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Film and Motion Pictures

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IV. FILM AND MOTION PICTURES

A. Copyright

1. Copyright Infringement: Substantial Similarity Found Lacking

By all accounts, Hollywood is loaded with scripts in search of a deal. When a blockbuster opens, lots of people wish they had conceived it. Steven Spielberg's "E.T.—The Extra-Terrestrial" looked to playwright Lisa Litchfield very much like the illegitimate child of her unsold play, "Lokey from Maldemar." One gray-green alien might look very much like another to the uninitiated, but the Ninth Circuit, in *Litchfield v. Spielberg*,¹ found no family resemblance between "Lokey from Maldemar" and "E.T." The court held that the two works were not substantially similar. Thus, there could be no question of copyright infringement or violation of the Lanham Act.²

In 1978, Litchfield wrote a one-act musical entitled, "Lokey from Maldemar," which chronicled the adventures of two extra-terrestrials stranded on earth. The aliens, known as "Lokey" and "Fundinkle," were first befriended and later pursued by earthlings, demonstrated extra-terrestrial powers, and traveled from the North Pole to Japan and the Andes Mountains before finally returning home. The play was performed a few times in Los Angeles, and Litchfield tried to find a producer for a motion picture version of the work. Defendant Universal rejected the script as "unsuitable for motion picture development," and Litchfield's later attempts to sell the "screenplay outline" were equally unsuccessful.³

In 1982, Spielberg's "E.T." burst on the horizon, opening to huge commercial success and critical acclaim. "E.T." was the story of a little lost alien accidentally left behind on earth. Driven by hunger and curiosity to a suburban California home, E.T. met and was befriended by a young boy, for whom he demonstrated extra-terrestrial powers. Earthlings later pursued him. He appeared to expire, but revived when his fellows returned for him.

1. 736 F.2d 1352 (9th Cir. 1984).

2. *Id.* at 1358. See Trademark (Lanham) Act of 1946, ch. 540, § 43(a), 60 Stat. 427 (codified at 15 U.S.C. 1125(a) (1982)). Litchfield's four other causes of action were state claims of unfair competition, misrepresentation of story authorship, breach of implied-in-fact contract, and breach of confidence. Named defendants were Steven Spielberg, M.C.A., Inc., Universal City Studios, Inc., Extra-Terrestrial Productions, Kathleen Kennedy, Ned Tannen, and Melissa Mathison.

3. *Litchfield*, 736 F.2d at 1354.

The federal district court dismissed the Lanham Act allegation for failure to state a claim, and, with it, the state claims of unfair competition and misrepresentation of authorship.⁴ The court also granted Spielberg's motion for summary judgment on the copyright infringement issue, including derivative merchandising rights, on the basis of a finding of no substantial similarity.⁵ The two remaining pendent state claims were dismissed at that time for lack of subject matter jurisdiction.⁶ Litchfield appealed the summary judgment on the copyright issue to the Ninth Circuit, which declared that no reasonable jury could find that the two works were substantially similar. Therefore, summary judgment was proper.⁷ The Ninth Circuit also affirmed the lower court's dismissal of the Lanham Act claim, again because it agreed that there was no substantial similarity between the works.⁸

The court pointed out that, in order to prove copyright infringement, a plaintiff must show ownership of the copyright, access by the defendant to the copyrighted work, and substantial similarity between the copyrighted work and the defendant's work.⁹ Litchfield and Spielberg agreed that Litchfield owned the copyright to "Lokey." For purposes of the motion for summary judgment, defendants conceded they had access.¹⁰ The only issue to be resolved on appeal was whether summary judgment was proper on the issue of substantial similarity.¹¹

In adjudicating the issue of substantial similarity, the court applied the two-part analysis it set forth in *Sid & Marty Krofft Television Productions Inc., v. McDonald's Corp.*¹² In order to prove infringement under

4. *Id.* at 1355.

5. Litchfield v. Spielberg, 2 COPYRIGHT L. REP. (CCH) ¶ 25,541 (C.D. Cal. June 10, 1983). Defendants moved for summary judgment only on the claim directed against the film. The court found that, since the film was non-infringing, the derivative merchandising claims should be included in the order as well.

