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ANTI-TRUST CASES AFFECTING THE DISTRIBUTION OF MOTION PICTURES

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THE growth and development of the motion picture industry present interesting cases in connection with the federal anti-trust laws. This article deals primarily with the federal anti-trust cases relating to the distribution of motion pictures.

There is no monopoly in the distribution of motion pictures. At the present time there are eight[1] principal distributors in the United States and a large number of so-called "independent" distributors. The eight principal distributors, or their affiliates, produce approximately 350 feature pictures a year[2] and the independent producers turn out approximately an additional 350 feature pictures a year. No individual company produces more than about 60 pictures a year. A majority[3] of the eight companies is affiliated through stock ownership with national chains of theatres. It is estimated[4] that at the start of 1938 there were 16,251 theatres operating in the United States, of which approximately 2,192,[5] or about 13%, were operated by companies affiliated with the principal distributors and the balance by other circuits or by exhibitors having no such affiliation, called "independent" exhibitors. Thus it will be seen that no producer or distributor monopolizes or controls the distribution of motion pictures and in fact there is a highly competitive condition both in the production, distribution and exhibition of motion pictures.[6]

After a motion picture is produced in California or New York, numerous positive prints are made from the negative and shipped by common carrier in interstate commerce to various branch offices, called "exchanges", in approximately twenty-five states, and to foreign countries. The positive prints are sent by the exchanges to various theatre exhibitors who have contracts for the exhibition of such films in their theatres. After exhibiting the film the exhibitor sends the film to the exchange, or to

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1. Loew's (M.G.M. pictures), Paramount, Warner's (through Vitagraph and First National), Twentieth Century-Fox, RKO Radio, United Artists, Columbia and Universal.

2. Fortune Magazine, December 1935, p. 130.

3. Only Columbia and Universal have no such affiliation. The number of theatres affiliated with United Artists is relatively small.

4. The Film Daily, February 14, 1938, p. 7.

5. Motion Picture Herald, January 25, 1936, p. 15.

6. Federal Trade Commission v. Paramount Famous Lasky Corp., 57 F. (2d) 152, 155 (1932). In 1931 a consent decree was entered in the Southern District of New York holding the acquisition by Fox of the capital stock of Loew's, Inc. to be unlawful under the Clayton Act and ordering the defendants to divest themselves of such stock. On the other hand, Warner's purchase of the remaining one-third of the stock of First National was permitted. Suit was started in the Southern District of New York by the Department of Justice but later abandoned.

another exhibitor, if so instructed. After all exhibitions the film is returned to the distributor or destroyed. The motion picture is copyrighted and the exhibitor receives a non-exclusive license under copyright to exhibit the same. Salesmen from the exchanges solicit applications from exhibitors which are forwarded to the distributor's office in New York for acceptance or rejection. It is customary for the distributor and the exhibitor to enter into contracts for pictures released during a motion picture season commencing either August first or September first and continuing for a year.

It is clear that the distribution of motion pictures involves interstate commerce.[7] It involves the licensing, transportation and delivery of films across state lines.

Patent and Copyright Cases

In the early days of the motion picture industry the owners of basic patents pooled them and formed the Motion Picture Patents Company to produce pictures. During the early stages of the growth of such company it licensed 116 jobbers who distributed films, projection machines and other accessories necessary to the exhibition of motion pictures. It later formed the General Film Company to take over the business of distribution and eventually only one of the 116 jobbers survived. In *United States v. Motion Picture Patents Company*,[8] the court held that the acts of the defendants constituted a conspiracy and monopoly in restraint of interstate trade thus violating Sections 1 and 2 of the Sherman Act. It appears that the defendants actually had a practical monopoly and refused to sell films to exhibitors who did not pay royalties on projection machines regardless of when, or from whom, they were purchased. The defendants pleaded the protection of their patent rights. The court said:[9]

". . . if the subject-matter of a contract, which otherwise would be illegal because in restraint of trade, is a patented article, this takes away the illegality only to the extent to which the field of the trade, controlled through the combination, is co-extensive with the field within which exclusive control has been granted by the law."

The court concluded that the agreements and acts of the defendants in this case went far beyond what was necessary to protect the monopoly incident to the patent rights. It considered the purpose and result, which was expected to be and was accomplished, an unreasonable restraint of trade and a monopoly.

