It should be noted that the Government is not attacking the validity of the provisions of the by-laws which prohibit AP and any member from giving AP news to a nonmember.[95] These provisions protect the exclusiveness of AP news as against those who have not contributed to its cost and who have not accepted the other obligations which membership entails.

F. Neither in Form nor in Substance is the Exclusion from AP Membership and News Reports the Act of a Single Trader Exercising his own Independent Discretion in Selecting Those with whom he Will Deal

AP urges (Br. 66–68) that this Court should ignore the fact that exclusion of competitors from the commerce in news which the members carry on through AP is by virtue of agreement among some 1,250 independent newspaper enterprises and should treat the exclusion as if it were the act of a single trader independently selecting his customers. The grounds upon which this plea appears to be based are (1) that news collection through a cooperative form of organization serves certain useful purposes and (2) that, as applied to the restraints here involved, the distinction between agreement of a group not to deal with outsiders and a single trader's refusal to deal is one of form, not substance.

As to the first ground, it is sufficient to refer to the established rule that a combination which

[95] By-laws, Art. VII, Sec. 4, R. 77; Art. VIII, Sec. 6, R. 80.

promotes certain desirable objectives does not, by reason of this fact, obtain a license to impose restraints of trade prohibited by the Sherman Act.[96] The rule is *a fortiori* applicable where, as here, the desirable objectives which cooperative action may promote are wholly separable from the restraints of trade resulting from membership restriction, as is attested by the long-standing and satisfactory co-existence of competitive member papers in many cities. See pp. 94–95, *supra.*

Equally untenable is the second ground advanced, that there is no difference in substance between the combination of most of the country's leading newspapers to collect news through a common agent and news collection by a stock corporation organized for profit such as UP or INS. Among important differences are: AP as the common agent of its members is backed by the resources of all member papers and hence requires little capital contribution or reserves since it can always, by assessment, recoup costs of operation, whereas the ordinary stock corporation has the resources only of its own capital and earning power. It operates free from income tax liability, and its members, by receiving

[96] *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U. S. 600, 613; *Anderson* v. *Shipowners Ass'n*, 272 U. S. 359, 363; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 43; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 467–468.

service at cost instead of at cost plus the news agency's normal profit, share in the profits incident to the news-collection business without paying a tax on dividend distribution of income. The reciprocity of agreement incident to the cooperative form of organization enables it to obtain exclusively the local news of its members [97] whereas corporations such as UP and INS, serving the same newspapers as AP, cannot obtain local news from them even on the non-exclusive basis provided for in contracts with non-AP subscribers.

A further significant and vital difference is that the restraints of trade resulting from the denial, for competitive reasons, of AP membership and news are directly and solely due to the organization of AP as a cooperative functioning under the rules and limitations agreed upon by its members. If AP were a stock corporation organized for profit it would seek to increase its profits and news coverage by expanding its newspaper clientele. The membership agreement, however, requires AP to put the competitive interests of its several members ahead of those which would actuate it were it operating as a unitary organization. AP recognizes this by asserting (Br. 17) that its restriction

[97] At one time AP's board of directors declared that the right to obtain exclusively a member's local news was a contribution "quite as valuable as the weekly sum he pays as his share of the expenses of the organization" (Complaint, par. 72, R. 20, admitted R. 126, 141–2).

of membership "has greatly facilitated and stimulated the growth of competitive news-gathering services". Notwithstanding AP's contrary suggestion (Br. 14–15, 45), it is clear that if the interests of AP are considered from the standpoint of a functioning entity rather than from the standpoint of the competitive interests of its individual members, AP benefits from additions to membership in a city and field where there is a member. Under the requirement for report of local news, additional membership augments AP's news coverage.[98] Additional membership likewise adds to AP's revenue resources. The contrary conclusion does not follow merely because AP's board of directors has chosen up to the present to allocate expense to a city and field and to divide such allocation among the members therein, irrespective of their number.

The newspapers served by AP have a voice in its management and control, but subscribers to UP and INS have no such control over their operations. This is a difference going to sub-

[98] AP's statement (Br. 45) that a new member in a city and field where there is one "adds substantially nothing to * * * the news coverage of AP" cannot be accepted. To take one example, the Chicago Sun, the country's eleventh largest newspaper, can obviously make a greater contribution of local news than can a paper with a daily circulation of less than 3,000 published in a town or city not presently represented in membership. This is not an extreme illustration since there are numerous AP members with a daily circulation of less than 3,000 (Lee affidavit, Ex. 2, R. 1088–1112).

stance; AP has averred that it is this characteristic which gives its news service peculiar value. Its answer to the complaint states (R. 117–8):

> The nature of the service furnished by AP and the resulting contribution which AP has made to the dissemination of complete and unbiased information of world events and conditions are not fortuitous, but stem from the very character of AP's organization. This in turn reflects the experience gained in a long-continued struggle by newspapers to obtain effective cooperative control over the news gathering and distributing facilities upon which they depend.[99]

The question of the legality under the Sherman Act of an agreement between UP or INS and a subscriber to its news service not to furnish news to a competitor of the subscriber is not now before this Court. We have already indicated why it is far from "inconceivable", as AP believes (Br. 67), that there should be one rule for AP and another for UP and INS. But what is important to note is that such an agreement by UP or INS would not be within the rule that refusal to deal by a single trader does not violate the Sherman Act even if the trader uses his power of customer selection to promote particular resale price or other policies. Rather, such agreement would

[99] For similar statements by the man who served as AP's president for more than 25 years, see Noyes affidavit (AP), R. 1421, 1427.

involve relinquishment of the power independently to select one's customers, for the purpose of restraining or suppressing the competition of others with the favored customer. It would be analogous to an agreement between a distributor of copyrighted films and his first licensee calling for restrictive conditions in subsequent licenses granted by the distributor to competitors of the first licensee, such as was held illegal under the Sherman Act in *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 227–230.

