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Motion Picture Split Agreements: An Antitrust Analysis

William J. Borner

MOTION PICTURE SPLIT AGREEMENTS: AN ANTITRUST ANALYSIS

INTRODUCTION

Motion picture exhibitors[1] in a particular geographic area often allocate among themselves the first right to negotiate with distributors[2] for licenses to show upcoming films. They then refrain from submitting competing offers for films that have been allocated to other members of the "split agreement"[3] until the first right of negotiation has lapsed. This practice of splitting the rights to negotiate for upcoming films has been prevalent in the film industry for over thirty-five years.[4]

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1. An exhibitor may be defined as "[a]ny person engaged in the business of operating one or more theatres." Pa. Stat. Ann. tit. 73, § 203-3 (Purdon Supp. 1983-1984). Exhibitors can be classified as either circuits or independents. Circuits are large chains of theaters with common ownership. Independents are smaller, unaffiliated theater owners. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 488 (5th Cir. 1982).

2. A distributor may be defined as "[a]ny person engaged in the business of renting, selling or licensing feature motion pictures to exhibitors." Pa. Stat. Ann. tit. 73, § 203-3 (Purdon Supp. 1983-1984). There are seven major distributors of motion pictures: Buena Vista Distribution Co., Columbia Pictures Industries, Inc., Paramount Pictures Corp., Twentieth Century-Fox Film Corp., MGM-UA Entertainment Co., Universal Film Exchanges, Inc., and Warner Brothers Distributing Corp. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 488, 487 n.1 (5th Cir. 1982); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1054 (W.D. Va. 1981). These distribution companies are affiliated with production companies which finance the motion pictures. Together the "majors" distribute films which produce over 85% of the annual national box office revenue. *Southway Theatres*, 672 F.2d at 487-88; *Greenbrier Cinemas*, 511 F. Supp. at 1054. *See generally* Cassady, *Impact of the* Paramount *Decision on Motion Picture Distribution and Price Making*, 31 S. Cal. L. Rev. 150, 154-55 (1958) (describing market structure of film distribution); Whitman, *Anti-Trust Cases Affecting the Distribution of Motion Pictures*, 7 Fordham L. Rev. 189, 189 (1938) (same).

There are also two large independent unaffiliated distributors: Embassy Pictures Corp. (formerly Avco Embassy Pictures Corp.) and Orion Pictures, Inc. (formerly Filmways Pictures, Inc.). United States v. Capitol Serv., Inc., 568 F. Supp. 134, 136 (E.D. Wis. 1983); *see Greenbrier Cinemas*, 511 F. Supp. at 1049 & nn.5, 6.

3. Split agreements are also known as "split of product" agreements, "splits" and "surgery." These terms will be used interchangeably throughout this Note.

4. Split agreements "have been widely used in the motion picture industry, especially since the case of *United States v. Paramount Pictures, Inc.* [1948]." Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1049 (W.D. Va. 1981) (citation omitted); *see* Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 292 n.7 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); Gordon, *Horizontal and Vertical Restraints of Trade: The Legality of Motion Picture Splits Under the Antitrust Laws*, 75 Yale L.J. 239, 241 (1965) ("Splits are the prevailing mode of market allocation for film product."); Comment,

Some distributors claim that split agreements are illegal restraints of trade under section 1 of the Sherman Act[5] because splits tend to reduce competition for film licenses.[6] Moreover, they argue that these agreements are per se illegal[7] because they are so inherently anticompetitive

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An Experiment in Preventive Anti-trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount *Decrees*, 74 Yale L.J. 1040, 1073 & n.133 (1965) (splits are "very common") [hereinafter cited as *The* Paramount *Decrees*]; United States Dep't of Justice, Press Release, Apr. 1, 1977, at 1 ("Split agreements have been widely used by motion picture exhibitors for decades."); *see also* Cassady, *supra* note 2, at 164 (discussing splits as an alternative to competitive bidding prior to 1958).

5. 15 U.S.C. § 1 (1976). Section 1 provides, in part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* The language of § 1 is very broad, proscribing "every" contract that restrains trade. A literal reading of the statute would prohibit all contracts, because "[t]o bind, to restrain, is of their very essence." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *see* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-43 (1982); United States v. Topco Assocs., Inc., 405 U.S. 596, 606 (1972); United States v. Joint Traffic Ass'n, 171 U.S. 505, 566-68 (1898). The legislative history of the Sherman Act makes clear, however, that Congress intended for the courts to delineate the contours of the statute by drawing upon the common law. 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman); *see* United States v. Topco Assocs., Inc., 405 U.S. 596, 606 (1972). Early on, the courts recognized that a narrow reading of § 1 was inappropriate. Instead, the language of the Act has been read as protecting the "freedom from undue restraint on the right to contract," Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911), and precluding only those conspiracies which "unreasonably" restrain trade. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); United States v. Topco Assocs., Inc., 405 U.S. 596, 606-07 (1972); Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958); Standard Oil Co. v. United States, 221 U.S. 1, 64-68 (1911). *See generally* L. Sullivan, Handbook of the Law of Antitrust §§ 63-65 (1977) (discussing early development of antitrust laws); Forkosch, *Antitrust in the United States: Some Thoughts On Historical and Recent Developments*, 11 Gonz. L. Rev. 892 (1976) (same).

6. *See, e.g.*, Syufy Enters. v. National Gen. Theatres, Inc., 575 F.2d 233, 234 (9th Cir.), *cert. denied*, 439 U.S. 954 (1978); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1248 (C.D. Cal. 1982). Splits have also been challenged by the United States Government, *e.g.*, United States v. Capitol Serv., Inc., 568 F. Supp. 134, 135-36 (E.D. Wis. 1983). Split agreements are frequently challenged by exhibitors. See *infra* notes 62, 153 and accompanying text.

7. Although the term "per se" was used for the first time in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940), the classic definition of the doctrine was enunciated in 1958 by Justice Black in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958):

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principal of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity

that elaborate inquiry into the "precise harm they have caused or the business excuse for their use"[8] is unwarranted.[9]

The Department of Justice has recently adopted the position that split agreements are per se illegal.[10] Some courts, however, have held that conclusive presumptions regarding the anticompetitive nature of splits are unjustified.[11] These courts require a detailed "rule of rea-

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> for an incredibly complicated and prolonged economic investigation into the entire history of the the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

Id. at 5 (citations omitted); *accord* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 645-47 (1980) (per curiam); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 7-8 (1979); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 & n.16 (1977); United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972); White Motor Co. v. United States, 372 U.S. 253, 259-62 (1963); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-65 (5th Cir. 1980); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). *See generally* L. Sullivan, *supra* note 5, §§ 63-64, 67, 70-72 (development and scope of per se rule); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775 (1965) (same); von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 UCLA L. Rev. 569, 569-82 (1964) (same).

There are several significant reasons for allowing generalizations and conclusive presumptions to be drawn in antitrust cases. First, the per se rule provides guidance to the person planning a new transaction by delineating which type of restraints are proscribed by the Act. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8 n.11 (1979); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1979); United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); *see* Van Cise, *The Future of Per Se in Antitrust Law*, 50 Va. L. Rev. 1165, 1165-66 (1964); Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531, 1535 (1958) [hereinafter cited as *Concerted Refusals to Deal*]. Second, it benefits the parties and the judiciary by reducing the need for a complicated and prolonged investigation into whether a particular restraint is unreasonable. *Maricopa County Medical Soc'y*, 457 U.S. at 343; *Continental T.V., Inc.*, 433 U.S. at 50 n.16; *Northern Pac. Ry.*, 356 U.S. at 5; *Concerted Refusals to Deal*, *supra*, at 1535. Third, it avoids the necessity of judicial resolution of technical and complex issues which are often beyond the capabilities of the judge. *Maricopa County Medical Soc'y*, 457 U.S. at 343; *Topco Assocs., Inc.*, 405 U.S. at 609-10 & n.10; F. Scherer, Industrial Market Structure and Economic Performance 440 (1970).

8. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

9. See *supra* note 6 and accompanying text.

10. United States Dep't of Justice, Press Release, Apr. 1, 1977, at 2.

11. *E.g.*, Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 293 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123

son"[12] inquiry into all of the circumstances surrounding the use and effect of a particular split agreement to determine whether it is anticompetitive.

Part I of this Note discusses the structure of the motion picture industry and the methods of film licensing and illustrates how splits operate within this framework. Part II scrutinizes the anticompetitive and procompetitive effects of split agreements. In particular, it discusses whether split agreements can be characterized as any of the practices—group boycotts, horizontal market divisions or horizontal price fixing agreements—that courts have found to be so thoroughly anticompetitive that they are presumed illegal.[13] After determining that these agreements may be characterized as horizontal market divisions, horizontal price fixing agreements and, depending upon the nature of the agreement, group boycotts, this Note examines the economic justifications for the use of splits to determine whether they fall within the ambit of the per se rule. This Note concludes that splits lack procompetitive effects sufficient to justify an extensive inquiry into their purpose and effect and, therefore, are per se illegal.

(1964); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1060 (W.D. Va. 1981). See *infra* note 175 and accompanying text.

12. Justice Brandeis, in Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), announced what is still the classic formulation of the rule of reason:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238. In essence, the rule of reason requires the judge to decide whether, under all of the circumstances of the case, the allegedly restrictive practice imposes an unreasonable restraint on competititon. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688-92 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); United States v. Topco Assocs., Inc., 405 U.S. 596, 606-07 (1972); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933); United States v. Trenton Potteries Co., 273 U.S. 392, 395 (1927); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362 (5th Cir. 1980). *See generally* L. Sullivan, *supra* note 5, §§ 65-69, 72 (1977) (development and scope of rule of reason); Bork, *supra* note 7, at 820-28 (same).

13. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). Tying arrangements, which are defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product," are also per se illegal. *Id.*; *see* White Motor Co. v. United States, 372 U.S. 253, 259, 262-63 (1963); International Salt Co. v. United States, 332 U.S. 392, 394-96 (1947). Tying arrangements do not arise in the context of split agreements, and are thus beyond the scope of this Note.