7. Binderup v. Pathe Exchange, Inc., 263 U. S. 291 (1923), *rev'g*, 280 Fed. 301 (1922); Paramount Famous Lasky Corp. v. U. S., 282 U. S. 30 (1930), *aff'g*, 34 F. (2d) 984 (S. D. N. Y. 1929); U. S. v. Motion Picture Patents Co., 225 Fed. 800 (E. D. Pa. 1915), *appeal dismissed*, 247 U. S. 524 (1918); Majestic Theatre Co. v. United Artists Corp., 43 F. (2d) 991 (D. Conn. 1930).

8. 225 Fed. 800 (E. D. Pa. 1915), *appeal dismissed*, 247 U. S. 524 (1918).

9. *Id.* at 805.

The Motion Picture Patents Company, in licensing a party to use, manufacture and sell projection equipment, imposed the condition that such equipment should be used by the purchaser only for projecting motion pictures produced or distributed by it. This condition was held[10] to be in violation of Section 3 of the Clayton Act, in that it was an attempt to extend the scope of the patent monopoly by restricting the use of the patented equipment to materials necessary to its operation but not part of the patented invention. These decisions, as well as the growth of competition, led to the eventual dissolution of the Motion Picture Patents Company thereby ending its practical monopoly; and no single company has since dominated the industry.[11]

The advent of the sound reproduction of pictures in theatres raised certain questions as to the validity of certain provisions in the agreements leasing such equipment. The agreements required that repairs should be made only by the lessor and that all parts or replacements should be purchased from the lessor and that producers would distribute films produced on sound producing apparatus of the lessor only to exhibitors using the lessor's sound reproducing equipment. In line with previous decisions, the District Court held[12] that such provisions were invalid "tying agreements" under Section 3 of the Clayton Act, except at a time when there was no competing equipment of adequate efficiency on the market.[13] The protection granted by the patent laws is a "limited monopoly to make, use and vend an article [and] may not be 'expanded by limitations as to the materials and supplies necessary to the operation of it' "[14] so as to monopolize commerce in unpatented articles or to dominate a business. However, in an action by a distributor for patent infringement it was held[15] that it was no defense to allege that the contract was in restraint of trade under the Sherman Act.

10. Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502 (1917), *aff'g*, 235 Fed. 398 (C. C. A. 2d, 1916).

11. A recent decision of great practical importance to the industry is Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464 (1935). In that case the United States Supreme Court after first denying a writ of *certiorari* later granted the writ and held a patent for producing combined sound and picture films invalid for lack of novelty and invention. At the same time a claimed improvement in a mechanism for recording and reproducing sound pictures was also held invalid for lack of invention in Altoona Publix Theatres v. American Tri-Ergon Corp., 294 U. S. 477 (1935). Had these cases been decided the other way, there would have been possible a partial domination of the industry by a single company.

12. Stanley Co. of America v. American Telephone & Telegraph Co., Fed. Tr. Reg. Ser. 5193 (D. Del. 1933). (Not officially reported. A number of cases which are not officially reported can be found in C.C.H., Federal Trade Regulation Service, 8th ed., Court decisions supplement, 1932-1937, or in new court decisions in such service. This service will be cited as Fed. Tr. Reg. Ser. with the page number).

13. Gen. Talking Pictures Corp. v. American Telephone & Telegraph Co., Fed. Tr. Reg. Ser. 25,078 (D. Del. 1937).

14. See Carbice Corp. v. American Patents Develop. Corp., 283 U. S. 27, 31 (1931).

15. Motion Picture Patents Co. v. Eclair Film Co., 208 Fed. 416 (D. C. N. J. 1913); Motion Picture Patents Co. v. Laemmle, 178 Fed. 104 (C. C. S. D. N. Y. 1910).

The protection granted to the owner of a copyrighted motion picture is substantially similar to the protection granted to the owner of a patent. He may refuse to license others to exhibit a copyrighted motion picture or may license others to exhibit such pictures on reasonable conditions necessary for the protection of the copyright and may charge a license fee. The exhibition of a copyrighted motion picture on days other than those fixed in the license agreement is an infringement of the copyright.[16] But the copyright acts, like the patent acts, do not render immunity to acts which constitute a violation of the anti-trust laws.[17]

The music used in the production of motion pictures is acquired from the copyright owner. Each theatre must have a license from the American Society of Composers, Authors and Publishers, an unincorporated association, to perform publicly for profit the music in the repertory of the Society. A petition was filed in the District Court for the Southern District of New York in 1934 against the Society and the Music Publishers Protective Association and their members charging a combination or conspiracy to restrain, monopolize and control interstate and foreign commerce as represented by radio broadcasting and other entertainment in the public performance of music for profit through the pooling of independent copyright monopolies. Although the trial of the case was adjourned in 1935, the case is still pending. A New York Court had previously held[18] that the Society was not an illegal monopoly in restraint of trade.

