

Different law.
New JOA terms.
Same old Deseret News.

In the many months since we began challenging the 2013 Joint Operating Agreement engineered by the Deseret News, we often hear this counter-argument to our allegation that the JOA's Section 10 veto power violates antitrust law:



Bart Barker I believe both the Tribune and the Deseret News have had in their agreement the right to approve of their competitor's buyer, ever since they signed a joint operating agreement many decades ago.

The News didn't recently "weasel" its way into this.

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It was only 15 years ago that a sprawling lawsuit was filed in federal court over ownership of The Salt Lake Tribune. Those with long memories may believe we are simply rehashing legal issues of yore with our new public-interest antitrust lawsuit in federal court.

We are not.

The facts, laws and issues in both disputes are very confusing -- so confounding that even the defendants and their lawyers frequently misstate them. Adding to the confusion is the term "veto power," which has been bandied about in both cases.

So, here, we will seek to clarify the difference between Section 10 of the 2013 JOA, which we allege violates antitrust law, and Section 2 of the 1982 JOA, which was at issue 15 years ago in litigation by the McCarthy family, the historic owners of the Tribune who were trying desperately to buy back their newspaper.

By way of introduction, here are a few other differences between the cases:

- The old dispute was fundamentally a state-law contract dispute; our lawsuit is brought under the Clayton and Sherman antitrust acts.
- The old case involved multi-millionaires, media moguls and titans of industry. (In fact, there were so many deep-pocketed parties that the Deseret News estimated the litigation to be the most costly in Utah history.) Our public-interest lawsuit, conversely, is brought by a small nonprofit group representing newspaper readers and advertisers.
- At the conclusion of the 2000 litigation, the Tribune continued to publish, albeit with an out-of-state owner; this time around, we maintain the stakes for the community are higher, as the continued existence of the newspaper hangs in the balance.
- And finally, besides challenging the veto-power language in Section 10 under antitrust law, we also are challenging brand-new Section 2 provisions according the Deseret News 70 percent of the two newspapers' revenue. This profit split has cut the Tribune's revenue

share in half, sending it into a downward spiral. Additionally, Section 2 turns over control of the two newspapers' joint advertising and production business to the News. And it outlines "Reserved Matters," including the mechanisms for reducing the Tribune's circulation area, cutting its days of publication, and ceasing to publish the Tribune altogether.

So, then, here below is Section 2 of the 1982 JOA, which is a mutual prohibition on the alienation of stock in the two newspapers' joint business -- then known as NAC or Newspaper Agency Corp and now named Utah Media Group. ("Alienation" refers to the sale or transfer of property.)

The Deseret News leaders argued a few decades back that the Tribune's owners violated Section 2 when the paper merged with TCI without News' consent; therefore, their theory was, the News could prevent the re-purchase of the Tribune by its historic owners.

2. STOCK RESTRICTIONS.

The parties hereto shall continue the operations of the Agency Corporation and shall not assign, sell, transfer, mortgage, pledge or otherwise dispose of their stock in the Agency Corporation nor voluntarily permit alienation thereof by any means during the term of this Agreement or any renewal or extension thereof, and such stipulation shall remain printed on the face of the stock certificates heretofore issued to the parties hereto as aforesaid, or any stock certificates representing shares of the Agency Corporation hereafter issued.

And here is Section 10 of the 2013 JOA, which the Deseret News sought after its bitter years-long contest with the McCarthy family over Tribune ownership:

10. Ownership of K-T, LLC. The parties confirm that this Agreement creates a special relationship between them that must be honored and preserved. It is therefore agreed that the present ownership of K-T, LLC (i.e., one hundred percent owned by MediaNews Group, Inc.) shall not be changed without written consent of DNPC, which shall not be unreasonably withheld; provided, however, that DNPC shall have the unrestricted discretionary right to withhold its consent if any sale, transfer or conveyance in one or more transactions would result in more than 49% of the ownership of K-T, LLC being held by any entity or entities other than MNG or if any such owner or owners of a minority interest in K-T, LLC, individually or collectively, would have the right to manage or participate in management of K-T, LLC or compel it to take or forbear any action with respect to this Agreement or the management of the NAC.

The dispute over Tribune ownership 15 years ago implicated contract law, with all its difficult questions of intent of the parties and enforceability. Our challenge of Section 10 in the new JOA is much more straightforward.