6. *Id.*

7. Litchfield, 736 F.2d at 1358.

8. *Id.* Although Litchfield had not specifically appealed the district court's dismissal of the unfair competition and story misrepresentation claims, the Ninth Circuit asserted jurisdiction and held the dismissals proper since both claims were preempted by federal copyright law. *Id.* The defendants questioned the court's jurisdiction over these claims since they were not named in Litchfield's notice of appeal. The court held that because an appeal from a final judgment calls in question all earlier rulings, the court can infer the additional intent to appeal from a specific judgment as long as the appellee is not misled by the appellant's mistake. *Id.* at 1355. Since the federal claims had been dismissed prior to trial, the court also affirmed dismissal of the pendent state claims of breach of implied-in-fact contract and breach of confidence. *Id.* at 1358.

9. *Id.* at 1355.

10. *Id.*

11. *Id.*

12. 562 F.2d 1157, 1164 (9th Cir. 1977). *Sid & Marty Krofft Productions, Inc.*, who pro-

Krofft, Litchfield had to show that the works in question were substantially similar both in idea and in expression.¹³ The court explained that similarity of idea could be shown through the use of an extrinsic test.¹⁴ This test focuses on alleged similarities in the objective details of the works by comparing plot, theme, dialogue, mood, setting, pace, and sequence.¹⁵

Litchfield also produced a list of similarities between "Lokey" and "E.T." to show extrinsic similarity.¹⁶ She argued that there were too many similarities, especially in the sequence of events, for the court to determine that there was no material issue of fact.¹⁷ The court conceded that it had relied on lists in the past for "illustrative purposes."¹⁸ However, such lists were "inherently subjective," especially if they emphasized "random similarities scattered throughout the works," as Litchfield's did.¹⁹ After reading "E.T.'s" continuity script²⁰ and the two versions of "Lokey,"²¹ the court held that the ideas presented in the two works were not substantially similar and that any similarities in plot were too general to warrant copyright protection.²² Although it could see some similarity between the opening scenes, the court found no substantial similarity between the sequence of events, mood, dialogue, and char-

duced the children's show, "H.R. Pufnstuf," sued McDonald's Corp. for infringing the copyright to their show by the production of "McDonaldland" television commercials. The court found substantial similarity.

13. *Litchfield*, 736 F.2d at 1356.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (citing *Twentieth Century Fox v. M.C.A., Inc.*, 715 F.2d 1327, 1329 n.5 (9th Cir. 1983)).

19. *Litchfield*, 736 F.2d at 1356.

20. A continuity script is a scenario that gives the complete action and scenes in detail and in the order in which they are to be shown on the screen. The court held that basing its comparison on "E.T.'s" continuity, rather than on the film itself, was permissible in this case since neither party had claimed the continuity varied from the movie. It prudentially declined to decide, however, whether reading a film's continuity script would provide a sufficient basis for comparison with other works in all cases. *Id.* Litchfield did not ask the court to view the movie.

21. The district court judge had read both versions of "Lokey," the continuity script of "E.T.," and had viewed "E.T." in the defendants' screening room. *Id.* On appeal, Litchfield claimed that it was prejudicial error for the district court judge to screen "E.T." outside the presence of her counsel, and that the version shown might have differed in some material respects from the version shown publicly. The Ninth Circuit declined to consider this objection as it was not raised below. Its review was held not necessary to prevent manifest injustice, especially in light of the court's *de novo* review of the issue of substantial similarity. *Id.*

22. *Id.* at 1357.

acters of the two works.²³

The court explained that similarity of expression under *Krofft* would depend on an intrinsic test focusing on the subjective response of the "ordinary reasonable person" to the works in their entirety.²⁴ The court found "even less" similarity of expression than idea, and stated that the "total concept and feel" of the works were completely different.²⁵ It pointed out that, while "E.T." concentrated on the development of the characters and the relationship between a boy and an extra-terrestrial, "Lokey" used caricatures in developing its theme of mankind divided by fear and hate.²⁶ It concluded that no lay observer would recognize "E.T." as a dramatization of "Lokey," and that summary judgment was proper.²⁷