The cases involving commodity exchanges cited by AP (Br. 69–71) do not deal with or consider any question similar to that here presented, namely, whether an agreement by the members of a membership corporation to exclude competitors of the individual members from certain trade violates the Sherman Act. In *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236, the Chicago Board of Trade collected quotations on sales made on the Board and delivered the quotations to telegraph companies under agreements to transmit the quotations only to persons approved by the Board. In a suit to enjoin unauthorized use of these quotations the question decided by this Court was that the alleged gambling character of the sales on the Board was not a defense to unauthorized use of the quotations. The Court said (p. 252) that the legality under the Sherman Act of the contracts with telegraph com-

panies was not before it, and its dictum that the contracts involved no monopoly or contract in restraint of trade was not directed to their exclusory aspect. As to this, the Court said that the scheme to exclude bucket shops simply restrained acquisition of the quotations "for illegal purposes".

United States v. *New York Coffee & Sugar Exchange, Inc.,* 263 U. S. 611, presented solely the question whether the evidence established the Government's charge that the officers and members of the Exchange had conspired to establish artificial prices for sugar.

In *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, quotations of prices established in sales on the Exchange were distributed only to persons approved by the Exchange and applicants were required to agree not to use the quotations in connection with a bucket shop. This Court held that the Exchange did not violate the Sherman Act when it refused the quotations to a concern which it had found to be organized as a cover to permit bucket shop operations. The case involved disposal of a by-product of the business carried on by Exchange members and the refusal to deal was not for the purpose of restricting competition with Exchange members.

Appalachian Coals, Inc., v. *United States,* 288 U. S. 344, did not involve, directly or indirectly, any refusal to deal or exclusion of others from

advantages of joint action. While membership in the agency organized to market bituminous coal was limited to 80% of the commercial tonnage of the producing area, less than that percentage had sought membership. And in *Greer, Mills & Co.* v. *Stoller,* 77 Fed. 1, (W. D. Mo.), no question of violation of the Sherman Act or of restraint of trade at common law was passed upon.

The ten cases cited by AP (Br. 73–74) as holding that cooperative associations may withhold association privileges from nonmembers have even less relevancy to the issues here than the commodity exchange cases. With two exceptions, no question of restraint of trade either at common law or under state or Federal statute was even considered in these ten cases, and the two exceptions referred to in the margin in no respect support the defendants here.[1]

[1] *American Live Stock Commission Co.* v. *Chicago Live Stock Exchange*, 143 Ill. 210, 234–235 (1892), held that even if rules of the Exchange under which its members were barred from dealing with the plaintiff were in restraint of trade the plaintiff could not, by reason of their illegality, obtain the affirmative equitable relief which it was seeking. *Cline* v. *Insurance Exchange of Houston*, 140 Texas 175, 182–183 (1943), held that the rule of the Exchange attacked by the plaintiff did not violate the antitrust laws of the state, the court saying that no evidence of a conspiracy had been offered, that any person willing to comply with the rules of the Exchange could become a member, and that it did not appear that the rule under attack would in any way prevent or lessen competition.

II

THE AGREEMENT OF AP'S REGULAR MEMBERS TO GIVE THEIR LOCAL NEWS EXCLUSIVELY TO AP AND AP'S CONTRACT WITH THE CANADIAN PRESS CONFERRING UPON AP EXCLUSIVE RIGHTS IN THIS COUNTRY TO CANADIAN PRESS NEWS ARE IN UNLAWFUL RESTRAINT OF INTERSTATE COMMERCE IRRESPECTIVE OF ILLEGAL RESTRICTIONS ON MEMBERSHIP IN AP

A. The Members' Agreement not to Give their Local News to any Nonmember

The Government is not attacking the requirement of the AP by-laws that every member furnish his local news to AP.[2] It attacks only the requirement that no regular member shall furnish, "or permit anyone to furnish", such news to a nonmember (Art. VIII, Sec. 6, R. 80). By virtue of this requirement, the 1,235 regular AP members have entered into a multilateral agreement to interchange their local news exclusively with each other and have reciprocally agreed not to sell such news to or exchange it with any nonmember. The extent to which the agreement blankets the country is shown by the fact that it covers morning newspapers having 96%, and after-

[2] The exact obligation is to furnish news of the "member's district, the area of which shall be determined by the Board of Directors," which is "spontaneous in its origin" and which has not "originated through deliberate and individual enterprise on the part of such member" (Art. VIII, Secs. 3, 4, R. 79).

noon papers having 74%, of the total circulation in these respective fields.[3]

We submit that the cases and the principles discussed in connection with the AP membership restrictions clearly establish the invalidity of this agreement. It is a combined agreement by the newspaper members—comprising a preponderant part of the entire industry—that each will not deal with any nonmember respecting the local news which it gathers. It is also an agreement by independent business enterprises to obtain an advantage in trade for themselves by a pooling of information from which others are excluded.

The agreement, like that relating to admission of new members, is aimed at and effects a restraint of competition. The agreement not to furnish reports of local news to any nonmember restricts the sources of news available to every non-AP newspaper competitive with any member. Such newspapers necessarily rely upon the news service of UP or INS for reports of spontaneous news in localities other than their own. The agreement among the regular members of AP bars UP and INS from obtaining from them the spontaneous news which they gather and shuts off UP and INS from a quick and reliable source of information as to unanticipated events of all kinds.

[3] Percentage as to morning papers computed from figures in Findings 86 and 88 and percentage as to afternoon papers computed from figures in Findings 87 and 95 (R. 2618–20).