I. The Motion Picture Industry and Split Agreements

A. *Motion Picture Licensing*

During the 1930's the motion picture industry was dominated by vertically integrated companies each of which functioned as producer, distributor and exhibitor.[14] In *United States v. Paramount Pictures, Inc.*,[15] the Supreme Court ordered these companies to divest themselves of their exhibition operations.[16] The Court found that vertical integration in this industry violated the Sherman Act, in part because small independent exhibitors were unable to compete for films in a market dominated by exhibitors affiliated with national distributors.[17] The Court thus recognized that competition in the area of film licensing outweighed any efficiency-producing benefits of affiliation.[18]

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14. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 488 (5th Cir. 1982); *id.* at 498 app. (lower court opinion); M. Conant, Antitrust in the Motion Picture Industry 84-112 (1960); M. Mayer, The Film Industries 109 (rev. ed. 1978); Cassady, *supra* note 2, at 153-57. *See generally The* Paramount *Decrees, supra* note 4 (discussing *Paramount* and its progeny); Comment, *Restraints on Motion Picture Exhibition and the Anti-Trust Laws*, 33 Nw. U.L. Rev. 424 (1938) (discussing the structure of the motion picture industry).

15. 334 U.S. 131 (1948).

16. *Id.* at 152.

17. *Id.* at 149-51, 154-55, 159-60, 162. When theater ownership was tied financially to film distributorship, the Court found that "the natural gravitation of films is to the theatres in whose earnings the distributors have an interest." *Id.* at 151. Larger affiliated or circuit exhibitors were given many advantages that were not available to smaller, independent theater owners. In addition to being given the opportunity to rent the film, they were allowed deductions in rental fees for showing double features, maintaining extended exhibition periods and providing special preview exhibitions. *Id.* at 159-60; *see* Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 498 app. (5th Cir. 1982) (lower court opinion).

18. Although the Court refused to require that motion pictures be licensed only by a competitive bidding system, as the district court had recommended, United States v. Paramount Pictures, Inc., 70 F. Supp. 53, 73-74 (S.D.N.Y. 1946), *aff'd in part, rev'd in part and remanded*, 334 U.S. 131 (1948), it was not because the Court did not want a competitive atmosphere. In fact, the Court found a competitive bidding system commendable. *Paramount Pictures*, 334 U.S. at 162. The Court did not, however, want to grant a remedy that "involves the judiciary so deeply in the daily operation of this nation-wide business." *Id.* Because the Court rejected the district court's requirement of competitive bidding, the Court remanded the case to enable the district court to fashion a new decree. *Id.* at 166. The district court, upon further consideration, ordered additional divorcement of the exhibition, production and distribution branches of the industry. 85 F. Supp. 881, 895-96 (S.D.N.Y. 1949).

For general discussions of *Paramount* and all its ramifications, see R. Cassady & R. Cassady, The Private Antitrust Suit in American Business Competition 6-11, 32-37 (1964); M. Conant, *supra* note 14, at 84-106; M. Mayer, *supra* note 14, at 108-16; Cassady, *supra* note 2, at 150-60, 177-80; Note, *Judicial Regulation of the Motion Picture Industry: The* Paramount *Case*, 95 U. Pa. L. Rev. 662 (1947); *The* Para-

After *Paramount*, competitive bidding and competitive negotiations became the predominant methods of film licensing.[19] In competitive bidding, distributors invite exhibitors to bid for specific films.[20] After examining the bids received, distributors license the film to the exhibitors of their choice.[21] If dissatisfied with the bids submitted a

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mount *Decrees*, *supra* note 4; Note, *Legislation By Consent in the Motion Picture Industry*, 50 Yale L.J. 854 (1941).

19. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 488-89 (5th Cir. 1982); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 882 (8th Cir. 1978); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 289 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1050-51 (W.D. Va. 1981); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 415 (S.D. Ohio 1980), *aff'd in part and remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

In addition to competitive bidding and competitive negotiations, motion pictures are licensed pursuant to state motion picture licensing acts. *See, e.g.*, Ala. Code §§ 8-18-1 to -6 (Supp. 1979) (first motion picture licensing act); Pa. Stat. Ann. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1983-1984). Twenty-three states have enacted motion picture licensing acts. United States v. Capitol Serv., Inc., 568 F. Supp. 134, 138 (E.D. Wis. 1983); Note, *Motion Picture Licensing Acts: An Analysis of the Constitutionality of Their Provisions*, 51 Fordham L. Rev. 293, 295 & n.16 (1982) [hereinafter cited as *Licensing Acts*].

Films are also licensed through non-competitive bidding, a variety of competitive bidding, in which the distributor will contact one theater in a given market and license all its films to that theater, without contacting any other theater. Hence, there is no competition among exhibitors. *See* General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1249-50 (C.D. Cal. 1982); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1050-51 (W.D. Va. 1981).

20. *E.g.*, Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 488-89 (5th Cir. 1982); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 137-38 (E.D. Wis. 1983); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1050 (W.D. Va. 1981); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 415 (S.D. Ohio 1980), *aff'd in part and remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982); Cinema-Tex Enters. v. Santikos Theaters, Inc., 414 F. Supp. 640, 641 & n.3 (W.D. Tex. 1975), *modified*, 535 F.2d 932 (5th Cir. 1976); *see* Cassady, *supra* note 2, at 160-64.

21. Selecting the most favorable bid is usually a very difficult process. The distributor will consider, among other factors, rental fee (generally a percentage of the gross box office receipts), guarantee or advance payment, theater size, theater location, theater reputation and past grossing history, theater suitability for the subject matter of the film, length of run (the number of weeks the exhibitor will show the film), play dates (days of the week the picture will be shown), and clearance (amount of time between runs). *E.g.*, Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 489 (5th Cir. 1982); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 882 (8th Cir. 1978); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 289-90 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964). *See generally* M. Mayer, *supra* note 14, at 114 (discussing difficulty of selecting most favorable bid); Gordon, *supra* note 4, at 258 (same); *The* Paramount *Decrees*, *supra* note 4, at 1086 (same). Because of the number of terms included in a bid, and their great variety, comparing and contrast-

distributor may reject them and opt for an alternate method of licensing,[22] such as competitive negotiations. In competitive negotiations, distributors contact the individual exhibitor to whom they wish to license their films. They then bargain with the exhibitor to arrive at mutually agreeable terms.[23]

B. *Split Agreements*

The dissatisfaction of exhibitors with the competitive bidding process, particularly the "large cash guarantees which the exhibitors were required to put up to get pictures,"[24] provided the impetus for the development of split agreements. Split agreements ensure that each split member has an initial right to bid or opportunity to negotiate for certain films without competition from other split members.[25] Because other split members agree not to submit bids for films that have not

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ing bids to determine the most lucrative offer is a task distributors seek to avoid. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 162-63 (1948); M. Mayer, *supra* note 14, at 114; Cassady, *supra* note 2, at 164; Gordon, *supra* note 4, at 258.

22. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 488 (5th Cir. 1982); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 882 (8th Cir. 1978); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 289 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1050 (W.D. Va. 1981); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 415 (S.D. Ohio 1980), *aff'd in part and remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

23. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 489 (5th Cir. 1982); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 138 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1249 (C.D. Cal. 1982); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1050 (W.D. Va. 1981); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 415 (S.D. Ohio 1980), *aff'd in part and remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982). *See generally* Cassady, *supra* note 2, at 165-77 (describing competitive negotiations).

24. Cinema-Tex Enters. v. Santikos Theaters, Inc., 414 F. Supp. 640, 641 (W.D. Tex. 1975), *modified*, 535 F.2d 932 (5th Cir. 1976); *see* Brown v. Western Mass. Theatres, Inc., 288 F.2d 302, 305 (1st Cir. 1961) ("competitive bidding was suicidal for the exhibitors"); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 141-43 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1254 (C.D. Cal. 1982).

25. Split agreements take two basic forms—the company split and the picture split. In a company split, exhibitors who are members of the split assign a member the right to negotiate for all of the upcoming film releases of a given distributor without interference from fellow split members. Cassady, *supra* note 2, at 164; *accord* Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 491 (5th Cir. 1982); Syufy Enters. v. National Gen. Theaters, Inc., 575 F.2d 233, 234 (9th Cir.), *cert. denied*, 439 U.S. 954 (1978); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 139 (E.D. Wis. 1983). In the more common picture splits, the split members agree that one member shall have the right to negotiate for a specific film before fellow members may do so. Syufy Enters. v. National Gen. Theatres, Inc., 575 F.2d 233, 234 (9th Cir.), *cert. denied*, 439 U.S. 954 (1978); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 141 (E.D. Wis. 1983); Cassady, *supra* note 2, at 164.

been designated to them, initially the split designee faces competition only from exhibitors who are not members of the split.[26] Although split agreements may vary in other respects, they all require that participants refrain from competing against the split designee while its right to bid or opportunity to negotiate continues.[27]

The duration of this period of limited competition depends upon the terms of the split agreement. Some split agreements prohibit the submission of bids by other members until a specified period of time has elapsed.[28] Other agreements restrict competition only until the distributor has rejected the split designee's bid.[29] After the initial right has lapsed, any member of the split is free to submit bids for the film, unless the split agreement provides that the negotiation right is to be reassigned to another split member.[30]

II. Split Agreements and the Sherman Act

Like other restraints of trade, split agreements are illegal under the Sherman Act if they unreasonably destroy or suppress competition.[31]

In practice, if there are two exhibitors, one exhibitor will divide the films into two lists. The other exhibitor then has the first choice of lists. For the next group of films, the parties reverse roles. Gordon, *supra* note 4, at 240; *The* Paramount *Decrees*, *supra* note 4, at 1108-09.

26. Wilder Enters. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 (4th Cir. 1980); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971).

27. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1252-53 (C.D. Cal. 1983); *see, e.g.*, Wilder Enters. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 (4th Cir. 1980); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 882 (8th Cir. 1978); Syufy Enters. v. National Gen. Theatres, Inc., 575 F.2d 233, 234 (9th Cir.), *cert. denied*, 439 U.S. 954 (1978); Cinema-Tex Enters. v. Santikos Theaters, Inc., 535 F.2d 932, 933 (5th Cir. 1976); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 205 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 292 n.7 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 145-46 (E.D. Wis. 1983); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1049 (W.D. Va. 1981); United States Dep't of Justice, Press Release, Apr. 1, 1977, at 1.