Recently, legislation has been passed in several states and has been introduced in New York State for the purpose of reducing the effectiveness or destroying the pooling of independent copyright monopolies. The Nebraska statute was held unconstitutional and the constitutionality of such legislation has been attacked in the states of Montana, Washington and Florida[19] on what seems to be a sound theory that the states have no jurisdiction to infringe upon the exclusive rights guaranteed to authors under Article I, Section 8 of the Constitution of the United States and the copyright laws.

Standard Form of Exhibition Contract

The Motion Picture Producers and Distributors of America, Inc. was organized in 1922 for self-regulation of the producers and distributors

16. Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theatre Co., 59 F. (2d) 70 (C. C. A. 1st, 1932), *rev'g*, 50 F. (2d) 908 (D. Mass. 1931), *rehearing denied*, June 11, 1932; Vitagraph, Inc. v. Grobaski, 46 F. (2d) 813 (W. D. Mich. 1931). If a copyrighted motion picture is licensed for exhibition at a particular theatre the owner is entitled to damages and an injunction for the exhibition of the picture at a different theatre. Tiffany Producers v. Dewing, 50 F. (2d) 911 (D. Md. 1931).

17. Straus v. American Publishers Ass'n, 231 U. S. 222 (1913).

18. 174th St. & St. Nicholas Ave. Amusement Co. v. Maxwell, 169 N. Y. Supp. 895 (Sup. Ct., 1918).

19. Motion Picture Herald, p. 18 (March 12, 1938).

of motion pictures. It has fostered the adoption of beneficial trade practices and regulations. After a number of years a standard form of contract between the distributors and the exhibitors of motion pictures was adopted by its members on May 1, 1928. This form was adopted after numerous conferences with both distributors and exhibitors in which all parties agreed that the arbitration of disputes was a fair trade practice. Among other things, the contract provided for the compulsory arbitration of disputes and the furnishing of security by an exhibitor to each distributor in the event of failure to arbitrate disputes or to abide by the award of the arbitrators and gave each distributor the option to cancel its contract upon the failure of the exhibitor to furnish security. A board of arbitration was established in each of the 32 cities in which local Film Boards of Trade were located. The distributors' representatives comprised the local Film Boards of Trade which represented distributors of practically all motion pictures in the United States. The distributors agreed among themselves that the standard exhibition contract would be used for all contracts with exhibitors. In *Paramount Famous Lasky Corp. v. United States,*[20] the Supreme Court held that the agreement of the distributors not to contract with exhibitors, except upon a standard form requiring compulsory joint action on the part of distributors with reference to arbitration, was in restraint of trade.

From the Court's opinion, it is not entirely clear as to whether the illegality consisted in the agreement of the distributors to refuse to contract for motion pictures except on the standard form of agreement or whether the illegality consisted in the provisions with respect to the compulsory arbitration. However, it appears to the writer that the illegality consisted in the concerted action of the distributors in refusing to deal except on the standard form of contract.

Mr. Justice McReynolds speaking for the Court, said:[21]

"The record discloses that ten competitors in interstate commerce, controlling sixty per cent of the entire film business, have agreed to restrict their liberty of action by refusing to contract for display of pictures except upon a standard form which provides for compulsory joint action by them in respect of dealings with one who fails to observe such a contract with any distributor, all with the manifest purpose to coerce the exhibitor and limit the freedom of trade."

"The fact that the standard exhibition contract and rules of arbitration were evolved after six years of discussion and experimentation does not show that they were either normal or reasonable regulations. That the arrangement existing between the parties cannot be classed among 'those normal and usual agreements in aid of trade and commerce', spoken of in *Eastern States Retail Lumber Dealers' Asso. v. United States,* 234 U. S. 612, 58 L. ed., 1499, L. R. A. 1915A, 788, 34 S. Ct. 951, *supra,* is manifest."

"It may be that arbitration is well adapted to the needs of motion picture industry; but when under the guise of arbitration parties enter into unusual

20. 282 U. S. 30 (1930), *aff'g,* 34 F. (2d) 984 (S. D. N. Y. 1929).

21. *Id.* at 41, 42, 43, and 44.

arrangements which unreasonably suppress normal competition their action becomes illegal. In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration. The prohibitions of the statute cannot 'be evaded by good motives. The law is its own measure of right and wrong, of which it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.' *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 S. Ct. 9."