The district court was of the opinion that the agreement for an exclusive interchange of the members' local news fell within the rule that "a restrictive covenant necessary to the protection of property transferred is 'reasonable'" (R. 2598). The court further said that taken by itself, and apart from the restrictions upon membership, the agreement—

> would be valid; it is essential to the protection of the main purpose that the member who furnished "spontaneous" news * * * shall not destroy the value of what is transferred by making it available to others, before it can be published. (*Ibid.*)

We submit that the district court's analysis of this matter was incomplete and erroneous. The common type of an "ancillary" or "partial" restraint is, as the court noted, a covenant by the seller of a business or of a professional practice not to compete with the buyer, this being upheld as in aid of the main lawful purpose of the contract if the covenant is reasonably limited in duration and territorial coverage. See *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 281–282 (C. C. A. 6), affirmed 175 U. S. 211. But in the present case the agreement is not between a single seller and buyer (treating the AP member as the seller and AP as the buyer). The agreement is a horizontal one by and between the various AP members, AP's role being merely that of agent of the members. Each member has, as to the inter-

change of news, the dual position of seller and buyer in that the member both contributes and receives news reports. Their agreement is therefore like that condemned in *Montague & Co.* v. *Lowry,* 193 U. S. 38, where a dominant group of sellers and a dominant group of buyers agreed to deal exclusively with each other.

The restraints of this agreement will not be cured by removal of illegal restrictions on AP membership. Not every newspaper free to become an AP member will wish to do so. The very enlargement of membership resulting from removal of present barriers to admission will further limit the number of newspapers from which UP and INS can obtain news reports. An agreement in restraint of trade which tends to coerce membership in AP is as much to be condemned as one which operates to exclude from membership.

We submit that the district court erred in stating that if members were free to make their local news available to others "before it can be published", this would "destroy the value" of the local news which they furnish to AP. In the first place, the members' agreement is that they will not furnish their spontaneous news to others before, simultaneously with, or after they have reported the news to AP. This is very different from an agreement merely not to report to others in advance of reporting to AP. In the second place, elimination of the requirement that the

member report his spontaneous local news exclusively to AP would not "destroy the value" of his report to AP. That AP attaches value to a nonexclusive report of the news of the vicinage gathered by a member is established by the fact that associate members are subject to the general requirement to report such news but are exempt from the obligation to report to AP exclusively (R. 79–80). The action of the other news services establishes that they also attach value to the right to receive from newspapers nonexclusive reports of such news.[4]

Defense of the members' agreement not to furnish to any nonmember the spontaneous local news which they gather, upon the ground that this is necessary to achieve the exclusiveness which gives value to the news reported to AP, presents this dilemma. To the extent that AP and its members thereby achieve full exclusiveness as to this news, they are monopolizing as well as restraining commerce therein. The monopolization, though fleeting, is for the period of time during which it has value to newspapers and may be judicially protected against unauthorized appropriation. See *International News Service*

[4] INS always seeks to obtain from its newspaper subscribers an obligation to furnish to INS, but not exclusively, the local news which the newspaper gathers (Connolly deposition (AP), R. 2169). UP in its contracts with non-AP newspaper subscribers requires them to report to UP the news which they gather (Williams affidavit (AP), R. 1478).

v. *Associated Press,* 248 U. S. 215. On the other hand, if, as AP indicated in its brief in the district court, the agreement for exclusive report to AP has little practical importance and effect today,[5] the argument that such agreement is necessary to preserve the value of the news which the member reports to AP correspondingly disappears.

We therefore submit that the provisions of the AP by-laws which prohibit regular members from furnishing to any nonmember news which they are required to report to AP are unlawful taken by themselves and irrespective of coincident illegal restriction on membership in AP.

The judgment which the district court entered gives effect to the views set forth in the court's opinion (R. 2599), that the agreement of members not to give to any nonmember the spontaneous news which they gather is unlawful only as a part of an unlawful combination which, "though bound to admit all on equal terms, does not do so", and that the agreement as to spontaneous news was therefore to be enjoined only "until the primary wrong is remedied". Paragraph III B of the judgment declares that the by-law provision prohibiting giving such news to a non-member, "taken

[5] The AP brief (pp. 20–21) asserted that the effect of eliminating the prohibition against a member furnishing his local news to a nonmember "would be primarily psychological", adding that the "psychological factor, however, is not without significance".

in connection with" the existing restrictions on membership, is illegal and is canceled, and the paragraph enjoins adopting any new or amended by-law having a "like" purpose or effect, i. e., when connected with illegal membership restrictions (R. 2632). Paragraph V of the judgment also expressly gives the defendants leave to apply for modification or termination of paragraph III B, upon furnishing satisfactory proof that they have amended the by-law provisions respecting the admission of members in conformity with paragraph I of the judgment (R. 2633).

We submit that the judgment should be modified by eliminating the words "taken in connection with the by-laws and agreements described in Paragraph I hereof" from paragraphs III A and III B of the judgment.

B. Contract With Canadian Press Giving AP the Exclusive Right in this Country to Canadian Press News

Canadian Press is a non-profit membership corporation composed of Canadian newspapers, described by AP's general manager as "a counterpart in the Dominion of Canada of AP".[6] Its membership comprises over 95% of the total circulation of English-language Canadian newspapers and its members are not permitted to furnish reports of their local news to any United States newspaper or news agency other than AP

[6] Cooper affidavit (AP), R. 1435; McNeil affidavit (AP), Ex. 1, R. 1859–60.

and its members (*supra,* pp. 43–44). A contract running for ten years from November 1, 1935, and thereafter from year to year until terminated by six months' notice, obligates Canadian Press to deliver to AP, for its exclusive use throughout the world (aside from Canada and English Western Hemisphere possessions), the Canadian news gathered by Canadian Press.[7] The contract also provides that AP shall give its news to Canadian Press for the exclusive use of that organization in Canada and English Western Hemisphere possessions,[8] but the Government is presently attacking only the exclusive rights given to AP (see *supra,* p. 45).