28. *See, e.g.*, United States v. Capitol Serv., Inc., 568 F. Supp. 134, 143 & n.6 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982).

29. *See, e.g.*, Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 205 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1052, 1054-55 (W.D. Va. 1981); Cinema-Tex Enters. v. Santikos Theaters, Inc., 414 F. Supp. 640, 643 (W.D. Tex. 1975), *modified*, 535 F.2d 932 (5th Cir. 1976).

30. In some splits, the exhibitors agree that if the designee's bid is rejected by the distributor, the split may reconvene and reallocate the right to negotiate for that film to another split member. *See* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 146 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982).

31. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); United States v. Topco Assocs., Inc., 405 U.S. 596, 606-08 (1972); Northern Pac. Ry.

Distributors and the Department of Justice argue that split agreements constitute horizontal market divisions[32] and horizontal price fixing agreements.[33] Independent exhibitors excluded from splits argue that the agreements constitute group boycotts.[34] If split agreements can be characterized as any of these activities, and lack sufficient procompetitive virtues to overcome the presumption that such activities are anticompetitive, per se treatment is appropriate.[35] If the potential procompetitive benefits of splits justify the time and expense of evaluating them individually, however, the actual competitive effect of each split must be analyzed under the rule of reason to determine whether the split imposes an unreasonable restraint on competition.[36]

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v. United States, 356 U.S. 1, 5 (1958); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 64-68 (1911). See *supra* note 5.

32. *E.g.*, Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 890 (8th Cir. 1978); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 154-55 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982). *See* Gordon, *supra* note 4, at 240-41 (splits are a form of market division); United States Dep't of Justice, Press Release, Apr. 1, 1977, at 1 (splits are agreements to allocate market). See *infra* notes 65-83 and accompanying text.

33. United States Dep't of Justice, Press Release, Apr. 1, 1977, at 2; *e.g.*, Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 890-92 (8th Cir. 1978); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 149-54 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1248 (C.D. Cal. 1982). See *infra* notes 84-112 and accompanying text.

34. *E.g.*, Wilder Enters. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1140 (4th Cir. 1980); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 890 (8th Cir. 1978); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971). See *infra* notes 37-64 and accompanying text.

35. Per se treatment is reserved for business practices which are "so plainly anticompetitive that no elaborate study . . . is needed to establish their illegality." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978); *see* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977) ("manifestly anticompetitive"); White Motor Co. v. United States, 372 U.S. 253, 263 (1963) ("naked restraints of trade with no purpose except stifling of competition"); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) ("pernicious effect on competition and lack of any redeeming virtue"); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980) ("plainly anticompetitive on their face and, equally plainly, serve no legitimate procompetitive purpose"). See *supra* note 7 and accompanying text.

36. *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979); White Motor Co. v. United States, 372 U.S. 253, 263 (1963); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 167, 170 (3d Cir. 1979); Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119, 127 & n.6 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); Van Cise, *supra* note 7, at 1173. See *supra* note 12 and accompanying text.

A. *Classification Analysis*

1. Group Boycotts

"[T]here is more confusion about the scope and operation of the *per se* rule against group boycotts than . . . any other aspect of the *per se* doctrine."[37] Much of this confusion is due to what the Supreme Court recently referred to as the "marked lack of uniformity in defining the term [boycott]."[38] Despite these problems, the Court has consistently declared group boycotts to be among the types of business activity that are per se violations of the Sherman Act.[39]

The "classic boycott"[40] involves an agreement among competitors at the same level designed either to impede entry into the market or to drive existing competitors from it.[41] In split agreements, by contrast, competitors by acting together are able to gain better trade terms from members of a different market level than they would if they competed with each other.[42] Whether this type of coercive conduct, which is aimed at members of a different market level, is properly

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37. L. Sullivan, *supra* note 5, § 83, at 229-30; *see* United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1366 (5th Cir. 1980); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); P. Areeda, Antitrust Analysis ¶ 370, at 495-96 (3d ed. 1981); R. Bork, The Antitrust Paradox 330 (1978); *Concerted Refusals to Deal*, *supra* note 7, at 1532 & nn.5, 6.

38. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 543 (1978); *see* Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119, 124-25 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 Rutgers L. Rev. 773, 799 (1974); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule*, 71 Nw. U.L. Rev. 818, 818-19 (1977) [hereinafter cited as *Specific Definition*].

39. *E.g.*, Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 250 (1968); United States v. General Motors Corp., 384 U.S. 127, 146 (1966); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60 (1961) (per curiam); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467-68 (1941); Binderup v. Pathe Exch., Inc., 263 U.S. 291, 311-12 (1923); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914); *see Concerted Refusals to Deal*, *supra* note 7, at 1535.

40. L. Sullivan, *supra* note 5, § 85; *see* Larry V. Muko, Inc. v. Southwestern Pa. Bldg. Constr. Trades Council, 670 F.2d 421, 429-30 & n.11 (3d Cir.), *cert. denied*, 103 S. Ct. 229 (1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978).

41. L. Sullivan, *supra* note 5, § 85; *see, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 208-09 (1959); Associated Press v. United States, 326 U.S. 1, 4, 8-9 (1945); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 611 (1914); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166-69 (3d Cir. 1979).

42. *See* E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); L. Sullivan, *supra* note 5, § 90.

characterized as a group boycott is a subject of disagreement between the Supreme Court, on the one hand, and lower courts and commentators on the other.[43]

In *Paramount Famous Lasky Corp. v. United States*[44] and *United States v. First National Pictures, Inc.*,[45] for instance, film distributors agreed upon the terms of standard form contracts to be offered to exhibitors, and refused to deal with exhibitors who did not comply with these terms.[46] The Supreme Court held that these agreements were conspiracies among the distributors designed to coerce exhibitors into accepting the dictated contract terms and, therefore, were in violation of section 1.[47] The Supreme Court has recently reaffirmed this position, stating that:

> [T]he boycotters and the ultimate target need not be in a competitive relationship with each other. This Court also has held unlawful, concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers.[48]

Similarly, when split members refrain from submitting bids that compete with the bid of the split designee, the distributor may in fact be forced to accept the terms of the designee's offer.[49]

Splits in which the first right of negotiation extends for a fixed period of time may be coercive if there are few or no exhibitors in the area that are not members of the split.[50] Under these circumstances

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43. See *infra* notes 57-58 and accompanying text.

44. 282 U.S. 30 (1930).

45. 282 U.S. 44 (1930).

46. *Famous Lasky*, 282 U.S. at 37, 41; *First Nat'l Pictures*, 282 U.S. at 50, 54.

47. *Famous Lasky*, 282 U.S. at 34; *First Nat'l Pictures*, 282 U.S. at 54-55. Although the term "per se illegal" was not used in either of these early cases, subsequent citations by the courts leave little doubt that a per se rule was applied. *See, e.g.*, United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 789 n.12 (7th Cir. 1981); *id.* at 794 (Bauer, J., dissenting); Azalea Drive-In Theatre, Inc. v. Hanft, 540 F.2d 713, 716 (4th Cir. 1976), *cert. denied*, 430 U.S. 941 (1977); GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1020 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977); *cf.* De Jong Packing Co. v. United States Dep't of Agriculture, 618 F.2d 1329, 1335 n.8 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980) (addressing, without resolving, question whether per se or rule of reason approach was taken in *Famous Lasky* and *First National Pictures*).

48. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 543 (1978).

49. *See* General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1259 (C.D. Cal. 1982); Cinema-Tex Enters. v. Santikos Theaters, Inc., 414 F. Supp. 640, 643 (W.D. Tex. 1975), *modified on other grounds*, 535 F.2d 932 (5th Cir. 1976).

50. Cinema-Tex Enters. v. Santikos Theaters, Inc., 414 F. Supp. 640, 643 (W.D. Tex. 1975), *modified on other grounds*, 535 F.2d 932 (5th Cir. 1976). Exhibitors, in general, prefer that all of the theater owners in their geographic area be members of the split because the result is fewer exhibitors against whom they must compete. *See*

distributors may not receive bids during the initial negotiation period that offer reasonably attractive alternatives to the split designee's bid.[51] If the initial negotiation period extends beyond the time within which it is economically practical or feasible for the distributor to wait for a more favorable offer, the distributor will be compelled to accept the split designee's terms.[52] Even if the distributor can wait until the designated period is over before licensing the films, other exhibitors may already have filled their schedules.[53] This is particularly true when there is a surplus of films on the market.[54] As a practical matter, therefore, the distributor will be forced to acquiesce in the split designee's terms.

Split agreements that require members to refrain from submitting competing offers only until the distributor has rejected the split designee's bid would not be characterized as boycotts under the Supreme Court's definition. Bids can be submitted by other members of the split if the distributor, finding the split designee's offer unsatisfactory, merely rejects the designee's bid.[55] The distributor then can choose the bid with the terms most favorable to it.[56] Characterization of split agreements as coercive boycotts is possible under the Court's definition depending upon the existence of competing exhibitors and the duration of the exclusive negotiation opportunity or bidding right.

A contrary position has been taken by commentators[57] and lower courts,[58] who disagree with the classification of coercive refusals to deal as per se illegal group boycotts. They argue persuasively that per

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General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255, 1257 (C.D. Cal. 1982).

51. *Cf.* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692-93 (1978) (analogous reasoning applied to competitive bidding among engineers).

52. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255, 1259, 1261 (C.D. Cal. 1982).

53. *Id.* at 1255, 1259, 1261; *see* Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1058 (W.D. Va. 1981).

54. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982).

55. *Id.* at 1258; *see* Wilder Enters. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1140 (4th Cir. 1980).

56. See *supra* note 21 and accompanying text.

57. P. Areeda, *supra* note 37, ¶ 370, at 495-96; L. Sullivan, *supra* note 5, § 90; Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847, 876-79 (1955); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685, 705 (1979); McCormick, *Group Boycotts—Per Se or Not Per Se, That is the Question*, 7 Seton Hall L. Rev. 703, 707-08 (1976); Woolley, *supra* note 38, at 775; *Specific Definition*, *supra* note 38, at 824-27; Comment, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131, 1150-52 (1980).