In the district court[22] which had also held the concerted action of the distributors in restraint of trade, Judge Thacher recognized that the anti-trust laws did not prevent commercial groups from voluntarily imposing upon themselves standard forms of agreement or voluntarily agreeing to submit controversies to arbitration. He pointed out that, although the standard form of contract had been agreed upon as a result of conferences with many exhibitors, all exhibitors were compelled to sign the standard form in order to secure pictures so that the action of some exhibitors in signing the contract was not voluntary.

As a result of this decision numerous cases arose out of the failure of the exhibitor to pay for pictures licensed under the standard form of contract and actions were commenced by exhibitors for treble damages under the anti-trust laws. The courts were almost evenly divided[23] as to whether the entire contract was illegal or whether only the arbitration provision was illegal but severable from the rest of the contract. Unfortunately these cases do little to clarify the decision in the *Paramount* case.

After such decision a number of distributors allowed the exhibitors to choose between an optional standard license agreement with a further

22. United States v. Paramount Famous Lasky Corp., 34 F. (2d) 984 (S. D. N. Y. 1929).

23. The cases holding the arbitration provision severable and allowing recovery on the contract are: Fox Film Corp. v. Ogden Theatre Co., 17 P. (2d) 294 (Utah 1932); Walker Theatre Co. v. R-K-O. Distributing Corp. (Ind. App. 1934); Columbia Pictures Corp. v. Bi-Metallic Inv. Co., 42 F. (2d) 873 (D. Colo. 1930); Paramount Famous Lasky Corp. v. National Theatre Corp., 49 F. (2d) 64 (C. C. A. 4th, 1931); R-K-O Distributing Corp. v. Moody, 12 Wash. Co. Rep. 153 (Pa. 1932); R-K-O Distributing Corp. v. Shook, 108 Pa. Super Ct. 383 (1933).

The cases holding the entire contract illegal are: United Artists Corp. v. John Piller (Sup. Ct. N. D., June 30, 1932); United Artists Corp. v. R. E. Mills (Sup. Ct. Kans., June 4, 1932, *rehearing denied,* July 11, 1932) (in which the court said that even if the arbitration provision was severable the contract provided for a minimum price of admission violating § 50-101 of the Revised Statutes of 1923); Vitagraph, Inc. v. Theatre Realty Co. Inc., 50 F. (2d) 907 (E. D. Pa. 1931); Majestic Theatre Co. v. United Artists Corp., 43 F. (2d) 951 (D. Conn. 1930). The only case to reach the Supreme Court of the United States was Fox Film Corp. v. Muller, 296 U. S. 207 (1935), *aff'g,* 225 N. W. 845 (Minn. 1934). The Minnesota Court had held that: (1) the

option of arbitration and the distributor's own form of contract. It appears that the arbitration provisions would then be upheld.[24]

On the same day that the *Paramount* case was decided, the Supreme Court also held in *United States v. First National Pictures, Inc.*[25] that the agreement of distributors to endeavor to prevent exhibitors from colorable transfers of theatres for the purpose of evading film contracts by requiring an exhibitor to deposit security, unless he assumed the existing film contracts, or until his credit rating had been approved, was an unreasonable restraint on interstate commerce. The district court[26] had held that the agreement was designed to eliminate a recognized trade abuse and was not unreasonable, as its purpose and effect was not to suppress competition nor attempt to monopolize, but to regulate competition and thus promote the free flow of commerce.

In neither the *Paramount* nor the *First National* case did the Supreme Court recognize the right of concerted action on the part of the distributors even though it was admitted in the former case that the standard form of contract had eliminated many disputes and would have beneficial results and even though the purpose in the latter case was admittedly to eliminate a trade abuse. It seems that in line with previous decisions[27] the Supreme Court should have considered whether or not the method used was reasonable and the effect on interstate commerce only incidental. It is difficult to see just how competition would be lessened among distributors in either of these cases.

These cases raise the interesting question as to whether in the absence of concerted action and prior agreement among distributors a particular provision in a contract between one distributor and one exhibitor may be in restraint of trade.

Contracts Prohibiting the Exhibition of Double Features

Whether because of a desire to give the public a bargain during the depression or for other reasons, the practice of showing two feature motion pictures at one performance has become common and is in use in the majority of theatres in the United States. Certain license agreements

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arbitration provision was illegal and not severable and the entire contract was illegal and, also, (2) that the contract violated the anti-trust laws. The Supreme Court held it had no jurisdiction as the grounds were independent of each other and the non-federal ground was adequate to support the judgment.

