>

Thereafter, the acting chair of the Federal Communications Commission Michael Copps indicated that his agency may reconsider the FCC restrictions on combined

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March 17, 2009.

<sup>2</sup> Randall Mikkelsen, *U.S. Law Chief Open to Antitrust Aid for Newspapers*, REUTERS, Mar. 18, 2009, available at <http://www.reuters.com/article/industryNews/idUSTRE52H81K20090318>.

ownership of broadcast television stations and newspapers.<sup>3</sup> The FCC should “visit this whole problem” before long.<sup>4</sup> In 2007 and 2008, Commissioner Copps vigorously opposed relaxing the cross-ownership rules, and advocated for “tough” FCC rules “to redress our localism and diversity gaps.”<sup>5</sup> He dissented when the FCC voted to relax media cross-ownership restrictions.<sup>6</sup> He observed how the experts “demonstrate[d]—in the record before the FCC, using the FCC’s own data—that cross ownership leads to less total newsgathering in a local market. And that has large

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<sup>3</sup> Todd Shields, *FCC Head Says Agency Should Reconsider Newspaper Ownership Rule*, BLOOMBERG, March 28, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYAdWOXUq9FA>.

<sup>4</sup> *Id.*

<sup>5</sup> Statement of FCC Commissioner Michael J. Copps, *Concurs and Dissents in Part in Promoting Diversification of Ownership in the Broadcasting Services et al.*, MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, & 04-228 at 1 (Dec. 18, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279035A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A3.pdf).

<sup>6</sup> The vote was three to two along party lines. The FCC adopted a presumption, in the top 20 Designated Market Areas (“DMAs”), that it is consistent with the public interest for one entity to own a daily newspaper and a radio station or, under the following circumstances, a daily newspaper and a television station, if (1) the television station is not ranked among the top four stations in the DMA and (2) at least eight independent “major media voices” remain in the DMA. In all other instances, the FCC will adopt a presumption that a newspaper/broadcast station combination would not be in the public interest, with two exceptions, and therefore emphasize that the FCC is unlikely to approve such transactions. Taking into account these respective presumptions, in determining whether the grant of a transaction that would result in newspaper/broadcast cross-ownership is in the public interest, the FCC will consider: (1) whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast outlet, and if the newspaper or broadcast station is in financial distress, the proposed owner’s commitment to invest significantly in newsroom operations. The FCC discussed the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity. FCC, *Report And Order And Order On Reconsideration*, in *In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-244, 04-228, 99-360 at Appendix A (Released Feb. 4, 2008).

and devastating effects on the diversity and vitality of our civic dialogue.”<sup>7</sup>

I strongly concur with Speaker Pelosi’s concerns that “a strong, free, and independent press is vital to our democracy and for informing our citizens, especially news organizations that devote resources to gathering news.”<sup>8</sup> Likewise, the Attorney General’s belief “that we need to have a healthy, vibrant newspaper industry” is sound.<sup>9</sup> Our democracy relies on a healthy marketplace of ideas, which is defined as a sphere in which intangible values compete for acceptance. Its beneficial social value is based on the theory that truth prevails in the widest possible dissemination of information from diverse and antagonistic sources. The marketplace of ideas is important to our democracy, in that democracy prospers when there is an unrestrained flow of information. Consequently, the marketplace of ideas’ and our democracy’s health depends upon competing diverse and independent voices.<sup>10</sup>

Newspapers have played, and continue to play, an

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<sup>7</sup> Copps, *supra* note 5, at 4.

<sup>8</sup> Letter from Speaker of the House Nancy Pelosi to Attorney General Eric H. Holder, Jr., dated March 16, 2009, available at [http://www.bayareanewsgroup.com/multimedia/mn/news/pelosi\\_letter\\_031809.pdf](http://www.bayareanewsgroup.com/multimedia/mn/news/pelosi_letter_031809.pdf).

<sup>9</sup> Mikkelsen, *supra* note 2.