Since it found no substantial similarity between the works, the court also dismissed Litchfield's allegation that Spielberg violated Section 106(2) of the Copyright Act²⁸ by preparing a "derivative work," "E.T.," based on "Lokey." Noting that the district court had not addressed this issue, the court held that a violation of Section 106(2) of the Act would require some form of incorporation of the copyrighted work into the infringing work, and that "E.T." had neither incorporated nor substantially copied any portion of "Lokey."²⁹ Litchfield argued that Section 106(2) of the Act was intended to expand the definition of "derivative works" to include any work based on a copyrighted work, and that similarities between the two works constituted the required "incorporation" to show that "E.T." was based on "Lokey" for purposes of the statute.³⁰ The court noted that Litchfield had cited no authority to support this "novel proposition," and characterized Litchfield's arguments that Section 106(2) of the Act radically altered the protection afforded by the

23. *Id.* at 1356-57. Although the Ninth Circuit did not address Litchfield's allegations below that the character, E.T., infringed her character, Lokey, the district court found that Lokey and Fundinkle were not "distinctively delineated" enough to warrant copyright protection. In the 1978 play, Lokey was described as a bald, egg-headed, grey-green five foot tall boy, and Fundinkle, a giant firefly. In the 1980 screenplay outline, Lokey was simply a tall, grey, hairless alien, but Fundinkle had grown to a three foot talking bug with a flashing phosphorous tail. (How could Hollywood resist?) The court found that neither one was the focus of "Lokey." *Litchfield v. Spielberg*, 2 COPYRIGHT L. REP. (CCH) ¶ 25,541 (C.D. Cal. June 10, 1983).

24. *Litchfield*, 736 F.2d at 1356.

25. *Id.* at 1357.

26. *Id.*

27. *Id.*

28. 17 U.S.C. § 106(2) (1982) grants a copyright owner exclusive right to prepare derivative works based upon the copyrighted work.

29. *Litchfield*, 736 F.2d at 1357.

30. *Id.*

copyright law as "frivolous."³¹ Works that are not substantially similar are not protected by copyright law and, therefore, cannot be considered derivative.³²

Since it found no substantial similarity between the works, the Ninth Circuit also affirmed the district court's dismissal of the Lanham Act claim.³³ Section 43(a) of the Lanham Act assigns liability for the use of a false designation of origin in connection with any goods and services put into commerce.³⁴ The court referred to its holding in *Smith v. Montoro*,³⁵ in which it held that an actor could state a claim for "reverse passing off"³⁶ when a motion picture was mislabeled to mask his contribution.³⁷ Although the *Litchfield* court found reverse passing off to be actionable under the Lanham Act if a plaintiff's mark has actually been removed from his or her product,³⁸ it declined to decide whether the doctrine would apply to cases of substantial similarity as well as to bodily appropriation.³⁹ Since there was no question of bodily appropriation of *Litchfield's* work, and a finding that the works were not substantially similar anyway, the court held that *Litchfield* could have no claim for reverse passing off under Section 43(a).⁴⁰

The court concluded with an observation that *Litchfield's* suit was premised on an erroneous understanding of the extent of copyright protection.⁴¹ The copyright laws were designed to strike a balance between

31. *Id.*

32. *Id.*

33. *Id.* at 1358.

34. Section 43(a) of The Lanham Act, 15 U.S.C. § 1125(a) (1982) provides, in part: Any person who shall . . . use in connection with any goods or services . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false designation or representation.

35. 648 F.2d 602 (9th Cir. 1982).

36. *Id.* at 605. Reverse passing off is the removal of the name or make from someone else's product so that it can be sold under a name chosen by the wrongdoer. Passing off is the selling of a good or service of the wrongdoer's own creation under the name or mark of someone else. *Id.* at 604.

37. *Litchfield*, 736 F.2d at 1357-58. In *Smith*, the actor's name had been removed from both film credits and advertising material.

38. *Litchfield*, 736 F.2d at 1358.

39. *Id.* The court referred to its decision in *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1064 (9th Cir. 1981), which concerned an allegation of copyright infringement and violation of the Lanham Act by a manufacturer of toy stuffed animals. In that case, the court declined to decide whether a cause of action for reverse passing off could lie in cases of substantial similarity, as well as in cases of bodily appropriation, since the plaintiff had not raised that question below.