24. See in the Matter of Arbitration between Metro-Goldwyn-Mayer Dist. Corp. & Dewitt Development Co., 150 Misc. 408, 269 N. Y. Supp. 104 (Sup. Ct. 1931).

25. 282 U. S. 44 (1930), *rev'g*, 34 F. (2d) 815 (S. D. N. Y. 1929).

26. 34 F. (2d) 815 (S. D. N. Y. 1929).

27. *Cf.* United States v. Fur Dressers' & Fur Dyers' Ass'n, 5 F. (2d) 869 (S. D. N. Y. 1925) holding legal the rules of the Association requiring cash payments from delinquent accounts. *Cf.* Board of Trade v. United States, 246 U. S. 231 (1918); Hopkins v. United States, 171 U. S. 578 (1898); Anderson v. United States, 171 U. S. 604 (1898);

prohibited the use of double features. In *Vitagraph, Inc. v. Perelman*[28] the court found that there was an illegal combination and conspiracy among several distributors to license pictures for exhibition only upon an agreement of the exhibitors not to exhibit double features. However, in *Shubert Theatre Players Co. v. Metro-Goldwyn-Mayer Dist. Corp.*,[29] in an action by an exhibitor to compel distributors to supply films to a theatre showing double features at a low admission price, the court denied a temporary injunction and upheld the restriction against double features and requiring the charging of a minimum admission price where the only evidence of a conspiracy among distributors was the fact that they had all included similar provisions in their contracts. In the *Perelman* case the distributors argued that there was no conspiracy or combination and that each distributor had acted independently, but the court found such a conspiracy or combination and stated that collective action on the part of major distributors against double features amounted to a restraint of interstate trade, because independent exhibitors often purchase the second feature from an independent distributor, and the effect of the prohibition was to deter exhibitors from using pictures distributed by independent distributors, who were in competition with the major distributors, and thus tended to lessen competition from independent distributors and create a monopoly in favor of the major distributors. In the *Shubert* case the court pointed out that over 50% of all distribution revenue was usually obtained from "first runs" throughout the country and the distributors had an interest in the amount of license fees received, which were based upon a percentage of gross receipts in many cases, and that the restrictions in license agreements regarding admission prices and double features did not tend to substantially lessen competition or to create an illegal monopoly if uninfluenced by understandings with other distributors.

As was pointed out in the discussion of the *Paramount* and *First National* cases, the courts have laid emphasis upon the question as to whether the distributors have acted in concert or as a result of a prearranged understanding in adopting a particular form of contract or a particular contract provision and it appears that they have not given a great deal of consideration as to what provisions in the contract are reasonable

28. Fed. Pr. Reg. Ser. 6239 (C. C. A. 3rd, 1936), *aff'g*, Perelman v. Warner Bros. Pictures, Inc., 9 Fed. Supp. 729 (E. D. Pa. 1935). The District Court held that there was a violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. On appeal the Circuit Court held that there was a violation of § 1 of the Sherman Act and that it was unnecessary to consider whether there was a violation of § 3 of the Clayton Act. Subsequent proceedings in the Circuit Court were unusual. The case was reargued and in March, 1937, the Circuit Court issued a memorandum opinion affirming its previous decision. The memorandum was recalled the next day with the explanation that it had been issued by mistake. Another rehearing was had in December, 1937 and the Circuit Court affirmed its previous decision without opinion on March 10, 1938.

29. (Not reported, D. C. Minn. Jan. 30, 1936). The court had before it the decision in Vitagraph, Inc. v. Perelman, Fed. Pr. Reg. Ser. 6239 (C. C. A. 3rd, 1936).

regulations of trade and only indirectly affect interestate commerce. It must be recognized that in the words of Mr. Justice Brandeis[29] "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their every essence." It is submitted that the court should give more consideration to the peculiar facts of the motion picture business to which the restraint is applied, the condition of the business before and after the restraint is applied, the nature of the restraint and its effect, probable and actual, the evil sought to be remedied and the methods used. This will aid the court in determining whether the restraint is reasonable or not.[31] If the restraint is a reasonable one, and does not lessen competition nor tend to create a monopoly, it would appear that the mere fact that there is concerted or collective action on the part of the distributors should not amount to a violation of the anti-trust laws. If there is no collective action or pre-existing understanding among distributors, the courts have not indicated except in a limited way whether the agreement of one distributor and one exhibitor may be a violation of Section 1 of the Sherman Act.