Under the foregoing contract all competition between AP and other American news agencies or newspapers to obtain the news reports of Canadian Press is eliminated for a period of at least ten years. AP is given a ten-year monopoly, not of Canadian news as such, but of the only available comprehensive and speedy report of the news of a great neighboring country, a report contributed to and supported by substantially all of the country's newspapers. Aside from the question of cost, no really comparable substitute for this report could be built up by UP or INS.

In *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 719, this Court was evenly divided as to the legality of an exclusive supply contract.

[7] Fng. 134, R. 2625–6; Ex. 1, R. 458, 460.

[8] *Idem.*, Ex. 1, R. 458–9.

But in that case the contract was terminable at will, it applied to a product which could be obtained from other manufacturers, and it protected a comparatively small concern against possible destruction of its specialty business if the supplier, the leading manufacturer in its field, were free to make the specialty product for others or to market such product itself. If the reasonableness of the restraint is the test of the validity of a contract to supply exclusively one person or corporation, we submit that the circumstances to which we have already referred clearly make the restraints and monopolization resulting from AP's exclusive rights under the Canadian Press contract unreasonable.

If the Sherman Act sanctions the Canadian Press contract, it would appear to be permissible for AP to enter into a series of exclusive news-exchange contracts with foreign news agencies. Prior to 1932, indeed, the flow of news from country to country was to a large extent governed by just such contracts. Under an agreement made in 1902 between AP, Reuters (British), Havas (French), and Continental Telegraphen Compagnie, i. e., Wolff (German), AP was exclusively entitled in the United States to the news of the three foreign agencies and AP was barred from furnishing its news to any one, other than these agencies, outside of North America, Central America and United States possessions.[9] This was

[9] Pl. 2nd Req. Adm. 5–a, Ex. 5–A (R. 355, 369–71), admitted (R. 399, 432).

followed in 1927 by an agreement, called a "Treaty", between the four agencies which begins with the recital that they "have regulated between themselves the exploitation of the world's news" by an agreement expiring December 31, 1927.[10] The 1927 agreement provided that AP "shall have the exclusive news distribution field of" North America and United States possessions, reserving, however, to Reuters and Havas a "free hand" in Canada and Mexico and to AP a "free hand" in Central America, South America and Cuba (R. 374).[11] A 1932 "Treaty" between the parties continued the intra-party news exchange and division of territory but permitted the giving of news to a newspaper, but not to any outside news agency, in the territory of another party.[12]

We may turn to AP itself for an apt characterization of these cartel agreements. In 1934 AP

[10] *Idem*, 5–b, Ex. 5–B (R. 355, 373), admitted (R. 399, 432).

It appears that the 1902 agreement remained in effect until December 31, 1927. It was described as of that time by AP's general manager as "the 34-year-old contract". Cooper, *Barriers Down* (1942), 174. The 34 years to which he refers run from 1893 when, upon organization of AP's predecessor, Reuters, Havas and Wolff "gave the United States and Canada to The Associated Press" (*idem*, 169).

[11] A supplement to the 1927 agreement between AP and Reuters gave AP "free entry into Japan to serve only Reuters' ally in Japan", and with the ally's consent, its members and clients (Pl. 2nd Req. Adm. 5c, Ex. 5–C (R. 355, 380), admitted (R. 399, 432)).

[12] *Idem*, 5–d, Ex. 5–D (R. 355, 382–3), admitted (R. 399, 432).

and UP made a five-year contract providing that neither would contract for the news of any "European agency" unless such agency's news should be available to the other "upon the same terms", the contract reciting that AP and UP do not approve "the practice of European agencies which at the dictation of one or more of them hinder international news exchange by making exclusive arrangements for the availability of their news."[13] AP's general manager described this contract with UP as "a thrust at the Victorian news agency monopoly".[14] The thrust, however, was so phrased as not to include the AP-Canadian contract for exclusive news exchange, and the thrust was quietly ended by the same general manager of AP, for reasons not stated, by giving UP on October 5, 1936, advance notice of termination of AP's contract with UP.[15]

The district court in its opinion and judgment treated the contract provisions by which AP secured exclusively for its own members all Canadian Press news dispatches as governed by the court's ruling on the members' agreement not to furnish their spontaneous news to nonmembers (R. 2599, 2632–3). Reading paragraph IV B of the judgment together with paragraphs IV A and V, the injunction against such exclusive provisions

[13] *Idem*, 6–a, Ex. 6–A (R. 355, 387–9) admitted (R. 399, 433).

[14] Cooper, *Barriers Down* (1942), 251.

[15] Pl. 2nd. Req. Adm. 6–b, Ex. 6–B (R. 355–6, 392), admitted (R. 399, 433).

of the Canadian Press contract will not bar their reinstatement following amendment of the AP by-laws which eliminates illegal restrictions on membership in AP. We therefore submit that the district court's judgment should be modified by striking from paragraphs IV A and IV B the words "taken in connection with the by-laws and agreements described in Paragraph I hereof".

III

THE PROVISIONS OF THE JUDGMENT RELATING TO ADOPTION BY AP OF NEW BY-LAWS RESPECTING ADMISSION TO MEMBERSHIP FAIL TO GIVE ADEQUATE RELIEF AND SHOULD BE MODIFIED

The question of what provisions restricting the admission of new members may be incorporated in new by-laws to take the place of those voided by the judgment is of fundamental importance. The Government does not object to what it believes to be the basic theory upon which the district court's judgment was formulated, i. e., that the conditions for admission shall be the same when the applicant's newspaper is published, and when it is not published, in the same "field" and city as that of a member newspaper. But the Government contends that the judgment does not adequately assure attainment of this end.