<sup>10</sup> We discuss in greater detail antitrust’s role in preserving the marketplace of ideas in Maurice E. Stucke & Allen P. Grunes, *Toward A Better Competition Policy For The Media: The Challenge Of Developing Antitrust Policies That Support The Media Sector’s Unique Role In Our Democracy*, 42 CONN. L. REV. (forthcoming 2009), draft available at <http://ssrn.com/abstract=1330681>; Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001), available at <http://ssrn.com/abstract=927409>.

important role in a vibrant marketplace of ideas. Although much has been said about the Internet, to date it has not replaced the role of daily newspapers in gathering international, national, and local news, and tying that news to issues in the local community. The AAI's Transition Report goes into greater detail on the state of the media industry and proposals for the Obama Administration.<sup>11</sup> But as the Transition Report notes, many daily newspapers and television stations, although their profit margins have shrunk, remain profitable -- indeed, more profitable than other industries.<sup>12</sup> Ultimately, the marketplace of ideas' and our democracy's health relies on competition, not on allowing already dominant firms to acquire the assets of their remaining competitors.

Hearst and MediaNews have not announced publicly any plans to consolidate their holdings in the San Francisco Bay Area. MediaNews Chief Executive Officer Dean Singleton, however, recently stated in a MediaNews newspaper that "if you look at the economics of the Bay Area News Group—which

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<sup>11</sup> THE NEXT ANTITRUST AGENDA, THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44<sup>TH</sup> PRESIDENT, *available at* [www.antitrustinstitute.org](http://www.antitrustinstitute.org).

<sup>12</sup> *Id.* at 255; *see also* Copps, *supra* note 5, at 5 ("The truth remains that the profit margins for the newspaper industry last year averaged around 17.8%; the figure is even higher for broadcast stations. As the head of the Newspaper Association of America put it in a Letter to the Editor of the Washington Post on July 2 of this year: 'The reality is that newspaper companies remain solidly profitable and significant generators of free cash flow.' And as Member after Member Congress has reminded us, our job is not to ensure that newspapers are profitable—which they mostly are. Our job is to protect the principles of localism, diversity and competition in our media.").

operates this paper and the Mercury News—and the Chronicle, it would seem that might be a smart thing to do, to do more consolidation.”<sup>13</sup> But if anything, Hearst’s history in San Francisco Bay Area cautions against further relaxing the federal antitrust laws to permit Hearst to acquire the assets of MediaNews or any other competitor in the Bay Area.

In 1965, Hearst’s newspaper, *The Examiner*, entered into a joint operating arrangement (“JOA”) with its primary competitor, *The San Francisco Chronicle*.<sup>14</sup> Fearing antitrust liability as the Justice Department began cracking down on price-fixing between JOA newspapers in local communities,<sup>15</sup> Hearst CEO Richard E. Berlin and other media giants lobbied Congress and the Nixon Administration for the Newspaper Preservation Act.<sup>16</sup> The statute immunized the newspaper joint operating arrangement’s otherwise per se illegal price-fixing activity from criminal and civil liability under the federal antitrust laws.<sup>17</sup> The law also immunized existing joint operating arrangements,

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<sup>13</sup> Pete Carey, *Pelosi Ignites Talk of Bay Area Newspaper Merger*, CONTRA COSTA TIMES, March 17, 2009, available at [http://www.contracostatimes.com/news/ci\\_11938069?source=rss](http://www.contracostatimes.com/news/ci_11938069?source=rss).

<sup>14</sup> Under their joint operating arrangement, Hearst and the Chronicle jointly owned all of the assets used to produce and distribute their San Francisco newspapers. In addition, they created the San Francisco Newspaper Agency, which acted as an agent to perform all business functions of their newspapers, including circulation, advertising sales, printing, distribution and personnel. The news and editorial departments of both newspapers, however, remained separate and were independently operated. Press Release, *The Hearst Corporation to Purchase the San Francisco Chronicle*, Aug. 6, 1999, available at <http://www.sfmuseum.org/hist10/chronsale.html>.

<sup>15</sup> *United States v. Citizen Publ’g Co.*, 280 F. Supp. 978 (D. Ariz. 1968), *aff’d*, 394 U.S. 131 (1969).

<sup>16</sup> BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 204-17 (2004).

<sup>17</sup> 15 U.S.C. § 1801 *et seq.*



including the one between *The San Francisco Chronicle* and Hearst's *Examiner*.<sup>18</sup> In exchange for this antitrust immunity, the JOA partners were required to maintain their newspapers' newsrooms independent and competitive.<sup>19</sup> In an embarrassment to the Nixon Administration, however, its own Antitrust Chief testified against the antitrust immunity as unnecessary, as lesser restrictive joint ventures existed.<sup>20</sup> Nonetheless, the passage of the Newspaper Preservation Act benefitted Hearst's joint operating arrangements in San Francisco and elsewhere. The antitrust immunity enabled the *Chronicle* and Hearst's *Examiner* to continue to fix advertising and circulation prices over the next couple decades.