40. *Litchfield*, 736 F.2d at 1358.

41. *Id.*

the countervailing interests of protecting artists' creative expressions and allowing free access to the pool of ideas which inspire those expressions. The rule has always been that an idea is not protectable, but its concrete expression is.⁴² The idea/expression dichotomy was codified in the Copyright Act of 1976,⁴³ expressly precluding copyright protection of ideas.

Arguably, the line between an idea and its expression is a fine one. In attempting to delineate the area of protection afforded by copyright law, courts have searched for a yardstick with which to measure similarity sufficient for infringement, *i.e.*, substantial similarity. Judge Learned Hand aptly observed that "[o]bviously, no principle can be stated as to when an imitator has gone beyond the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*."⁴⁴

The Ninth Circuit's use of the *Krofft* formula to determine which elements of a copyrighted work are protected is at best an imprecise analytical tool, since it is difficult and often confusing⁴⁵ to distinguish between a creative idea and its expression.

Because this conceptual difficulty often leads to *ad hoc* decisions, Professor Nimmer suggests an approach to the analysis of substantial similarity based on an examination of the pattern of the works.⁴⁶ The operative pattern to determine similarity would be in some degree abstract, but still sufficiently concrete to indicate the sequence of events and the interplay of the major characters.⁴⁷

A concrete application of Professor Nimmer's overlay of patterns approach can perhaps be seen in *Twentieth Century-Fox Film Corp. v.*

42. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1] (1983).

43. 17 U.S.C. § 102(b) (1982).

44. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.03[A] [1] (1983).

45. See generally *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 279 F.2d 487, 489 (2d Cir. 1960); see also Reporter's Transcript of Proceedings at 708, *Twentieth Century Fox v. M.C.A.*, Case No. CV 78-2437-IH (C.D. Cal. 1980) in which the court found the *Krofft* test difficult to apply to feature-length motion pictures. The "facts involved in the *Krofft* case lent themselves much easier than the facts of this case to an analysis of idea and expression of ideas." The court further found it "almost impossible to reduce such a complex work to one idea." The *Fox* case involved a claim that "Battlestar: Galactica" had infringed the copyright of "Star Wars."

46. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1] (1983).

47. *Id.* An interesting illustration of this idea can be found in Professor Nimmer's thirteen points of comparison between "West Side Story" and "Romeo and Juliet." It is Professor Nimmer's contention that his thirteen points are sufficiently concrete to state the essential sequence of events and character interplay to warrant a conclusion that the works are substantially similar, although not all courts would accept the pattern as an sufficiently concrete expression of an idea. *Id.*

MCA, Inc.,⁴⁸ which dealt with alleged copyright infringement by the motion picture and television series, "Battlestar: Galactica," of the motion picture, "Star Wars." The district court had granted summary judgment for defendant MCA (the parent company of Universal Studios, which produced and owned the rights to "Battlestar: Galactica"), finding that the substantial differences in idea of the story lines and characters, and the vastly different expressions of idea, precluded a finding of substantial similarity as a matter of law.⁴⁹ The Ninth Circuit, quoting "for illustrative purposes only"⁵⁰ thirteen of Professor Nimmer's thirty-four alleged similarities, reversed and remanded for jury trial, holding that the films raised genuine issues of material fact which should be resolved by way of trial.

Although the *Litchfield* court stated that summary judgment is disfavored in cases involving intellectual property because substantial similarity is such a close issue of fact, courts frequently decide the issue as a matter of law.⁵¹ The *Litchfield* court's view, that this action was premised partly on a misunderstanding of the copyright law and partly on an "obsessive conviction" among artists that others are plagiarizing their work,⁵² seems to indicate that summary judgment may effectively be more favored in the future. Although the entertainment business will undoubtedly continue to generate countless copyright infringement actions, the degree of protection afforded by courts will continue to be narrowly defined.

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48. 715 F.2d 1327 (9th Cir. 1983).

49. Reporter's Transcript of Proceedings at 10, *Fox v. MCA*, Case No. CV 78-2437-IH (C.D. Cal. 1980).

50. *Fox*, 715 F.2d at 1329 n.5.