The Newspaper Preservation Act -- the limited exemption to antitrust law that enabled joint businesses like NAC -- states that there can be "no merger,

combination, or amalgamation of editorial or reportorial staffs” (between participants) and that “editorial policies” shall be “independently determined.”

Yet Section 10 of the 2013 JOA at issue in our lawsuit purports to give the Deseret News an unconditional, unrestricted veto power over the identity of any new owner of The Salt Lake Tribune, and the same veto power over any potential investor who would be entitled to “participate in management.”

We argue that the editorial policy of a newspaper is determined by, or at least subject to being determined by, the newspaper’s owner.

That is obvious, right?

And, not incidentally, it is the defendants who will have the burden of proof on this issue. The Deseret News and the New York owner of the Tribune will have to prove the unilateral Section 10 veto power does not violate the Newspaper Preservation Act; we won't have to show that it does. Not that it would be difficult for us to demonstrate: On its face, the Section 10 language inhibits complete editorial independence.

The leaders and owners of the Deseret News rarely deign to publicly discuss their deal with the New York owner of the Tribune, despite its ramifications for our community and marketplace of ideas. On the rare occasions they do, they will argue that business partnerships often have language restraining "alienability" like rights of first refusal or consent requirements.

But such arguments ignore the rarity of a newspaper Joint Operating Agreement in federal law.

A contract between competing newspapers that merges their business operations violates antitrust law. That was the position of the U.S. Justice Department in the 1960s when it first challenged such JOA deals. The U.S. Supreme Court agreed.

It took an act of Congress to legalize newspaper JOAs. But the Newspaper Preservation Act, passed by Congress in 1970, provides only a limited exemption. It is a sparsely written law, not clearly drafted. But it does at least unambiguously require independent editorial policies of participating newspapers.

The U.S. Department of Justice remains the enforcing agency for the few JOA's that still exist today. Its lawyers have been skeptical of alienability language like rights of first refusal. The only federal court to address the question in the context of a JOA also called such provisions "suspect" under the Newspaper Preservation Act.

The massive case involving the McCarthey family never went to trial. In 2003, when the 10th Circuit Court of Appeals considered some of the issues raised, the three-judge panel found the family was likely to prevail on their claim that they had a contractual right to buy back the Tribune. (The appeals court suggested the McCartheys could exercise their option by buying company stock rather than assets back from from Dean Singleton's MediaNews Group, which acquired the Tribune in 2000 with the Deseret News' blessing.)

When considering the language of Section 2 in the 1982 JOA, the appeals court concluded that it was not the sweeping "veto power" the Deseret News (and the McCarthey family) believed it to be.

Here is a snippet from the appeals court's discussion of Section 2:

Second, the stock transfer restriction cannot in fact be wielded as the club that Tribune Publishing imagines. If MediaNews wants to transfer ownership of The Tribune to Tribune Publishing, it can do so, and Deseret News would have no ability to stop the transfer. By restructuring a sale of the paper as a sale of KTLIC and not as a sale of the assets of KTLIC, MediaNews could entirely avoid Section 2 of the JOA.⁷ Therefore, the stock transfer restriction cannot be used, as Tribune Publishing claims, to keep The Tribune out of the hands of

⁷Of course, we do not suggest that the court could restructure the deal as a stock transaction, rather than as an asset transaction. That, it seems to us, would be beyond the authority of the court. We mention this possibility only to show that Deseret News does not have unilateral power to prevent Tribune Publishing from acquiring de facto control over KTLIC interest in the JOA if Media News and Tribune Publishing decided to restructure the deal as a stock transaction.

So, there, the appeals court finds no unilateral "veto power" in the 1982 JOA. But there is one in the 2013 JOA.

The new JOA we are challenging contains more than one section addressing alienability. There is Section 10, of course; and Section 2 contains the prohibition on NAC stock transfer among other features; Section 21 restricts assignment or delegation of "any of the rights or obligations" of either participant "without the written consent of the other."

We focus on Section 10 not only because it violates antitrust law on its face, but also because it is such an insidious power. A right of first refusal is a narrow right, enabling the right-holder to choose just one party – itself – as the new owner. Conversely, the Section 10 power allows the Deseret News to quietly veto any attempted sale of the Tribune at any time.

The News claims it has never exercised its purported Section 10 power. It does not need to. The mere existence of this power creates a chilling effect, discouraging prospective purchasers of the Tribune who doubt they could ever obtain the Deseret News' blessing.