Despite this antitrust immunity, the San Francisco newspapers were criticized for their poor quality. For example, in the movie "All the President's Men," someone hounded the Ben Bradlee character, played by Jason Robards, about featuring yesterday's weather report, "for people who were drunk or slept all day . . . ." Bradlee responded, "Send it out to the *San Francisco Chronicle*

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<sup>18</sup> The Newspaper Preservation Act immunized "any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

<sup>19</sup> The Newspaper Preservation Act required that there was "no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined" between the newspapers in the joint operating arrangement. 15 U.S.C. § 1802(2).

<sup>20</sup> Bagdikian, *supra* note 16, at 213.

— they need it.”<sup>21</sup> The looming issue was “Why can’t San Francisco get the newspaper it deserves?”<sup>22</sup>

After benefitting from antitrust immunity for over twenty-five years, Hearst in 1999 sought to acquire *The San Francisco Chronicle*. Hearst assured the public that if it could acquire its primary editorial rival, San Francisco would finally get the newspaper it richly deserves. But the merger also showed the fragility of the marketplace of ideas. As the Justice Department’s antitrust investigation revealed, and which came to light only during a private lawsuit, Hearst sought to subvert the marketplace of ideas. During the trial, evidence was presented that senior Hearst executives sought to suppress critical news stories about the transaction.<sup>23</sup> And the district court found that Hearst offered “to ‘horse trade’ favorable editorial coverage of the mayor in return for [Mayor] Brown’s support” of Hearst’s acquisition of its rival.<sup>24</sup>

The San Francisco JOA came to an end in 2000 when Hearst acquired the *Chronicle* (after agreeing to sell its *Examiner* to a third-party). Hearst proceeded to lose money every year thereafter.<sup>25</sup> Then in 2006, Hearst sought to finance MediaNews,

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<sup>21</sup> Peter H. King, *A Letter From San Francisco: What the Shadow Knew*, COLUM. JOURNALISM REV., Nov./Dec. 1999.

<sup>22</sup> *Id.*

<sup>23</sup> See Reynolds Holding, *Hearst Insisted Examiner Hold Story on Chronicle*, S.F. CHRONICLE, June 9, 2000, at A1, available at 2000 WLNR 4952592.

<sup>24</sup> Reilly v. Hearst Corp., 107 F. Supp. 2d 1192, 1207 (N.D. Cal. 2000).

<sup>25</sup> Pete Carey, *Hearst Threatens To Shut Down San Francisco Chronicle*, S.J. MERCURY NEWS, Feb. 24, 2009, available at

its primary competitor in the Bay Area, by acquiring a 30 percent equity stake in MediaNews's newspaper businesses outside of the San Francisco Bay Area. That questionable dealing also triggered an investigation by the Justice Department and a private lawsuit.<sup>26</sup> As the Justice Department noted, "Hearst's investment in MNG — its principal newspaper rival in the Bay Area — raised potential competitive concerns warranting investigation despite the parties' assertions that they had structured Hearst's proposed investment to give Hearst no equity interest in or influence over MNG's Bay Area businesses."<sup>27</sup> During the Justice Department's 2006-2007 investigation, Hearst and MediaNews modified their proposed transaction in an effort to mitigate the antitrust concerns raised by the Justice Department.<sup>28</sup> The Justice Department noted, however, that the parties' interactions "will continue to be subject to the antitrust laws."<sup>29</sup>

Now only a couple of years later, Hearst may be seeking antitrust leniency so that it can acquire its primary competitor in the Bay Area. Both MediaNews, through its controlling interest

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[http://www.mercurynews.com/news/ci\\_11775950](http://www.mercurynews.com/news/ci_11775950).

<sup>26</sup> See, e.g., *Reilly v. MediaNews Group, Inc.*, No. C 06-04332 SI, 2006 WL 3422204 (N.D. Cal. Nov. 28, 2006).