51. See *Jason v. Fonda*, 648 F.2d 966 (9th Cir. 1982) (Summary judgment affirmed as to alleged infringement of the film, "Coming Home," of Jason's novel); See *v. Durang*, 711 F.2d 141 (9th Cir. 1983) (summary judgment affirmed as to two plays about surprised understudies, much as in the classic Busby Berkeley musical "42nd Street," in which Ruby Keeler stepped onto stage as a chorus girl, but was "gonna come back a star"); *Warner Bros. v. Amer. Brdcast'g Cos.*, 720 F.2d 231 (2d Cir. 1983) (affirmed summary judgment as to the television series, "Greatest American Hero," and the film, "Superman"). *But see* text accompanying notes 48-50 *supra*.

52. *Litchfield*, 736 F.2d at 1358.

B. Antitrust

1. Theatre "Splits" Under Fire: The *Capitol Service* Case

Theatre split arrangements have become a controversial practice in recent years. Film exhibitors view "splits" as a legitimate business practice, offering the most efficient means for licensing motion pictures. Film distributors view them as an unlawful attempt by exhibitors to insulate themselves from economic competition. In *United States v. Capitol Service, Inc.*,¹ these two views collided, with the distributors' view of splits ultimately prevailing.

Under a split arrangement, theatre chains agree to refrain from bidding against one another for the rights to exhibit first-run films. Instead, film negotiation rights are divided among each of the chains participating in the split. Negotiation with film distributors proceeds according to the results of this division, with each chain authorized to negotiate only for those films it receives through the split.²

The *Capitol Service* case involved a federal antitrust challenge³ to a split arrangement operating in Milwaukee. The government claimed that the split posed an unlawful restraint on competition. After a trial lasting over a month, the Wisconsin district court ultimately agreed, holding that the Milwaukee split constituted a *per se* violation of the Sherman Antitrust Act.⁴

Defendants to the federal claim were four motion picture exhibitors operating theatres in Milwaukee.⁵ The exhibitors denied that any unlawful restraint could be attributed to their agreement. Even assuming the existence of a restraint, the exhibitors argued that under the rule of rea-

1. 568 F. Supp. 134 (E.D. Wis. 1983).

2. The division of films through the split takes place at periodic meetings scheduled by participating exhibitors. At these meetings exhibitors take turns selecting certain films to play at their theatres. Each exhibitor then has the exclusive rights to negotiate for those films it has chosen through the split. *Id.* at 140-41.

3. *Id.* at 135. Suit was brought by the Antitrust Division of the United States Department of Justice.

4. 15 U.S.C. § 1 (1976). The Act specifies: "Every 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."

5. The four exhibitors were Capitol Service, Inc., Kohlberg Theatres Service Corp., Marcus Theatres Corp., and United Artists Theatre Circuit, Inc. Of the four, U.A.T.C. is the most prominent, as the second largest motion picture exhibitor in the United States behind the largest, General Cinema Corporation. Kohlberg's business is limited to Wisconsin and neighboring states. Marcus and Capitol Service operate theatres exclusively in Wisconsin. *Capitol Serv.*, 568 F. Supp. at 138-39.

son, such a restraint would be outweighed by the split's pro-competitive advantages.⁶ Unlike the *per se* doctrine, under which certain market practices are conclusively presumed unreasonable,⁷ the rule of reason allows for an extended inquiry into a challenged market arrangement.⁸ Under the rule of reason, a court looks to the overall impact of the particular trade practice, weighing its pro and anti-competitive aspects to determine if it is reasonable.⁹

The court refused to allow an extended inquiry into the exhibitors' split. Prompting the court's decision was the deposition testimony of executives from each of the four theatre chains, which left little doubt as to the exhibitors' purpose in entering the split.¹⁰ It was through the split, the court concluded from the testimony, that the exhibitors sought to reverse the high prices being paid to distributors through the competitive bidding process.¹¹ Evidence of such a direct attempt to restrain competition, in conflict with the dictates of the Sherman Act, proved influential in the court's decision to hold the split *per se* illegal.