58. Board of Regents v. National Collegiate Athletic Ass'n, 707 F.2d 1147, 1160-61 (10th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3309 (U.S. Oct. 17, 1983) (No. 83-

se illegality should be reserved for "classic boycotts" used to suppress competition by impeding the entry of potential competitors into the market or by depriving them of essential trade relationships.[59] They suggest that coercive boycotts aimed at another market level[60] are more like price fixing agreements than classic boycotts in that the primary purpose of the arrangement is not to exclude the victim from competition, but rather to further the business interests of the conspiring parties.[61]

Under this characterization of group boycotts, splits may only be properly considered per se illegal in actions brought by exhibitors—the horizontal competitors that are excluded from competition.[62] There are, however, significant obstacles to such actions. A plaintiff-exhibitor bringing a suit against a defendant-exhibitor will generally have no cause of action, for it suffers no injury.[63] Exclusion from the splitting group will help, rather than harm, the exhibitor because instead of competing with potentially all of the exhibitors who are split members, it will have to compete only with the split designee.

Accordingly, the exhibitor-victim must establish distributor participation, consent or acquiesence in the split in order to allege a cause of

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271); Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 670 F.2d 421, 429-30 (3d Cir.), *cert. denied*, 103 S. Ct. 229 (1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1178-82 (D.C. Cir. 1978); DeFilippo v. Ford Motor Co., 516 F.2d 1313, 1317-18 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975); *see* Drayer v. Krasner, 572 F.2d 348, 355 (2d Cir.) (quoting L. Sullivan, *supra* note 5, § 90, at 256), *cert. denied*, 436 U.S. 948 (1978); *see also* Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 492 n.5 (5th Cir. 1982) (questioning viability of per se rule against group boycotts).

59. See *supra* notes 57-58 and accompanying text.

60. See *supra* notes 42-47 and accompanying text.

61. *See* P. Areeda, *supra* note 37, ¶ 370, at 495-96; L. Sullivan, *supra* note 5, § 90, at 257; *see also* Board of Regents v. National Collegiate Athletic Ass'n, 707 F.2d 1147, 1160 (10th Cir. 1983) (purpose of coercive arrangement was to "extract the highest possible prices," rather than to "freeze out their competitors"), *cert. granted*, 52 U.S.L.W. 3309 (U.S. Oct. 17, 1983) (No. 83-271).

62. For instances where exhibitors have asserted that they have been excluded from competition by horizontal competitors, see Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485 (5th Cir. 1982); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877 (8th Cir. 1978); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); Brown v. Western Mass. Theatres, Inc., 288 F.2d 302 (1st Cir. 1961); Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959); Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627 (E.D.N.C. 1966), *aff'd per curiam*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959 (1968).

63. Wilder Enters. v. Allied Artist Pictures Corp., 632 F.2d 1135, 1140 (4th Cir. 1980); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971); *see* P. Areeda, *supra* note 37, ¶ 314, at 341 n.18. See *supra* note 62.

action.[64] Under this characterization, only if the exhibitor-victim can prove the requisite vertical element to the split arrangement will the split constitute a per se unreasonable group boycott.

2. Horizontal Market Divisions

Both distributors[65] and the Justice Department[66] argue that split agreements are horizontal market divisions because split members allocate among themselves the right to negotiate with distributors or bid for films. Horizontal market divisions are presumed to be illegal because their effect is to restrict competition among otherwise competitive parties.[67]

Exhibitors object to this classification of split agreements,[68] arguing that the horizontal market divisions the Supreme Court has judged

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64. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 492 (5th Cir. 1982); Wilder Enters. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1140 (4th Cir. 1980); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1274-75 (C.D. Cal. 1982). Why distributors would participate or acquiesce in the split agreement is a question which has never been satisfactorily answered. For the most plausible explanations, see Gordon, *supra* note 4, at 241 & n.5, 259.

There are numerous obstacles to proving the requisite vertical arrangement between the exhibitor and distributor, discussion of which is beyond the scope of this Note. For a detailed treatment of these problems, see Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 499-502 app. (5th Cir. 1982) (lower court opinion).

65. *See, e.g.*, Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 892 (8th Cir. 1978); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982); *accord* Gordon, *supra* note 4, at 240-41.

66. *See* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 149 (E.D. Wis. 1983); United States Dep't of Justice, Press Release, Apr. 1, 1977, at 1.

67. United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972); United States v. Sealy, Inc., 388 U.S. 350, 358-59 (1967) (Harlan, J., dissenting); White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597-98 (1951); *see* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241 (1899). *See generally* L. Sullivan, *supra* note 5, §§ 79-82 (examining per se illegality of horizontal market divisions); Gordon, *supra* note 4, at 240, 246 (comparing splits with other forms of horizontal market division); Comment, *Horizontal Territoral Restraints and the Per Se Rule*, 28 Wash. & Lee L. Rev. 457 (1971) (discussing per se illegality of horizontal territorial market divisions) [hereinafter cited as *Horizontal Territorial Restraints*].

68. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 892 (8th Cir. 1978). Horizontal market divisions are unlawful whether entered into by competing buyers or competing sellers. *See* United States v. Champion Int'l Corp., 557 F.2d 1270, 1272 (9th Cir.), *cert. denied*, 434 U.S. 938 (1977); *cf.* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (buyer restraint of trade); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914) (retailer association restraint of trade).

illegal were territorial,[69] and that splits are product or customer allocations.[70] The distinction between territorial and customer or product allocations, however, does not require different treatment under the antitrust laws.[71] The product or customer allocations agreed upon by split members harm competition in the same manner as territorial restrictions, in that ultimately the number of offers received or alternatives available to the distributor is reduced. Rather than ensuring that another exhibitor will not conduct business in a particular geographic area, however, splits limit competition for a particular film or distributor's business.[72] The Supreme Court, in *United States v. Topco Associates, Inc.*,[73] recognized that customer allocations have an anticompetitive effect comparable to that of territorial restrictions.[74]

Courts have rejected the characterization of split agreements as horizontal market divisions, however, because splits do not completely eliminate competition for films.[75] This reasoning is mistaken because horizontal market divisions are per se illegal even if they do

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69. The major Supreme Court precedents discussing market divisions are: United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899); *see Horizontal Territorial Restraints, supra* note 67, at 465-67.

70. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 892 (8th Cir. 1978).

71. In Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), the Supreme Court stated that "[t]he fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis." *Id.* at 46. The Fifth Circuit has termed the difference between a territorial allocation and a customer allocation "a distinction without substance." United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1088 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978). Similarly, the Second Circuit has found no "significant difference between an allocation of customers and an allocation of territory." United States v. Consolidated Laundries Corp., 291 F.2d 563, 574-75 (2d Cir. 1961); *see* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 154 (E.D. Wis. 1983). Professor Sullivan has commented that to distinguish between territorial, customer or product allocations is "to draw overly fine distinctions." L. Sullivan, *supra* note 5, § 79, at 213.

72. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 892 (8th Cir. 1978).

73. 405 U.S. 596 (1972).

74. *Id.* at 612.

75. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 892 (8th Cir. 1978); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982); *see* Bork, *supra* note 7, at 826; Gordon, *supra* note 4, at 240; *cf.* Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (refusing to apply per se rule in part because the "alleged restraint does not completely eliminate competition for players' services."). *But see* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 154-55 (E.D. Wis. 1983).

not entirely eliminate competition.[76] As the Supreme Court stated in *Topco*, "[o]ne of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to *minimize* competition."[77] Split members, by agreeing not to compete with one another, in effect agree to minimize competition.[78]

Furthermore, the initial rights guaranteed by splits may be tantamount to exclusive rights of negotiation. Distributors may need to get their films licensed for economic reasons, including credit and promotional purposes, before an initial negotiation period has expired.[79] In addition, if the negotiation rights are reallocated pursuant to the split agreement, other split members will continue to refrain from competition. Competition in these instances is at least substantially reduced, if not entirely eliminated.[80]

Moreover, horizontal market divisions should be subject to heightened scrutiny because they are potentially more harmful to competi-

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76. United States v. Capitol Serv., Inc., 568 F. Supp. 134, 154-55 (E.D. Wis. 1983), is the first decision correctly finding split agreements to be per se illegal horizontal market divisions, despite the fact that competition for films was not entirely eliminated. Prior to *Capitol Service*, the horizontal market division argument had been consistently rejected. *See* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 892 (8th Cir. 1978); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 292 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982); Gordon, *supra* note 4, at 240-41; *The* Paramount *Decrees*, *supra* note 4, at 1072.

Whether business activity runs afoul of the Sherman Act is not dependent upon its successfully restraining trade. Associated Press v. United States, 326 U.S. 1, 12, 17 & n.16 (1945); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 466 (1941); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220 (1940); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930); United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1085 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978). An arrangement may be illegal if it has "*either* an unlawful purpose or an anticompetitive effect." McLain v. Real Estate Bd., 444 U.S. 232, 243 (1980) (emphasis in original); United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); *see also* United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969) ("The continuation of some price competition is not fatal to the Government's case."); L. Sullivan, *supra* note 5, § 82, at 226, 229 (per se treatment appropriate for "arrangement which, in purpose or effect, would divide markets."). See *infra* note 110 and accompanying text.

77. United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (emphasis added).

78. United States v. Capitol Serv., Inc., 568 F. Supp. 134, 155 (E.D. Wis. 1983); Gordon, *supra* note 4, at 240.

79. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255, 1259, 1261 (C.D. Cal. 1982). See *supra* notes 49-54 and accompanying text.

80. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982).

tion than other forms of per se unreasonable activity.[81] While price fixing agreements restrain only price competition, market divisions may affect all forms of rivalry.[82] For example, if a market is divided by customer allocation, sellers do not have to compete for the victim-customer's business. Thus, no incentive exists for sellers to become more efficient or improve product quality or service. Similarly, allocation of distributors or films among split members reduces the incentive for exhibitors to offer a more attractive outlet for the distributor's films. As the Supreme Court has noted, "all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[83] Even if split agreements do not entirely eliminate competition among exhibitors for film licenses, they are particularly pernicious because, by allocating customers, they reduce the need for exhibitors to compete in all other areas of their businesses. Split agreements, therefore, possess the anticompetitive characteristics of a horizontal market division.