<sup>27</sup> U.S. Dep't of Justice, Antitrust Div., Press Release, *Statement of the Department of Justice's Antitrust Division Regarding Its Investigation of Hearst Corporation's Proposed Acquisition of Tracking Stock In MediaNews Group Inc.*, Oct. 25, 2007, available at [http://www.usdoj.gov/atr/public/press\\_releases/2007/227168.htm](http://www.usdoj.gov/atr/public/press_releases/2007/227168.htm).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

in the California Newspapers Partnership, and Hearst control the majority of daily newspapers in the Bay Area. If such consolidation is permitted, one company would control the *San Francisco Chronicle*, *Contra Costa Times*, *San Jose Mercury News*, *Marin Independent Journal*, and several daily newspapers that operate under the name Alameda News Group (the *Oakland Tribune*, *Tri-Valley Herald*, *Daily Review*, *Fremont Argus*, and *San Mateo County Times*). These newspapers account for most of the readership of, and advertising in, daily newspapers in the Bay Area.<sup>30</sup>

The privately-owned Hearst Corporation does not claim to be an ailing or failing company. Indeed Hearst is one of the nation's largest diversified media companies, with interests in magazines,<sup>31</sup> newspapers,<sup>32</sup> cable networks,<sup>33</sup> television and radio broadcasting,<sup>34</sup> various Internet businesses, television production and distribution, newspaper features distribution, and real estate. Similarly, the privately-owned MediaNews, according to its

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<sup>30</sup> *Id.*

<sup>31</sup> Its magazine titles include *Cosmopolitan*, *Esquire*, *Good Housekeeping*, *Harper's BAZAAR*, *Marie Claire*, *O*, *The Oprah Magazine*, *Popular Mechanics*, *Redbook*, *Seventeen*, *SmartMoney*, and *Town & Country*.

<sup>32</sup> Hearst's other newspapers include the *Houston Chronicle*, *The Advocate* (Stamford, CT), *Albany Times Union*, *Beaumont Enterprise*, *Connecticut Post*, *Edwardsville Intelligencer* (IL), *Greenwich Time*, *Huron Daily Tribune* (MI), *Laredo Morning Times*, *Midland Daily News*, *Midland Reporter-Telegram*, *The News Times* (Danbury, CT), *Plainview Daily Herald*, *San Antonio Express-News*, and the *Seattlepi.com*.

<sup>33</sup> Hearst has an interest in A&E Networks, *Cosmopolitan TV*, *ESPN Inc.*, *Lifetime Television*, and *New England Cable News*.

<sup>34</sup> Hearst-Argyle Television, Inc. owns 26 television stations and manages an additional 3 television and 2 radio stations across the U.S. Hearst's television stations reach approximately 18% of U.S. television households, which according to Hearst's website, makes it one of America's largest television station groups.

website, “is one of the largest newspaper companies in the United States situated throughout California, the Rocky Mountain region and the Northeast.”<sup>35</sup> It operates 54 daily newspapers in 11 states with combined daily and Sunday circulation of approximately 2.4 million and 2.7 million, respectively. In addition, Hearst and MediaNews have formed a joint venture with Yahoo! Inc. and 10 other leading U.S. newspaper companies to sell advertising on their newspapers’ Internet sites and Yahoo.

Hearst’s San Francisco newspaper is no doubt losing money. But contrary to its repeated promise that in exchange for more antitrust immunity, Hearst will finally provide the citizens of San Francisco a quality newspaper has not come to fruition. Unquestionably many local newspapers across the United States for years have had minimal direct competition and enviable profit margins. Many newspapers, however, failed to quickly recognize the potential of the Internet or evolve their business model in the Internet economy. But ordinarily the competitive response should be better managed newspapers providing their communities a quality product. FCC Commissioner Cops warned in 2007, “Far from newspapers being gobbled up by the Internet, we ought to be far more concerned with the threat of big media joining forces with big broadband providers to take the

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<sup>35</sup> <http://www.medianewsgroup.com/about/>.

wonderful Internet we know down the same road of consolidation and control by the few that has already inflicted such heavy damage on our traditional media.”<sup>36</sup>

I support Speaker Pelosi’s announcement of Congressional hearings on antitrust’s role to preserve a vibrant and competitive marketplace of ideas. I also agree with Speaker Pelosi that antitrust analysis needs to consider evolving market dynamics. Other options besides media consolidation exist to keep newspapers afloat. The antitrust laws leave open procompetitive alternatives (such as joint ventures in the production and circulation of newspapers). Alternatively, the federal antitrust agencies permit mergers where one party satisfies a failing firm defense.<sup>37</sup> The antidote is not to weaken the antitrust laws to enable large media conglomerates to become even bigger. Instead, the health of the marketplace of ideas depends on the antitrust laws to preserve divergent and competing voices.

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<sup>36</sup> Copps, *supra* note 5, at 5.

<sup>37</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 5 (1997), available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html).