In the hearing before the district court on the motion for summary judgment neither the Government nor the defendants discussed in their briefs or in oral argument the nature of the relief

which should be granted if the court sustained the Government's attack on the validity of the existing rules governing admission to membership. The Government assumed, as the defendants probably also assumed, that if the court sustained the Government's attack, it would leave open the question of relief until the parties should have submitted their respective proposals and a hearing thereon had been held. While the parties did submit to the court proposed judgments and argument thereon was heard, the court had so explicitly stated in its opinion the relief which it would grant (R. 2598, 2600) that the proposed judgments and hearing involved little more than giving formal effect to the court's prior declaration as to the relief to which the plaintiff was entitled.

The provisions of the judgment bearing upon adoption by AP of new by-laws to take the place of those adjudged illegal might be drafted on either of two bases. One would be to phrase the prohibition in general terms, as is customary in judgments entered in cases under the Sherman Act. The other would be to chart in the judgment as definitely as is reasonably practicable the requirements to which new by-laws must conform.

The district court adopted the latter basis for formulating the judgment. If this Court should decide that relief respecting new by-laws restricting admission to membership should be phrased

only in general terms, this end could be achieved by a very simple change in the judgment, namely, elimination of the two provisos of paragraph I B of the judgment. That paragraph, after declaring illegal and canceling the existing by-law provisions dealing with admission of new members, enjoins the defendants from promulgating and observing any new by-laws "having a like purpose or effect in respect of admission to The Associated Press" (R. 2630–1). The Government believes, however, that relief in such general terms has certain disadvantages in the present case. Decision as to the character of the substitute by-laws permissible under the judgment would, in effect, be postponed. In addition, the practical problems incident to making vital changes in by-laws of an organization with a large and scattered membership point to the desirability of advance specification of the required changes.

This advance specification is given by the second proviso to paragraph I B of the judgment. The first proviso to the paragraph is merely introductory and states that nothing contained therein shall prevent AP from adopting new by-laws "which will restrict admission". The second proviso qualifies this permission as follows:

> provided that members in the same city and in the same "field" (morning, evening or Sunday), as an applicant publishing a newspaper in the United States of America

> or its territories, shall not have power to impose, or dispense with, any conditions upon his admission and that the by-laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and "field" shall not be taken into consideration in passing upon his application (R. 2631.)

From the language of the judgment itself, it would appear that its requirements would be met simply by incorporating in the new by-laws the two limitations set forth in the above proviso, and the district court's opinion supports this view. The court said (R. 2598): "We shall not attempt to say what conditions [restricting admission] may be imposed; we hold no more than that * * *", and the court then outlined the limitations substantially as they were later incorporated in the second proviso to I B of the judgment.

The limitation that "members" in the same city and field as the applicant shall not have "power to impose, or dispense with, any conditions upon his admission" would not by its express terms bar the adoption of by-laws providing one basis for admission where there is a member in the city and field of the applicant and a totally different, more onerous basis for admission where there is no such member. Under such by-laws the competitive members would have no

power to impose or dispense with conditions on admission but the by-laws themselves would make the stated conditions govern *all* applications involving competition with a member.

The Government recognizes that to subject applicants who are competitive with a member to special requirements of an extreme type would undoubtedly be held to be forbidden whether or not this came within the express language of the limitations of the proviso. But there is real danger that any special procedure or conditions, not on their face unduly restrictive, governing admission of applicants competitive with a member would be utilized to bar such applicants for competitive reasons.

We submit that if the judgment is to give adequate assurance of effective relief, the first limitation of the second proviso must be more explicit and comprehensive. The following is suggested by way of a substitute:

> the procedure and the conditions for admission to membership of an applicant seeking membership in a city and "field" (morning, evening or Sunday) in which there are one or more existing memberships shall be the same as the procedure and conditions for admission to membership of an applicant seeking membership in a city and field in which there is no existing membership; and that no applicant shall be required as a condition to admission to

> make any money payment or give any other consideration, directly or indirectly, to any AP member or members;

That part of the proposed substitute which bars requiring an applicant to make a money payment to individual AP members, as distinguished from a payment to and for AP itself on account of the new member's proportionate share of AP's net assets, makes explicit what we believe to be otherwise implicit in the judgment. It will serve, however, to avoid ambiguity and possible fruitless controversy. Obviously no new member should be required to compensate members competitive with him for their loss of "rights" of an illegal exclusory and monopolistic character.

The second limitation of the second proviso in paragraph I B is that the by-laws "affirmatively declare" that the effect of admission upon the applicant's ability to compete with members in the same city and field "shall not be taken into consideration in passing upon his application". The Government regards this limitation as being, in itself, desirable and appropriate. But, when written into the by-laws, it is not self-executing; it remains hortatory. The district court frankly recognized this. It said in its opinion (R. 2598):

> It is of course true that the members may disregard the last provision in practice; but that is not to be assumed. At any rate, * * * it is as far as we can go.

When an organization has been operating for 44 years on a basis directly opposed to that provided for by the judgment and when change is so strenuously resisted (as the present litigation attests), the ultimate effectiveness of the judgment should not be left to depend upon a gamble on the members' willingness to conform their conduct to the spirit and intent of the court's judgment. Some safeguarding provisions are, we submit, plainly called for. What these should be will largely depend upon the nature of the requirements for admission under AP's new by-laws. The Government therefore believes that the language of the judgment must be general on this point and we suggest adding to paragraph I B the following:

> and that the by-laws shall contain such further provisions as may be reasonably necessary or appropriate to assure observance of this declaration.