In *United States v. Interstate Circuit, Inc.*,[32] at the request of an important exhibitor, various distributors included in license agreements a provision that every feature picture shown first run for an evening admission price of $.40 or more in certain territories would not be exhibited in the same territories at a subsequent run for less than an evening admission price of $.25 and would not be exhibited with another feature picture. These provisions were included in all license agreements for the exhibition of pictures in the designated territories. The district court held that there was a conspiracy among the important exhibitors and the defendant distributors in restraint of interstate trade. In this case the opinion not only stated that the provisions in question were illegal and void and that concerted action on the part of the distributors with Interstate Circuit was illegal but also indicated, particularly in the decree, that such an agreement between any one distributor and any one exhibitor would also be illegal. The court said:[33]

"The citizen has the right to go to another citizen to make a contract and to have that other citizen free from any inhibiting prior agreement to limit the rights of him who seeks. The subsequent small theatre exhibitor who wanted the right to show a Class A film at ten or fifteen or twenty cents, has a right—that right which belongs to every free man—to contract with the owner of that film, free to exercise his own judgment. This evidence shows that no such subsequent run exhibitor has a field of that sort with the distributor defendant. There had already been a pre-occupation of this very field of agreement. Some of his

30. Board of Trade v. United States, 246 U. S. 231 (1918).

31. See the remarks of Judge Bondy in United States v. Fur Dressers' & Fur Dyers' Ass'n, 5 F. (2d) 869 (S. D. N. Y. 1925).

32. 20 Fed. Supp. 868 (N. D. Tex. 1937).

33. *Id.* at 873.

rights had already been taken away from him. It differs from the exercise of the distributor of the right to refuse to deal at all."

The court recognized that the owner of a copyright may refuse to license the exhibition of motion pictures at all and recognized that it was doubtless true that the exhibition, itself, of motion pictures is not interstate commerce and therefore beyond the finger of regulation as interstate commerce. However, the court took the view that the restraint upon the exhibition of a motion picture necessarily affected the production and distribution of pictures by independent producers and distributors. The question which was discussed in the *Perelman* case, as to whether the restraint on exhibition was so great as to directly affect the movement or flow of pictures in interstate commerce was only touched upon lightly. The distributors endeavored to show that there was no understanding or agreement among themselves but that each license agreement was made as a result of separate action by the exhibitor and the distributor; but the court decided that the conspiracy was shown by the unanimity of action of the distributors at a given time with reference to the identical matter. The Supreme Court has granted a writ of *certiorari* in this case and its decision may be helpful in clarifying the validity of restrictions prohibiting double features and requiring minimum admission prices, whether such restrictions are contained in agreements entered into as a result of concerted action on the part of distributors with an exhibitor, or whether contained in an agreement between one distributor and one exhibitor without concerted action on the part of a number of distributors.

Cases Involving Certain Trade Practices Including Block Booking and Clearance

As the motion picture industry developed, it became the practice for distributors and exhibitors to make contracts for the exhibition of all motion pictures released by a distributor during a motion picture season consisting of a year. The pictures are not produced or in production at the time the contracts are made. This practice of contracting for all pictures released by a distributor for a specified period, usually a year,[34] is known as "block booking". As the exhibitor does not know in advance what the finished pictures will be like, it is sometimes said that he is engaged in "blind buying". The Federal Trade Commission investigated the practice over a period of years and ordered Paramount to cease and desist from conspiring to monopolize distribution and exhibition by acquiring theatres and by block booking. In *Federal Trade Commission v. Paramount Famous Lasky Corp.*[35] the Circuit Court held that "block booking" was not an unfair method of competition. The court pointed

34. In some instances "franchise" agreements are made for the exhibition of all pictures released by a distributor for a period of two, three, or five years and occasionally for a longer period.

35. 57 F. (2d) 152 (C. C. A. 2d, 1932).

out that a distributor of films has the right to select its own customers and to sell in quantity, or refuse to sell at all, to any particular exhibitor for reasons of its own. It is to be noted that there was no claim made that distributors agreed among themselves to license pictures for exhibition only in blocks, although this practice has been in general use and is used today by most distributors. The Circuit Court distinguished the *Paramount* and *First National* cases on the ground that in such cases there was no protection of the freedom of contract, as there was no right to contract independently of a restraint placed upon either party by an agreement with others.