3. Horizontal Price Fixing Agreements

Horizontal price fixing agreements are arrangements "for the purpose and with the effect of . . . depressing . . . price."[84] Distributors argue that split agreements, by reducing the number of bids submitted, reduce competition for film licenses. Less competition or demand for a product invariably reduces the price that buyers are willing to pay for it. Split members thus keep the price of film licenses down by limiting the number of offers that distributors receive.[85] Exhibitors

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81. L. Sullivan, *supra* note 5, § 82 (1977); *cf.* Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176, 181 (E.D. Tenn. 1940) (customer allocation inherently as bad as price fixing), *aff'd per curiam*, 123 F.2d 1016 (6th Cir. 1941).

82. L. Sullivan, *supra* note 5, § 82, at 224-25.

83. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978); *see* L. Sullivan, *supra* note 5, § 82, at 224-25.

84. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). More recently, Professor Sullivan has defined horizontal price fixing in similar terms: "any arrangement among competitors which, in purpose or effect, directly or indirectly inhibits price competition." L. Sullivan, *supra* note 5, § 74, at 198.

Horizontal price fixing agreements generally have been held per se illegal violations of the Sherman Act. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344-348 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (per curiam); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978); United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340-41 (1897).

85. *See* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 890 (8th Cir. 1978); Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount

have, in fact, admitted that one purpose of split agreements is to lower the price of film licenses.[86]

Exhibitors claim, nevertheless, that splits are not price fixing arrangements because split members agree only to refrain from initial competition with the split designee for a limited period of time, and not to set prices.[87] Price fixing agreements, however, need not directly set prices to be considered illegal as long as they are designed to, or do, affect price.[88]

In *Catalano, Inc. v. Target Sales, Inc.*,[89] the Supreme Court held that an agreement by wholesalers to refuse free credit to retailers constituted price fixing, even when there was no agreement among the wholesalers regarding the actual price.[90] The Court recognized that credit, as a direct component of cost, affected prices directly[91] and also noted that it had held other agreements "that had substantially less direct impact on price" unlawful per se.[92] For example,

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Theatres, Inc., 268 F.2d 246, 250 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 150, 146-47 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1262 (C.D. Cal. 1982). The Justice Department shares the view that splits are per se illegal price fixing agreements. United States v. Capitol Serv., Inc., 568 F. Supp. 134, 149 (E.D. Wis. 1983); United States Dep't of Justice, Press Release, Apr. 1, 1977, at 2.

86. United States v. Capitol Serv., Inc., 568 F. Supp. 134, 141-43 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1254 (C.D. Cal. 1982).

87. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1256-57 (C.D. Cal. 1982); *see* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 890-92 (8th Cir. 1978); *cf.* Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168-69 (3d Cir. 1979) (manufacturer charged with price fixing claimed that refusal to deal with discount retailer was not price fixing because arrangement did not set prices at exact level).

88. It is the agreement that violates the Sherman Act. Whether the conspiracy is or will be successful is irrelevant to § 1 analysis. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 & n.59 (1940); *see* United States v. Container Corp. of Am., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168-69 (3d Cir. 1979); *see also* United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978) (dictum). See *supra* note 76 and accompanying text.

89. 446 U.S. 643 (1980) (per curiam).

90. *Id.* at 645-46, 650.

91. The Court characterized credit as "an inseparable part of the price." *Id.* at 648; *see* Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 507 (1969).

92. *Catalano*, 446 U.S. at 647. As examples of this proposition, the Court cited Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936), and National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). *Catalano*, 446 U.S. at 647. Neither of the arrangements in these cases, however, appears to have had a "substantially less direct impact on price," *id.*, than the arrangement in *Catalano*. In *Sugar Institute*, fifteen sugar refiners announced, through a trade association, prices, terms and conditions of sale. They agreed, inter alia, that upon announcement they would not change these terms. The Court found this practice to be an unreasonable restraint of trade, despite the refiner's argument that there was no agreement setting their

agreements that tend to stabilize price, such as agreements to exchange price information, may be price fixing arrangements.[93]

In addition, the Supreme Court has also held that mere "interference with the setting of price by free market forces is unlawful *per se*."[94] Splits interfere with the market forces that would otherwise determine price by reducing the number of competitive bids received.[95]

Furthermore, in *National Society of Professional Engineers v. United States*,[96] the Court held that a professional society's ethical canon prohibiting competitive bidding, while "not price fixing as such,"[97] was illegal because it "impedes the ordinary give and take of

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individual prices. *Sugar Institute*, 297 U.S. at 601. An agreement not to change prices, however, appears to be a direct, not indirect, attempt to prevent the free fluctuation of price. Indeed, the district court had found that the dominant purpose of the trade association was "to create and maintain a uniform price structure, thereby eliminating and suppressing price competition among themselves." *Id.* at 577. *See* United States v. Sugar Inst., Inc., 15 F. Supp. 817, 897 (S.D.N.Y. 1934), *aff'd and modified on other grounds*, 297 U.S. 553 (1936). *National Society* is unsatisfactory support because of the continuing dispute as to whether the Court in that case found the challenged practice illegal under the per se rule or the rule of reason. See *infra* notes 99-101.

More persuasive support might have been found in United States v. General Motors Corp., 384 U.S. 127 (1966), which held that inherent in an agreement among dealers not to sell cars through "discount houses," *id.* at 129-30, was a restraint on price competition which was per se illegal "even when the effect upon prices [was] indirect." *Id.* at 147. Similarly, in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), oil companies merely established a floor or minimum level which increased the stability and firmness of prices. *Id.* at 223. Although the practice did not fix prices directly, *id.* at 222, it was held illegal because any "market manipulation in its various manifestations is implicitly an artificial stimulus applied to . . . market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." *Id.* at 223.

93. *See, e.g.*, United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969); Sugar Inst., Inc. v. United States, 297 U.S. 553, 599-600 (1936); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 584-85 (1925); United States v. American Linseed Oil Co., 262 U.S. 371, 389-90 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377, 411-12 (1921). *See generally* Note, *Antitrust Liability For An Exchange of Price Information—What Happened to* Container Corporation?, 63 Va. L. Rev. 639 (1977) (discussion of exchanges of price information and per se doctrine).

94. United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969); *see* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

95. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 890-91 (8th Cir. 1978); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 150, 146 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1262 (C.D. Cal. 1982). See *supra* note 85 and accompanying text.

96. 435 U.S. 679 (1978).

97. *Id.* at 692.

the market place."[98] Lower courts have questioned whether this case justifies applying a per se analysis to split agreements because the Court found the prohibition "illegal on its face,"[99] but did not expressly relate its holding to the per se rule against price fixing.[100] The Court has subsequently relied on this ruling, however, to support its application of the per se rule to other agreements affecting price.[101]

The Eighth Circuit has distinguished the prohibition on competitive bidding in *National Society* from the limitations on competition imposed by splits.[102] Noting that *National Society* involved an ethical canon of a professional society, the Court of Appeals refused to evaluate business activities by the same standard[103] because the Supreme Court has stated that "[t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act."[104] The Supreme Court has indicated, however, that business

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98. *Id.* (quoting United States v. National Soc'y of Professional Eng'rs, 404 F. Supp. 457, 460 (1975), *modified*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978)). Competing engineers were prohibited from discussing price with potential customers until after negotiations were completed and the customer made an initial selection of an engineer. *Id.* The dominant purpose behind the Society's canon, which the Court termed a "ban on competitive bidding," *id.*, was a fear that selection on the basis of price would tempt engineers to cut costs by doing "inferior work" which would endanger the public. *Id.* at 693.

99. *Id.* at 692-93.

100. As a result of the Court's failure to expressly state that the ethical canon was per se unlawful, lower courts have differed as to which rule was applied. *Compare* General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1256 (C.D. Cal. 1982) ("ethical rule was held illegal per se without elaborate analysis of procompetitive benefits") *with* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 891 (8th Cir. 1978) ("ethical standard . . . illegal on the basis that it was unreasonable under the rule of reason"). *See generally* P. Areeda, *supra* note 37, ¶ 347, at 444 (questioning whether per se rule or rule of reason was applied).

101. Recent pronouncements by the Court indicate that *National Society* is to be treated as a case applying the per se rule. *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (per curiam) (citing *National Society* as a per se case). In Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), the three dissenting justices stated that in *National Society* the Court "held unlawful as a *per se* violation an engineering association's canon of ethics that prohibited competitive bidding by its members." *Id.* at 362 (Powell, J., dissenting). *See* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 150 n.15 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1256 n.7 (C.D. Cal. 1982).

102. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 891 (8th Cir. 1978).

103. *Id.*

104. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975). In *Goldfarb*, the plaintiffs sought to purchase a house through a financing agency which required title insurance. Procuring such insurance required a title examination which could only be performed by a member of the Virginia State Bar. *Id.* at 775. All of the attorneys approached by the plaintiff charged the amount suggested by a bar associa-

activities should be evaluated under a stricter standard than the activities of professional organizations.[105] If a professional organization's restrictions on competitive bidding are facially illegal, split agreements, which are restrictions in a business setting, should be evaluated at least as harshly. The fact that the prohibition in *National Society* involved a professional society, therefore, does not materially alter the antitrust analysis.[106]

Exhibitors argue that splits do not have an effect on price because competition with exhibitors who are not members of the split may continue despite the existence of the split agreement.[107] Accordingly, the split designee's bid must remain competitive with those of non-split exhibitors. Furthermore, because the distributor retains the power to reject the split designee's bid, the split only reduces license fees if the distributor agrees to accept the lower fee.[108] An agreement with the purpose or effect of influencing prices, however, is itself illegal.[109] Unsuccessful combinations in restraint of trade are as illegal

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tion minimum-fee schedule. *Id.* at 776. The Court found the minimum-fee schedule to be a violation of the Sherman Act, but noted that the analysis traditionally applied to a business is different from that applied to the professions. *Id.* at 788 n.17; *see* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348-49 (1982); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 686-87 (1978); United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952). *But see* Mardirosian v. American Inst. of Architects, 474 F. Supp. 628, 637 (D.D.C. 1979) (professions receive no special antitrust treatment). *See generally* Tyler, Goldfarb v. Virginia State Bar: *The Professions are Subject to the Sherman Act*, 41 Mo. L. Rev. 1 (1976) (discussing relationship between antitrust laws and learned professions); Note, *The Antitrust Liability of Professional Associations After* Goldfarb: *Reformulating the Learned Professions Exemption in the Lower Courts*, 1977 Duke L.J. 1047 (identifying a new, limited learned profession exemption); Note, *Application of the Antitrust Laws to Anticompetitive Activities by Physicians*, 30 Rutgers L. Rev. 991 (1977) (examining relationship between antitrust laws and learned professions).

105. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 686 (1978).

106. *See* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 891 (8th Cir. 1978).

107. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1257 (C.D. Cal. 1982); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1054-55 (W.D. Va. 1981); *see* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 887 (8th Cir. 1978); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971). See *supra* note 26 and accompanying text.

108. *See* General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1258 (C.D. Cal. 1982); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1052-55 (W.D. Va. 1981), Cinema-Tex Enters. v. Santikos Theaters, Inc., 414 F. Supp. 640, 642-43 (W.D. Tex. 1975), *modified on other grounds*, 535 F.2d 932 (5th Cir. 1975); Cassady, *supra* note 2, at 164-65.

109. United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969) ("limitation or reduction of price competition brings the case within the [per se] ban"); United States v. General Motors Corp., 384 U.S. 127, 148 (1966) ("protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws"). See *supra* note 88 and accompanying text.

as successful ones.[110] As the Court stated in *United States v. Socony-Vacuum Oil Co.*,[111] "[a]ny combination which tampers with price structures is engaged in an unlawful activity."[112] Split agreements thus have the essential characteristics of per se illegal price fixing arrangements even though they do not directly set prices.

B. *The Per Se Rule and Procompetitive Justifications*

Split agreements have the anticompetitive characteristics of horizontal market divisions, horizontal price fixing agreements and, depending upon the nature of the agreement, group boycotts. Thus, they literally fit within classifications that are per se illegal.

1. Blanket Music Licenses and Split Agreements

In *Broadcast Music, Inc. v. CBS*,[113] the Supreme Court held that a blanket music license that literally fixed prices[114] had to be analyzed under the rule of reason despite the fact that it had the characteristics of a per se illegal restraint of trade.[115] The Court found that the

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110. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1085 (5th Cir.) ("[T]he Sherman Act reaches unsuccessful restraints on interstate commerce as well as those which have not been shown to affect the price of goods or services in the market place."), *cert. denied*, 437 U.S. 903 (1978). See *supra* note 76 and accompanying text.

111. 310 U.S. 150 (1940).

112. *Id.* at 221.

113. 441 U.S. 1 (1979).

114. *Id.* at 8-9.

115. *Id.* In *BMI*, CBS challenged the issuance of blanket licenses to perform copyrighted musical compositions by the two major licensing organizations, Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP"). A blanket license permits the licensee to broadcast all of the compositions in the licensing organization's repertory for a set price and period of time. ASCAP represents approximately 22,000 members and 3 million compositions; BMI represents about 30,000 members and 1 million works. Almost every musical composition copyrighted in the United States is in either ASCAP or BMI's catalogue. *Id.* at 5; *see* Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 277-78 (S.D.N.Y. 1982), *appeal argued*, No. 83-7058 (2d Cir. Nov. 1, 1983); S. Shemel & M. Krasilovsky, *This Business of Music* 135-38 (rev. ed. 1971). The fee for the blanket license is generally based on either a percentage of the licensee's total revenues or a flat dollar amount. It is not based on the amount, type or popularity of the music performed.

CBS, the "giant of the world in the use of music rights," CBS v. American Soc'y of Composers, 400 F. Supp. 737, 771 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom.* Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979), argued that the blanket license is a per se illegal price fixing agreement because ASCAP and BMI set prices. The district court found that the blanket license was not per se illegal because BMI and ASCAP only set prices for the entire repertory.

presumption of illegality did not apply to this price fixing agreement because the blanket license increased competition among existing products by creating a "different product"[116] with "unique characteristics."[117] The Court also recognized that blanket licenses did not appear to have an anticompetitive purpose,[118] were widely used in the industry[119] and were not the only means of obtaining rights to musical compositions.[120] In addition, the Court stated that Congress had recognized the economic benefits of blanket licenses when, "[n]otwithstanding any provisions of the antitrust laws,"[121] it provided for their use under certain circumstances in the Copyright Revision Act of 1976.[122]

Individual composers were free to set their own prices. 400 F. Supp. at 748. The Second Circuit reversed, holding that the "blanket license dulls [the copyright owner's] incentive to compete" and therefore, is a form of per se illegal price fixing. 562 F.2d at 139. The Supreme Court reversed and remanded to the Second Circuit. 441 U.S. at 25. On remand, the blanket license was held to be lawful. CBS v. American Soc'y of Composers, Authors & Publishers, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). *See generally* Wood, *The "Market Necessity" Defense in Antitrust: A New Limit on the Area For Application of Per Se Rules?*, 54 Ind. L.J. 29 (1978) (examining analyses of district court and court of appeals).

116. 441 U.S. at 22.

117. *Id.* The blanket license competes with individual composers, and therefore promotes, rather than suppresses, competition. The blanket license offers the same product as the individual composer—the performing rights to a song—but also offers the rights to other compositions in the organization's catalog, and the cost advantages and transaction savings that come from dealing with a clearinghouse. Thus, the blanket license is actually a product different from, and in competition with, that offered by the individual composer. *Id.* at 22-23; *cf.* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 217 (1940) (distinguishing Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), on the ground that the challenged activity in *Chicago* created a new public market). *But see* Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 293-96 (S.D.N.Y. 1982) (finding that the anticompetitive effects of blanket licenses on price competition outweigh any cost savings to local television stations, as opposed to television networks), *appeal argued*, No. 83-7058 (2d Cir. Nov. 1, 1983).

118. 441 U.S. at 23-24.

119. *Id.* at 20-21, 24. The Court described the blanket license as an "obvious necessity" in the industry. *Id.* at 20. In addition, it found it "reasonably necessary" to the continued existence of the trade intended by the Copyright Act. *Id.* at 19. See *infra* notes 121, 125 and accompanying text.

120. *Id.* at 12, 24. Compositions may also be licensed, for example, on a "per-program" basis, in which case the fee is based on the revenues of the particular program on which the organization's music is used. *Id.* at 11. Also available is "direct dealing" between the network, or user, and the individual composer. *Id.* at 12; *see* Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 288-92 (S.D.N.Y. 1982), *appeal argued*, No. 83-7058 (2d Cir. Nov. 1, 1983).

121. 441 U.S. at 15 (quoting 17 U.S.C. § 111(d)(5)(A) (Supp. V 1981)).

122. 17 U.S.C. §§ 101-810 (Supp. V 1981).

Noting similarities between blanket licenses and split agreements, courts have questioned whether split agreements should be analyzed under the rule of reason enunciated in *BMI*.[123] Split agreements, like blanket licenses, arguably provide "a more flexible, practicable and efficient method of licensing" than competitive bidding[124] and are widely used in the film industry.[125] They remain substantially different, however, from the blanket license in *BMI* and therefore should not be analyzed under the same rule.

In *BMI*, the Court found that alternative licensing arrangements were available to the networks as "no practical impediments prevent[ed]" them from dealing directly with composers.[126] Split agreements, however, prevent the distributor from dealing with members

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123. *Compare* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 151 (E.D. Wis. 1983) (finding "fundamental differences" between blanket licenses and splits); *and* General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1260-61 (C.D. Cal. 1982) (*BMI* "has little relevance to the legal analysis of splits."); *with* Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1052-53 (W.D. Va. 1981) (*BMI* "closely on point").

124. Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1052 (W.D. Va. 1981); *see* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 153 (E.D. Wis. 1983).

125. In *BMI*, the Court noted:

> With this background in mind, which plainly enough indicates that over the years, and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason.

441 U.S. at 24. Similarly, split agreements have enjoyed widespread acceptance in the motion picture industry. Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1051 (W.D. Va. 1981); Gordon, *supra* note 4, at 241; United States Dep't of Justice, Press Release, Apr. 1, 1977, at 1.

Both splits and blanket licenses have been subjected to extensive judicial scrutiny. *Compare* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 10-16 (1979) (discussing consent decrees and litigation involving blanket licenses) *with* Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 292-93 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964) *and The* Paramount *Decrees*, *supra* note 4, at 1042-43 (discussing consent decrees and litigation involving motion picture licensing) *and* Cassady, *supra* note 2, at 159 n.65.

126. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 12 (1979). Available to the networks, besides the blanket license, were "per-program" licenses, based on a percentage of the actual revenues for the particular program on which the organizations' music is played, *id.* at 11, and "direct dealing" between the television network and the individual composer, *id.* at 12. *But see* Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 285-92 (S.D.N.Y. 1982) (per-program, direct dealing and source licensing not realistically available alternatives to local television stations), *appeal argued*, No. 83-7058 (2d Cir. Nov. 1, 1983).

of the split other than the split designee.[127] The split thus limits the distributor's alternatives. Furthermore, alternatives exist only in instances where there are non-split exhibitors interested in a distributor's films or after the initial negotiation period has lapsed.[128] Even in the latter instance, split exhibitors often redesignate the negotiation rights to a different split member[129] and, therefore, deprive the distributor of alternative choices.

In addition, split agreements, unlike blanket licenses, do not promote competition by creating a new product that competes with the product that exhibitors already offer. Nor do they create a new market level that is an alternative to dealing with exhibitors directly.[130] Moreover, in *BMI* the Court found that neither the music licensing organizations nor the composers appeared to have anticompetitive motives.[131] Exhibitors, however, have admitted anticompetitive motives when splits have been challenged in court.[132] Finally, unlike blanket licenses, Congress has not recognized split agreements as exceptions to the antitrust laws under any circumstances.[133] As the

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127. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883 (8th Cir. 1978); Cinema-Tex Enters. v. Santikos Theaters, Inc., 535 F.2d 932, 933 (5th Cir. 1976); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1261 (C.D. Cal. 1982); *cf.* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978) (ethical canon preventing competitive bidding limits customers' ability to choose from alternatives).

128. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1258 (C.D. Cal. 1982); *see, e.g.*, Wilder Enters. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1140 (4th Cir. 1980) (distributors free to refuse to license film); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1052, 1054-55 (W.D. Va. 1981) (distributor free to reject bid and solicit competitive offers); Gordon, *supra* note 4, at 260 (distributors are always free to award licenses to the exhibitor of their choice).

129. If negotiations between the distributor and the split designee are not fruitful, the split may reconvene and reallocate the rights of negotiation, General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1255 (C.D. Cal. 1982), or two participants may simply trade rights, *id.* at 1258; Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1055 (W.D. Va. 1981). This practice makes splits more anticompetitive because it prevents the first rights of negotiation from lapsing and, accordingly, prevents open competition. United States v. Capitol Serv., Inc., 568 F. Supp. 134, 145-46 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1258 (C.D. Cal. 1982).

130. United States v. Capitol Serv., Inc., 568 F. Supp. 134, 151 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1261 (C.D. Cal. 1982).

131. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20, 23-24 (1979).

132. *See* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 890 (8th Cir. 1978) (exhibitors did not dispute that purpose of split was to depress film rental prices); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 141-42 (E.D. Wis. 1983) (testimony tending to confirm anticompetitive purpose of splits); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1254-55 (C.D. Cal. 1982) (same).

133. See *supra* notes 121-22 and accompanying text.

Supreme Court noted in *United States v. Topco Associates, Inc.*,[134] "a decision . . . to sacrifice competition in one portion of the economy for greater competition in another portion [must] be made by Congress."[135] Split agreements, therefore, lack the characteristics of the *BMI* blanket license that justified an analysis of its purpose and effect under the rule of reason. Accordingly, the holding in that case does not require a rule of reason analysis for determining the legality of split agreements.

2. Procompetitive Justifications

In *BMI*, the Court analyzed the economic justifications for blanket licenses even though the licenses literally fit within a category of per se illegal activity.[136] This suggests that "legal characterization of a class of restraints requires 'a judgment about [its] competitive significance' " in light of "relevant 'economic conceptions.' "[137] The economic justifications for split agreements must be analyzed, therefore, to determine whether they offer any procompetitive benefits that are "sufficiently common or important to justify the time and expense necessary to identify them."[138] Unless the procompetitive consequences of splits overcome the presumption that they are anticompetitive, splits fall within the rationale of the per se rule, and thus, are per se illegal.[139]

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134. 405 U.S. 596 (1972).

135. *Id.* at 611; *see* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 354-55 (1982).

136. Broadcast Music, Inc. v. CBS, 441 U.S. at 19-24 (1979). Similarly, in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), the Court entertained the Society's procompetitive defense that competitive bidding would tempt engineers to do inferior work in order to lower prices, ultimately endangering public safety. *Id.* at 693. See *supra* notes 96-106 and accompanying text. Again, in Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam), the challenged practice was found to be per se illegal because no procompetitive justification was offered and it had "no apparent potentially redeeming value." *Id.* at 646 n.8, 649.

137. United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1363 (5th Cir. 1980) (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692, 690 n.16 (1978)); *see* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 362-63 (1982) (Powell, J., dissenting); *see also* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646 n.8, 649 (1980) (per curiam) (discussing procompetitive justifications).

138. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977).

139. *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977); Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553, 556, 558 (9th Cir. 1980), *rev'd on other grounds*, 457 U.S. 332 (1982); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1364 (5th Cir. 1980); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 167, 170 (3d Cir. 1979); Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119, 127 & n.6 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); Board of Regents v.

By designating which exhibitors can bid for certain films, split agreements may ensure that the same films are not shown at too many theaters within a given geographic area,[140] thus reducing the likelihood that theaters will draw upon the same audiences. Although exhibitors have a business interest in maximizing audiences and revenues, the split arrangement is not necessary to achieve this purpose. The distributor also has an economic interest in maximizing exhibitor box office receipts as it generally receives a percentage of those receipts as part of the licensing fee.[141] The distributor thus tries to avoid licensing the same film to theaters in close proximity with one another.[142] The restraint on trade, therefore, is not necessary to achieve the business purpose asserted and remains unreasonable.[143]

Exhibitors argue that the split agreement also ensures that small exhibitors will have an opportunity to bid on certain films without "ruinous competition" from more powerful exhibitors.[144] They assert,

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National Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1305 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir.), *cert. granted*, 52 U.S.L.W. 3309 (U.S. Oct. 17, 1983) (No. 83-271). See *supra* notes 35-36 and accompanying text.

140. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 504 app. (5th Cir. 1982) (lower court opinion); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 882 (8th Cir. 1978); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 141 (E.D. Wis. 1983).

141. Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 489 (5th Cir. 1982); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 289 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 137 (E.D. Wis. 1983); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 415, 418 (S.D. Ohio 1980), *aff'd in part and remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982); M. Conant, *supra* note 14, at 70-71; M. Mayer, *supra* note 14, at 61; Gordon, *supra* note 4, at 258; *Licensing Acts*, *supra* note 19, at 306. For a detailed discussion of the practices, techniques and concerns involved in negotiating rental fees, see M. Conant, *supra* note 14, at 58-83; M. Mayer, *supra* note 14, at 60-65; Cassady, *supra* note 2, at 165-177. Distributors generally would prefer not to use percentage arrangements with smaller theaters because on a low-gross business, percentage deals will not leave the exhibitor with sufficient profits to cover its operating expenses, and the small amount of revenue does not justify the transaction costs involved in percentage deals. *Id.* at 167 n.110.

142. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 882 (8th Cir. 1978); M. Conant, *supra* note 14, at 58-59; *see* Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 489 (5th Cir. 1982).

143. *Cf.* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 18-22 (1979) (blanket license necessary to achieve business purpose and, therefore, reasonableness must be analyzed under rule of reason); R. Bork, *supra* note 37, at 279 (horizontal agreement per se unlawful if not capable of increasing effectiveness of business purpose and if broader than necessary to achieve that purpose).

144. *See* Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246, 250 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 153 (E.D. Wis. 1983);

moreover, that this result is consistent with the policy enunciated by the Supreme Court in *United States v. Paramount Pictures, Inc.*,[145] in which large distributors were required to divest themselves of their holdings to protect smaller, unaffiliated exhibitors.[146] The Court in that case was concerned, however, with the potential for collusion engendered by affiliation between distributors and exhibitors, not with the protection of exhibitors who could not withstand the rigors of competition.[147]

Furthermore, avoidance of "ruinous competition" is not a valid defense to an antitrust charge.[148] Even though less "cut throat" competition may make it possible for small, independent exhibitors to compete,[149] the Sherman Act is not designed to protect competitors from the effects of competition.[150] Rather, it reflects a legislative

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General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1274 (C.D. Cal. 1982); Bork, *supra* note 7, at 826 & n.162; Cassady, *supra* note 2, at 165 n.96; Gordon, *supra* note 4, at 260.

145. 334 U.S. 131 (1948).

146. *Id.* at 149-53.

147. The Court recognized that:

> The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry..It is largely out of the ruins of the small operators that the large empires of exhibitors have been built.

Id. at 162; *see* M. Conant, *supra* note 14, at 84; M. Mayer, *supra* note 14, at 108-12.

The cause of the hardships in *Paramount*, however, was not fierce competition between independent exhibitors, but competition between small, independent exhibitors and exhibitors which were affiliated with large, powerful distributors. 334 U.S. at 154, 159-60. Despite these evils the Court refused to require competitive bidding, even though it would be a "great boon" to independent exhibitors, because it would involve the judiciary too deeply in the daily operations of a nation-wide business. *Id.* at 162; *see* Brown v. Western Mass. Theatres, Inc., 288 F.2d 302, 304 (1st Cir. 1961); M. Conant, *supra* note 14, at 101. See *supra* notes 15-18 and accompanying text.

148. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 345, 349 (1982); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690 n.16 (1978); United States v. Topco Assocs., Inc., 405 U.S. 596, 610-11 (1972); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467-68 (1941); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-22 (1940); Gordon, *supra* note 4, at 260.

149. *See* General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1274 (C.D. Cal. 1982). The fact that well-intentioned split members may be interested in helping competing exhibitors remain in the market will not save the arrangement from illegality. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912); *see also* United States v. General Motors Corp., 384 U.S. 127, 146-47 (1966) (motivation not relevant); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467 (1941) (anticompetitive intent not necessary for violation of Sherman Act).

150. In Brown Shoe Co. v. United States, 370 U.S. 294 (1962), Chief Justice Warren made the now classic pronouncement that "[t]aken as a whole, the legislative

judgment that open competition provides the best means of ensuring the efficient allocation of resources.[151] This allocation is not achieved by protecting less efficient competitors.[152] Moreover, small independent exhibitors are often excluded from split agreements, as is evidenced by the fact that many of these exhibitors are plaintiffs in suits challenging split agreements on antitrust grounds.[153]

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history [of the Sherman Act] illuminates congressional concern with the protection of *competition*, not *competitors*." *Id.* at 320 (emphasis in original). *But cf.* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553-55 (1944) (Sherman Act enacted in response to fear that large trusts had power "to crush small independent traders").

151. The Supreme Court made this abundantly clear in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958):

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Id. at 4; National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("competition will produce not only lower prices, but also better goods and services"); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (Sherman Act is the "Magna Carta" of free enterprise); Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition"); Associated Press v. United States, 326 U.S. 1, 13-14 (1945) (purpose of Sherman Act is to protect free enterprise system); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930) ("preservation of competition is the primary consideration"); *see* United States v. Colgate & Co., 250 U.S. 300, 307 (1919); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899) (citing United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895)).

152. In Catalano, Inc. v. Target Sales, Inc., 446 U.S 643 (1980) (per curiam), it was argued that a horizontal agreement to eliminate credit sales facilitated market entry and remainder in the market by offering greater potential returns on investment. The Court rejected this argument, however, because all price fixing arrangements could be said to offer this benefit and thus be immune from antitrust challenge. *Id.* at 649.

153. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1273 (C.D. Cal. 1982); *see, e.g.*, Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 487 (5th Cir. 1982); Wilder Enters. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 (4th Cir. 1980); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 881 (8th Cir. 1978); Syufy Enters. v. National Gen. Theatres, Inc., 575 F.2d 233, 234 (9th Cir.), *cert. denied*, 439 U.S. 954 (1978); Cinema-Tex Enters. v. Santikos Theaters, Inc., 535 F.2d 932, 933 (5th Cir. 1976); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 18 (9th Cir. 1971); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 287 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); Brown v. Western Mass. Theatres, Inc., 288 F.2d 302, 303 (1st Cir. 1961); Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246, 247 (2d Cir.), *cert. denied*, 361

Split members assert that competition for audiences is heightened by the split agreement because each member of the split is assured the right to bid for an attractive product.[154] It is argued that if all split members exhibit quality films, the films themselves will not be the factor that attracts a viewer to a particular theater. Competition in other factors, such as ticket price, concession quality and theater maintenance, will be encouraged.[155] This effect on competition for audiences, however, depends upon each split member being allocated a quality film. It also assumes that competition in these other areas will be stimulated if theaters exhibit films of comparable quality. Moreover, as the Supreme Court has stated, competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."[156] This is properly a matter for legislative determination.[157]

Exhibitors also argue that splits provide greater "lead time"[158] in which to advertise and promote films, thus increasing competition among exhibitors for audiences.[159] They claim that the time between licensing and releasing a film is longer under the split system than under the complex and time consuming system of competitive bidding.[160] Actual licensing practices do not support this contention. Distributors initiate competitive bidding five or six months in advance of the film release date.[161] Split meetings to allocate films are usually

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U.S. 885 (1959); Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627, 629 (E.D.N.C. 1966), *aff'd per curiam*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959 (1968); United States v. Loew's Inc., 1962 Trade Cas. (CCH) ¶ 70,347, at 76,374 (S.D.N.Y. 1962); *see also* Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1048 n.4 (W.D. Va. 1981) (motion to intervene by exhibitor claiming it was injured by split).

154. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1273 (C.D. Cal. 1982) ("splits are needed to assure that all exhibitors get their 'fair share' of quality films"); *see* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 153 (E.D. Wis. 1983).

155. *See* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 153-54 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1268 (C.D. Cal. 1982).

156. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

157. *Id.* at 611.

158. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1270-71 (C.D. Cal. 1982). Lead time is the period between the date of the licensing agreement and the exhibition date.

159. *Id.*

160. *Id.* As a result of its complexity, "[c]ompetitive bidding takes place in relatively few situations." Cassady, *supra* note 2, at 161. Competitive bidding for one film may involve 2400 transactions. *Id.* at 161 n.77. See *supra* note 21 and accompanying text.

161. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1271 (C.D. Cal. 1982).

held only one to two months in advance of the release date.[162] Distributors, accordingly, do not receive bids from members until several months after they have actively sought to license the film. The split system, therefore, shortens the time between bidding and exhibition if the distributor is interested in licensing a film to a split member.[163] Furthermore, if a split designee faces less competition for a film, it has less incentive to complete negotiations at an early date.

Exhibitors also argue that split bidding is less elaborate and time consuming than open competitive bidding and, therefore, reduces transaction costs.[164] Reduction of transaction costs is a desirable economic goal[165] but it does not override the interest in preserving free competition embodied in the Sherman Act. The Sherman Act does not permit the restraint of competition in order to avoid inconvenience and expense.[166]

Split agreements restrict competition for film licenses and do not foster any procompetitive economic efficiencies that are "sufficiently common or important to justify the time and expense"[167] that evaluation under the rule of reason entails. There is no reason, therefore, to remove them from the categories of traditionally anticompetitive conduct that the Supreme Court has condemned as per se violations of the Sherman Act.

3. Judicial Experience

Per se characterization of a particular practice has often been withheld until the judiciary has become familiar with the particular indus-

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162. *Id.*

163. *See id.* (no factual evidence that splits increased lead time).

164. *See* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 153-54 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1272 (C.D. Cal. 1982).

165. Reduction of transaction costs promotes competition by reducing prices and permitting a more efficient allocation of resources. For example, in Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979), the Supreme Court noted that one procompetitive justification of blanket licenses was their ability to accomplish in one or two transactions what would otherwise take 4,000 to 8,000, and to reduce the need to police or monitor users to ensure that they are not using unlicensed compositions. *Id.* at 20-23 & nn.35-36. Similarly, in United States v. United States Gypsum Co., 438 U.S. 422 (1978), the Court noted that exchanges of price information are not per se illegal forms of business activity because they may increase economic efficiency and, therefore, competition. *Id.* at 441 n.16; *see* United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1364-65 (5th Cir. 1980); L. Sullivan, *supra* note 5, § 74, at 200.

166. General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1272 (C.D. Cal. 1982); *see* United States v. Capitol Serv., Inc., 568 F. Supp. 134, 153-54 (E.D. Wis. 1983).

167. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977).

try and practice at issue.[168] Consequently, some courts have been reluctant to apply the per se doctrine to split agreements because they have not had considerable experience in analyzing them and have not consistently found them to be anticompetitive.[169] In *Arizona v. Maricopa County Medical Society*,[170] however, the Supreme Court rejected "the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation."[171] This suggests that it is the classification of a category of restraints as per se illegal that requires experience, not the application of the per se label to a previously established category of per se restraint in a new industry. Indeed, despite a lack of antitrust experience in the health care industry, the Court, in *Maricopa*, applied the per se rule to a restraint that it categorized as price fixing.[172] Similarly, because split agreements fall within the well established categories of horizontal price fixing, horizontal market division and group boycott—restraints with which the judiciary has had considerable experience—courts should not be reluctant to evaluate them under the per se rule.

Furthermore, courts have had extensive experience with the motion picture industry.[173] Few industries have been subjected to as much

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168. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344 (1982); *id.* at 364 (Powell, J., dissenting); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 9-10 (1979); United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1051-52 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983); Tose v. First Pa. Bank, N.A., 648 F.2d 879, 890-91 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 555 (7th Cir. 1980); Evans v. S.S. Kresge Co., 544 F.2d 1184, 1191-92 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *see* White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Northwest Power Prods., Inc. v. Omark Indus., 576 F.2d 83, 88 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); Van Cise, *supra* note 7, at 1172-73.

169. *See, e.g.*, Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1051 (W.D. Va. 1981).

170. 457 U.S. 332 (1982).

171. *Id.* at 351.

172. *Id.* at 357. Competing physicians formed medical societies which established maximum fees for specific services provided to patient-policyholders of certain medical insurance plans. The State challenged the arrangements, claiming they were per se illegal forms of price fixing which violated the Sherman Act and the equivalent Arizona statute. *Id.* at 335-36 & n.1. The Supreme Court held, in a closely divided 4-3 opinion (with Justices Blackmun and O'Connor not participating), that the maximum price fixing scheme was per se unlawful. *Id.* at 357; *see* 50 Tenn. L. Rev. 363 (1983) (discussing price fixing agreements and *Maricopa*); 52 U. Cin. L. Rev. 253 (1983) (examining significant differences in analysis taken by majority and minority in *Maricopa*).

173. *See* M. Conant, *supra* note 14, at 84-106 (describing the numerous court decisions concerning the motion picture industry between 1928 and 1951). Between 1951 and 1957 alone, at least 351 private antitrust actions were brought in the industry. *Id.* at 178-79. See *supra* note 125.

regulatory and judicial activity aimed at creating fair trade.[174] Similarly, courts have had the opportunity to analyze split agreements. Although some courts have refused to apply the per se rule to split agreements,[175] most courts that have assessed the competitive impact of these agreements have found that they are anticompetitive in nature.[176] Moreover, the position of the Department of Justice's Antitrust Division[177] has, since 1977, been that it considers all splits to be per se violations of the Sherman Act.[178] Judicial reluctance to classify split agreements as per se illegal is thus unfounded.

CONCLUSION

For decades motion picture split agreements have survived antitrust scrutiny and, specifically, evaded the per se rule. Split agreements, however, are properly characterized as horizontal market divisions, horizontal price fixing arrangements and, in some instances, group boycotts. As such, their pernicious effect on competition may be presumed and an elaborate rule of reason examination of their competitive significance is not necessary unless countervailing procompetitive justifications are offered. Given that the asserted benefits to the economy do not, in fact, withstand analysis, the appropriate judicial reaction is clear: Split agreements are per se illegal restraints of trade in violation of the Sherman Act.

William J. Borner

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174. M. Mayer, *supra* note 14, at 108-09. As early as 1919 the FTC attacked acquisition of theaters by the major distributors. *Id.* at 111; *see* Note, *The Sherman Act and The Motion Picture Industry*, 13 U. Chi. L. Rev. 346, 346 (1946) ("The application of the Sherman Act to the motion picture industry has been long continued and erratic."); Note, *Judicial Regulation of the Motion-Picture Industry: The* Paramount *Case*, 95 U. Pa. L. Rev. 662, 662 (1947) ("The motion-picture industry has been the subject of litigation under the Sherman Act throughout the entire course of its development as a major American industry.").

175. *E.g.*, Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 204-06 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285, 293 (3d Cir. 1963), *aff'd per curiam by an equally divided Court*, 378 U.S. 123 (1964); Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246, 250 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959); Greenbrier Cinemas, Inc. v. Attorney Gen., 511 F. Supp. 1046, 1051-53 (W.D. Va. 1981); United States v. Loew's, Inc., 1962 Trade Cas. (CCH) ¶ 70,347, at 76,374 (S.D.N.Y. 1962).

176. *E.g.*, Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 890-91 (8th Cir. 1978); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 141-43 (E.D. Wis. 1983); General Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1252-66 (C.D. Cal. 1982), Cinema-Tex Enters. v. Santikos Theaters, Inc., 414 F. Supp. 640, 643 (W.D. Tex. 1975), *modified*, 535 F.2d 932 (5th Cir. 1976).

177. The Supreme Court has labeled the Justice Department a "unique indicator" of whether a business arrangement is per se anticompetitive. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 13 (1979).

178. United States Dep't of Justice, Press Release, Apr. 1, 1977.