If both this change and the change previously suggested (*supra,* p. 119) are made, the judgment will specify the substantive requirements as to new by-laws, leaving open only the comparatively minor matter of supplementary provisions designed to secure compliance with the substantive requirements. The district court's ruling on supplementary provisions can be obtained prior to submitting the new by-laws to the members for vote. We have set forth in the Appendix, *infra,* p. 137, the two provisos of paragraph I B of the judg-

ment as they will read if the changes requested by the Government are adopted.

The question of additional relief here presented is very different from that which was in issue in *United States* v. *Bausch & Lomb Optical Co.*, 312 U. S. 707. In that case this Court, in denying the Government's plea for inclusion in the judgment of a further requirement to prevent continuance of the unlawful Soft-Lite distribution system, said (page 729):

> We have no reason to doubt that Soft-Lite will conform meticulously to the requirements of the decree. When it is shown to the trial court that it has not done so will be an appropriate time for the Government to urge this addition to the decree.

The present question concerns a command of the judgment as to which compliance or noncompliance will be peculiarly difficult to determine if the judgment provides no further means for testing the question. Furthermore, it is in the interest of AP itself that the full extent of its obligations under the judgment should be promptly settled.

IV

THE DECREE WILL NOT CONVERT AP INTO A PUBLIC UTILITY, NOR DOES IT EXCEED THE APPROPRIATE LIMITS OF EQUITABLE RELIEF

Appellants contend that the decree assumes that AP is a "business affected with a public interest" and that in effect it transforms AP into

a public utility. This line of argument was aptly termed by Judge Learned Hand to be "a red herring which should no longer be allowed to break the scent" (R. 2597). It cannot be successfully urged that AP, as a great news-gathering and distributing enterprise engaged in interstate commerce, is not subject to the Sherman Act. See *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 133.

The decree against AP is no different in character from those which have been traditionally entered against other violators of the antitrust laws. In cases of illegal boycotting an injunction, negatively phrased, against the continuance of concerted refusals to deal, is tantamount to a direction that the defendants shall deal without regard to the factors which led to the boycott.[16] In a number of cases the decrees have been affirmative in form, requiring the defendants to deal on equal terms with those who had previously been

[16] Illustrative of such a negative injunction is the decree in *United States* v. *National Association of Retail Druggists* (N. D. Ind.), found in *Decrees and Judgments in Federal Anti-trust Cases*, 115, 123–124. Certain defendants were enjoined "from refusing to sell or from discriminating in their sales to persons, corporations, or partnerships, whose names appear or have appeared on any list or document published or issued by or with the assistance of or under the direction of the defendants, * * * purporting to contain the names of persons, corporations, or partnerships, adhering or not adhering to their contracts, or maintaining or refusing to maintain prices for the reason, in whole or in part, that said names appear or have appeared on such lists; * * *"

excluded. Thus in *United States* v. *Terminal R. R. Assn.,* 224 U. S. 383, a terminal association which was monopolizing the means of access to the City of St. Louis was required, on pain of dissolution, to submit a plan for the admission of other railroads to joint ownership and control on reasonable terms, "which shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies" (p. 411) and for the use of the association's facilities on similar terms by railroads not electing to become owners. In *United States* v. *Great Lakes Towing Co.,* 208 Fed. 733, 747 (N. D. Ohio), the defendant was offered a similar alternative to dissolution; namely, the presentation of a—

> plan whereby its service shall be given for the equal benefit of all requiring the same * * * so that the company becomes in truth "the bona fide agent and servant" of every vessel owner who shall use or need its facilities, and so that the rights of competitors are completely safeguarded * * *.

Thereafter, the court devised a scheme which it thought met the indicated test (*United States* v. *Great Lakes Towing Co.,* 217 Fed. 656) and the government dismissed its appeal to the Supreme Court (245 U. S. 675).

In *United States* v. *New England Fish Exchange,* 258 Fed. 732, 752 (D. Mass.), defendants

were required to submit regulations, upon pain of dissolution, opening up a fish pier to outside dealers. More recently, a three-judge court, in *United States* v. *Pullman Co.,* 50 F. Supp. 123 (E. D. Pa.) required the Pullman Company, contrary to its previous practices, to operate sleeping cars manufactured by anyone and tendered to it, and to furnish through-line service to any railroad or group of railroads unconditionally (p. 137).

These cases do not rest in any respect upon a consideration of the question whether the enterprise involved in the particular case was or was not a public utility. The basis of the relief granted was the mandate of the antitrust laws, and not any duty at common law or otherwise to serve the public generally. This is made quite clear by comparing the decision in the *Terminal* case, *supra,* with that in *Louisville & Nashville R. R.* v. *United States,* 242 U. S. 60, which arose under the Interstate Commerce Act and not under the antitrust laws. In this case, it was held that carriers which had a joint lease of terminal properties and operated them through a joint agent were not obliged to receive traffic from an outside line; refusal to switch such traffic was held not to constitute unlawful discrimination. This result was held to follow from the terms of the Interstate Commerce Act, which, in Section 3, after requiring carriers to afford equal facilities

for the interchange of traffic, provided that this requirement was not to be construed "as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." Not until the amendments of 1920 was this proviso eliminated. See Sharfman, *The Interstate Commerce Commission,* III–A, pp. 410–421.

Petitioners also contend that the decree exceeds the bounds of appropriate equitable relief because it requires AP and its members to exclude from consideration the factor of the competitive position of an applicant for membership. But the relief presents no more difficult problems of judicial administration in this regard than are commonly found in decrees of courts of equity. A similar contention was urged in *Virginian Ry. Company* v. *System Federation No. 40,* 300 U. S. 515, 549–553. There it was contended that an obligation to negotiate in good faith should not be made the subject of a mandatory injunction, since "negotiation depends on desires and mental attitudes which are beyond judicial control." (P. 549.) This Court, rejecting the argument, observed that "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." (P. 550.) The Court added that it could not ignore the judgment of Congress that negotiation is

a powerful aid to industrial peace, nor could it ignore the large public interests affected, and it was pointed out that courts of equity frequently go much further either to give or to withhold relief in furtherance of the public interest than where only private interests are involved.