From time to time legislation has been introduced to prohibit block booking and blind buying. A recent example is the Neely Bill[36] recently reported favorably to the Senate by the Interstate Commerce Committee. It has been argued[37] that the practice of contracting for all pictures released during a motion picture season is as advantageous to the exhibitor as to the distributor since it gives the exhibitor a year's source of supply of motion pictures at prices which are generally less than he would have to pay if individual pictures were purchased. Moreover it has been argued that the bill is practically unworkable.[38]

A large part of the revenue of a distributor is secured from the "first run" exhibition of a motion picture in a certain territory, and the license fees in many cases are based upon a percentage of the gross receipts from exhibition, and are considerably higher than those paid by a subsequent run exhibitor. Pictures are first shown in a particular territory in the larger, better equipped theatres which spend substantial amounts in advertising the pictures. A well established practice in the industry is for the distributor to agree with the exhibitor that a picture will not be exhibited at a second showing in a particular territory within a certain number of days after the end of the first run in such territory. This is known as a "clearance" or "protection" period. The localities or territories in which exhibitors are given clearance are known as zones. The words "clearance" and "protection" are sometimes used to cover both the number-of-days protection and the zone.

It seems reasonable that the exhibitors who pay the higher prices for pictures and exhibit them in better equipped theatres and supply the publicity which reacts to the benefit of subsequent run exhibitors of the pictures should be entitled to a reasonable period of protection.[39] As a matter of business practice the protection periods granted by each distributor will usually be the same as those granted by other distrib-

36. Senate 153.

37. Motion Picture Daily, Mar. 19, 1938.

38. See the statement by S. R. Kent in The Film Daily, Mar. 22, 1938.

39. See the discussion of clearance as related to the exhibitors' buying problems. In. Comment (1936) 36 COL. L. REV. 635, 646, 647, and the cases citied therein.

utors. If the protection periods are arrived at as a result of individual negotiations between a distributor and an exhibitor there appears to be no objection. The question whether a uniform plan of clearance and zoning agreed upon by distributors without any intention to favor one exhibitor over another, or to force an exhibitor out of business, has not yet been decided, although the next few cases bear upon the subject.

In *Youngclaus v. Omaha Film Board of Trade*,[40] the distributors entered into an agreement among themselves not to license the exhibition of a picture by the plaintiff for a period of ten days after the picture had been exhibited at a rival theatre. The court held that this was an unreasonable restraint of trade. The court said:[41]

"Whatever the length of the period, whether for one day or more, the distributors limited their freedom to contract according to their individual judgments, as to the period of protection to be accorded to the Norfolk theatre and to be imposed upon the plaintiff. This agreement has been enforced against the plaintiff.

"Whatever may be the right of the distributors separately and individually to license the exhibition of pictures by contracts giving to the licensees the exclusive right of exhibition for a period of time, a combination of distributors, such as exists here, controlling a large part of the trade in interstate commerce, to refrain from competition among themselves in making such licensing agreements with exhibitors, by agreeing that they will each grant a substantial period of protection to one exhibitor over a rival distributor in competitive territory, is an unreasonable restraint of interstate trade, and is condemned by the anti-trust laws of the United States.

"The plaintiff is entitled to the right to bargain with distributors who are free from a combination among themselves not to bargain with the plaintiff unless he shall consent that his rival shall have had the first opportunity to exhibit a picture."

It is submitted that the *Youngclaus* case merely decides that a pre-existing agreement between distributors that one exhibitor in a certain territory shall have protection over a competing exhibitor in the same territory is unlawful but does not decide that an agreement of distributors to grant ten days' protection in a particular territory, regardless of which exhibitor shall have a first run in such territory, is in restraint of trade.

In *Rolsky v. Fox Midwest Theatres*,[42] the court recognized the right of an exhibitor to receive clearance where there was no agreement among distributors to use clearance as a means of preventing a rival exhibitor from securing first run pictures. An important customer with a large number of theatres, and therefore having a greater buying power than its competitors, requested and received clearance over competitors charg-

40. 60 F. (2d) 538 (D. Neb. 1932).
41. *Id.* at 540.
42. Fed. Tr. Reg. Ser. 6442 (W. D. Mo. 1936).

ing the same admission price. The plaintiff argued that the clearance granted violated the anti-trust laws, even in the absence of any collective action on the part of the distributors. The court said:[43]

"I do not think the theory is sound . . . I think that there cannot be any doubt whatever but that a distributor of motion pictures owning a copyright upon a given picture, may sell to an exhibitor in a given area, the exclusive right to exhibit that picture either for a short period or for a long period provided it is not longer than the life of the copyright without regard to whether that exhibitor is one who charges the same or a different admission price from that which is charged by another exhibitor or other exhibitors in the same area."