Similar contentions were made in attacking the validity of the National Labor Relations Act on the ground that it in effect compelled employers to enter into employment relationships or else placed on the board and the courts the impractical task of deciding whether the employers' actions with respect to hiring and discharge were determined by antiunion discrimination or by legitimate considerations. Cf. *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1, 45–46. Here, as there, past conduct is relevant in interpreting future compliance. Where an applicant was previously rejected following the exercise of a protest right, his subsequent rejection would, it is submitted, constitute *prima facie* evidence of violation of the decree.

It is contended further that the courts are ill equipped to supervise a decree in this case, and the dissenting opinion of Mr. Justice Brandeis in *International News Service* v. *Associated Press,* 248 U. S. 215, is invoked. The reference to that opinion is somewhat ironic, for its import was that the courts should not declare the existence of a property right in news, to be protected by in-

junctive relief against misappropriation by others, inasmuch as the granting of such protection ought appropriately to be accompanied by the imposition of obligations on the part of the news association which would best be the subject of legislative action. The opinion is far from standing for the proposition that the courts should abdicate their function in enforcing the antitrust laws under which Congress itself has imposed obligations upon all forms of interstate commercial enterprise. Furthermore, the apprehension that difficult questions of supervision of the affairs of AP will be required is unfounded. The hypothetical instances suggested (AP Br. 87–89) are without reality, since nothing in the decree will require AP to alter its classification or treatment of members once they are admitted, nor indeed will it affect standards of admission other than those based on the competitive position of an applicant.

We have previously suggested (pp. 119–121, *supra*) elaboration of the terms of the decree to the end that its object may be even more clearly and effectively achieved.

The judgment does not, directly or indirectly, touch upon the quantity or quality of service to be furnished by AP to its various members or the rates to be paid for such service. The Government flatly denies AP's statement (Br. 89) that "the court would have to exercise continuing

supervision over the relationship between the members even after they have been admitted." The one and only change in the by-laws required by the judgment, apart from making the requirement to report local news non-exclusive, is elimination of the right to exclude from membership for competitive reasons. With this change made, the judgment leaves AP free to operate precisely as it has operated in the past.

Appellants Tribune Company and McCormick object to the judgment (Br. 43–48) upon the curious ground that it requires AP to take affirmative action to end the restraints which the court found to be illegal. What these appellants seem to urge is that the court should have given to AP the option whether or not it would terminate these restraints. For example, they complain (Br. 46) that the judgment would not permit AP to continue to function "with its present memberships frozen in fields where members now exist", i. e., with those who are now barred from AP news for competitive reasons left forever barred.

These appellants betray their complete misunderstanding of the court's decision and judgment by their discussion of the court's cancellation of the first sentence of Article III, Section 3, of the by-laws. This sentence permits the board of directors to elect to membership where there is no member in the city and field of the applicant. Tribune Company and McCormick, pointing out

that the opinion below does not condemn election of such applicants by such method, profess (Br. 45) their inability to understand the reason for cancellation of this part of the by-laws. But if the judgment had, on the one hand, allowed this provision to stand and had, on the other hand, cancelled all provisions for admission where there is a member in the city and field of the applicant, the by-laws as thus partially truncated would impose restraints even more patently illegal than those imposed by the by-laws prior to entry of judgment. There would be the same barring from AP news for competitive reasons but this barrier against competitors, instead of being merely substantially absolute, would be quite absolute.

V

THERE IS NO VIOLATION OF FREEDOM OF THE PRESS

The contention of appellants that the decree is in conflict with the guarantee of the freedom of the press under the First Amendment is without substance. It is an echo of the argument made in *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103. There it was vigorously contended that freedom of the press was abridged by the requirement that an editorial employee be reinstated after he had been discharged for reasons which the board found were grounded in his union activities. That case, it was argued, was concerned not with mechanical employees but with

those who helped to edit and write news reports, and hence it was maintained that freedom of supervision and discharge without restraint by the surveillance of governmental agencies was essential to freedom of the press. "Can the newspaper be free if it is not able to choose between authors?" (p. 733). This Court, rejecting the argument, said (pp. 132–133):

> The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the antitrust laws.

The Court observed that the Associated Press retained full freedom to enforce policies of its own with respect to employment, editorial policies, and writing news, save that it might not discriminate against employees because of their labor activities.

In the present case there is even less semblance of interference with freedom of the press than it was argued existed in the earlier case. The antitrust laws do not affect in any way the editorial policies of the press. These laws deal with the relations of AP and its members to other

newspaper enterprises, and their effect is to widen the field of dissemination of news.

Appellants have quoted at length from the constitutional history of the First Amendment. But to ask that it be applied to strike down a nondiscriminatory regulation of commerce whose objective is the removal of restraints on the distribution of news is, to adapt the words of this Court in *O'Malley* v. *Woodrough,* 307 U. S. 277, 282, to belittle the great historic experience on which the framers based the safeguards of the First Amendment. For the same reason the references to control of the press in totalitarian countries (cf. AP Br., p. 103, note), which are again reminiscent of the argument in *Associated Press* v. *National Labor Relations Board, supra,*[17] are beside the point.

So far as appellants' objection under the First Amendment is specific, it appears to be that the decree takes from the press the right to their own "copy" and violates the "fundamental right defined by Milton" as "the just retaining of each

[17] Cf. the argument in the *N. L. R. B.* case, 301 U. S. at 733: "* * * Suppose one of our dictatorial neighbors in Europe should say * * * to the newspaper publisher, 'You shall not dismiss this man because he is a member of the Nazi or the Fascist or the Communist Party; you cannot dismiss him for that reason,' is it conceivable that that would leave the press free? * * * Indeed, what more effective engine could dictatorial power employ than to name the man who shall furnish the food of facts on which the public must feed?"

man his several copy; which God forbid should be gainsaid." (AP Br. 101). To this objection the answer is twofold. In the first place, the property right in one's own copy, important as it may be, is hardly an element of the guarantee of freedom of the press, and it was not so conceived by Milton himself, who spoke of it as a "pretense" by which "some old patentees and monopolizers in the trade of bookselling" supported an order requiring the registration of the printer's name in all books published.[18]

[18] The passage, which occurs in the final paragraph of Milton's *Areopagitica*, reads as follows:

"And as for regulating the press, let no man think to have the honour of advising ye better than yourselves have done in that order published next before this, 'That no book be printed, unless the printer's and the author's name, or at least the printer's, be registered.' * * * Whereby ye may guess what kind of state prudence, what love of the people, what care of religion or good manners there was at the contriving, although with singular hypocrisy it pretended to bind books to their good behaviour. And how it got the upper hand of your precedent order so well constituted before, if we may believe those men whose profession gives them cause to inquire most, it may be doubted there was in it the fraud of some old patentees and monopolizers in the trade of bookselling; who under pretence of the poor in their company not to be defrauded, and the just retaining of each man his several copy, (which God forbid should be gainsaid,) brought divers glossing colours to the house, which were indeed but colours, and serving to no end except it be to exercise a superiority over their neighbours; men who do not therefore labour in an honest profession, to which learning is indebted, that they should be made other men's vassals. * * *"

Secondly, nothing in the decree as entered or as sought to be modified by the Government deprives publishers of the right to retain their own copy. AP news is not required to be distributed to nonmembers; what is required is that there be an end of concerted withholding of news from competitive papers which may in all other respects satisfy the conditions of admission to membership. With respect to news of local origin having its source with an individual member paper, the Government does not seek to require the indiscriminate distribution of such news; it seeks only to have the member papers free themselves from the agreement whereby they have precluded individual freedom of contract with respect to the distribution of such news.

So far as the concept of the freedom of the press is at all relevant here, it may fairly be said that the relief granted and sought is in the interest of greater, and not less, freedom. The great objectives of the constitutional provision—to "preserve an untrammeled press as a vital source of public information" (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250)—will, we submit, be furthered and not abridged by removing barriers erected by private combination against access to reports of world news. So the court below concluded.

CONCLUSION

For the reasons stated, the decision below should be affirmed as modified in accordance with the views advanced in points II and III of the Argument.

Respectfully submitted.

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NOVEMBER 1944.

APPENDIX

Table A

Paper	1st year rejected	Year admitted	Time lag (years)	Record Reference
New York (N. Y.) Evening Journal	1900	1941	41	689
Chicago (Ill.) American	1900	1933	33	689
Red Wing (Minn.) Republican	1905	1940	35	692
Portland (Oreg.) Journal	1906	1931	25	693
Pasadena (Calif.) Evening Star News	1919	1932	13	700
New York (N. Y.) Evening Sun	1920	1923	3	701
New York (N. Y.) Daily and Sunday News	1925	1927	2	706
7 papers			152	

Table B

Paper	1st year rejected	Year admitted	Time lag (years)	Record Reference
Fort Collins (Colo.) Courier	1902	1923	21	690
Springfield (Ill.) News	1904	1918	14	691
Appleton (Wis.) Post	1904	1921	17	691
Flint (Mich.) Journal	1904	1904	0	692
Fremont (Nebr.) Tribune	1904	1912	8	691
Nebraska City (Nebr.) News	1904	1925	21	691
Fond du Lac (Wis.) Reporter	1905	1926	21	692
Wallace (Idaho) Press	1906	1906	0	694
Frankfort (Ky.) Evening News	1909	1911	2	694
Alton (Ill.) Telegraph	1910	1919	9	694
Alton (Ill.) Times	1910	1916	6	695
Springfield (Ill.) Record	1911	1918	7	695
Everett (Wash.) Morning Tribune	1912	1914	2	695
St. Cloud (Minn.) Times	1914	1914	0	696
Austin (Tex.) Morning American	1914	1917	3	697
Battle Creek (Mich.) Evening News	1915	1917	2	697
Richmond (Ind.) Item	1915	1916	1	697
Joliet (Ill.) Herald News	1917	1917	0	698
Long Beach (Calif.) Evening Press	1919	1924	5	699
Maryville (Mo.) Evening Democrat Forum	1919	1930	11	700
Vallejo (Calif.) Times	1922	1943	21	704
Norristown (Pa.) Daily Herald	1922	1943	21	704
Long Beach (Calif.) Daily Telegram	1923	1923	0	704
Baltimore (Md.) Evening Sun	1924	1928	4	705
Rochester (N. Y.) Times-Union	1924	1928	4	706
25 papers			200	

provided, however, that nothing herein shall prevent the adoption by The Associated Press of new or amended by-laws which will restrict admission, provided that the procedure and the conditions for admission to membreship of an applicant seeking membership in a city and "field" (morning, evening or Sunday) in which there are one or more existing memberships shall be the same as the procedure and conditions for admission to membership of an applicant seeking membership in a city and field in which there is no existing membership; and that no applicant shall be required as a condition to admission to make any money payment or give any other consideration, directly or indirectly, to any AP member or members; and that the by-laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and "field" shall not be taken into consideration in passing upon his application; and that the by-laws shall contain such further provisions as may be reasonably necessary or appropriate to assure observance of this declaration.

U. S. GOVERNMENT PRINTING OFFICE: 1944