Agreements among two or more distributors with exhibitors providing for arbitrary and unreasonable clearance were condemned in consent decrees,[44] as was the practice of distributors in agreeing upon a uniform plan of clearance for the purpose of preventing other exhibitors in the same territory from securing pictures in competition. It was provided that nothing in the decrees shall declare a classification of first, second, third or subsequent runs or any other reasonable classification, including clearance or protection according to runs or admission prices, to be illegal under the anti-trust laws, or prohibit distributors from selecting their own customers and bargaining with them according to law.

In a case in which the plaintiff alleged it was a violation of the anti-trust laws to change the area or zone in which her theatre would have a first run and to include her in a different area or zone where she would have to compete for the first run exhibition of pictures, the court held[45] that if the re-zoning was a violation of the anti-trust laws, the original zoning was also a violation and the plaintiff was claiming the right to recover on the basis of illegality. The court pointed out that it was not passing upon the validity of the method of zoning adopted by the parties.

If there is an agreement among distributors not to deal with an exhibitor in order to put the exhibitor out of business, there is a violation of the anti-trust laws. This was the basis of the decision in *Binderup v. Pathe Exchange, Inc.*[46] The Court pointed out that the illegality consisted, not in the separate action of each, but in the conspiracy and combination of all to prevent any one distributor from dealing with an exhibitor. It is recognized that producers or distributors separately may choose their own customers.[47]

Just as the concerted action of distributors in refusing to deal with any

43. *Id.* at 6445.

44. United States v. Balaban & Katz Corporation, Fed. Tr. Reg. Ser. 5028 (N. D. Ill. 1932); United States v. Fox West Coast Theatres, Fed. Tr. Reg. Ser. 5019 (S. D. Cal. 1932).

45. First Nat. Pictures, Inc. v. Robison, 72 F. (2d) 37 (C.C.A. 9th, 1934), *cert. denied*, 293 U. S. 609 (1934).

46. 263 U. S. 291 (1923), *rev'g*, 280 Fed. 301 (C.C.A. 8th, 1922).

47. Greater New York Film Rental Co. v. Biograph Co., 203 Fed. 39 (C.C.A. 2d, 1913).

exhibitor is a violation of anti-trust laws, the concerted action of a large number of exhibitors in refusing to deal with a distributor, except on terms satisfactory to the exhibitor, is a conspiracy in restraint of trade.[48] Similarly an association of motion picture theatre owners may not combine to coerce distributors to force them to refuse to deal with non-theatrical exhibitors such as schools, churches, *etc.*[49]

A re-issue of a motion picture under a new title, some three years after its original issue, without disclosing that it was a re-issue, was held to be a violation of the Federal Trade Commission Act as an unfair method of competition.[50]

Summary

It will be seen that there is no monopoly at the present time in the distribution of motion pictures and that the only attempts at monopoly have been founded upon control of basic patents. Probably the anti-trust laws have prevented and continue to prevent any monopoly in the distribution of motion pictures. The principal difficulties of the distributors in relation to the anti-trust laws have practically all arisen as a result of concerted or collective action on the part of the principal distributors controlling approximately 50% of the films distributed in the United States in carrying out various trade practices. The principal cases in which the courts have found that the distributors acted in concert and violated the anti-trust laws have been those in which there seems to be some question as to whether sufficient consideration has been given to the reasonableness or unreasonableness of the restraint and its effect on competition. It is hoped that future cases will decide the interesting question as to whether, in the absence of collective action on the part of distributors, an agreement between a single distributor and an exhibitor in relation to various trade practices violates the anti-trust laws.

48. Paramount Pictures, Inc. v. Allied Theatre Owners of North West, Inc. (Not reported, Minn. 1937); Paramount Pictures, Inc. v. United Motion Picture Theatre Owners of Eastern Pa. (Not reported. Pa. 1938). In the last case the District Court had found that the effect of the acts complained of was to stop all dealings of exhibitors with the distributor, and concluded that, if no pictures of the distributor were exhibited, there would be none shipped in interstate commerce and therefore no violation of the anti-trust acts. This conclusion was, of course, overruled by the Circuit Court.

49. United States v. Motion Picture Theatre Owners of Oklahoma (Not reported. Okla. 1928).

50. Fox Film Corp. v. Federal Trade Commission, 296 Fed. 353 (C.C.A. 2d, 1924).