6. *Id.* at 153. The exhibitors claimed that the split resulted in numerous advantages that actually benefitted competition. These advantages included greater efficiency in the licensing of films, better access to popular films for the movie-going public, increased opportunity for less prominent distributors to obtain first-run theatres for their films, and the elimination of "blind bidding." Blind bidding requires exhibitors to bid on motion pictures based on limited information. For example, exhibitors might be requested to submit bids on a picture with no more than a list of proposed actors for the film or a brief description of the picture's theme. Extremely unpopular among exhibitors, this practice has been statutorily prohibited in twenty-three states. *Id.* at 138.

7. *Id.* at 149. For a valuable discussion of the development of the *per se* doctrine, and its present role in antitrust analysis, see L. SULLIVAN, HANDBOOK ON THE LAW OF ANTITRUST § 67 at 182-86, §§ 70-72, at 192-97 (1977).

8. *Capitol Serv.*, 568 F. Supp. at 148-49. See also L. SULLIVAN, *supra* note 7, § 68-69 at 186-92, § 72 at 195-97.

9. The exhibitors offered two cases as authority for application of the rule of reason. In *Greenbrier Cinemas, Inc. v. Att'y Gen.*, 511 F. Supp. 1046, 1060 (W.D. Va. 1981), the rule of reason was held applicable to a split agreement operating in Charlottesville, Virginia. Pointing to the criticism of the *Greenbrier* decision in the more recent case of *General Cinema Corp. v. Buena Vista Distribution Co.*, 532 F. Supp. 1244, 1265-66 (C.D. Cal. 1982), the Wisconsin district court stated that the *General Cinema* decision provided a much more complete analysis of splits and the rationale for their *per se* illegality. *Capitol Serv.*, 568 F. Supp. at 152-53.

In *Broadcast Music, Inc. v. Columbia Brdcast'g Sys.*, 441 U.S. 1, 20-23 (1979), the Court held that the blanket licensing of performance rights sold by copyright clearinghouses could not properly be analyzed under the *per se* rule because of benefits achieved through blanket licensing of rights not otherwise available through individual licensing. Noting the absence of any finding in *Broadcast Music* that the challenged licenses had any effect or purpose to restrain competition in the market, the *Capitol Service* court distinguished the exhibitors' split through its anti-competitive purpose and consequent impact in restraining competition for film licenses in Milwaukee. Based upon this and other distinguishing features, the court concluded that reliance upon *Broadcast Music* was unfounded. *Capitol Serv.*, at 568 F. Supp. at 150-51.

10. *Id.* at 140-42.

11. *Id.* at 142-43.

Equally significant to the court was the split's function as a price-fixing agreement, which allowed participating exhibitors to assume control over film negotiations in the Milwaukee market. The split enabled each exhibitor to exercise exclusive negotiating power over designated films. The effect of such a power, the court concluded, was to allow the exhibitors to avoid direct competition and to exert direct influence over the price of motion pictures licensed in Milwaukee.¹²

Classification of the split as a price-fixing agreement¹³ was instrumental to the court's resolution of the case.¹⁴ Both in its purpose and effect, concluded the court, the patently anti-competitive nature of the exhibitors' split arrangement necessitated its condemnation as a *per se* violation of the Sherman Act. Based upon the court's belief in the applicability of this reasoning to all forms of theatre split arrangements, the defendants were ordered enjoined throughout the United States from further participation in splits.¹⁵

12. *Id.* at 146-48. Influence over price was exercised primarily through reductions in film guarantees, rental payments, and motion picture playtime made possible through the negotiating leverage of the split. Guarantees are minimum payments from exhibitors made in advance of a film's exhibition, and retained by the distributor regardless of how well the film does at the box office. Film rentals are payments based on a percentage of the profits a distributor is entitled to collect from an exhibitor for the right to exhibit the distributor's film. Motion picture playtimes refers simply to the length of time a film remains at a particular theatre. *Id.* at 137.

13. The court held that the division of motion pictures through the split, coupled with the exhibitors' purpose of eliminating competition for those pictures, provided an additional basis for the *per se* condemnation of the Milwaukee split as an illegal market allocation. *Id.* at 154-55.

14. *Id.* at 149-50. Two Supreme Court cases provided the authoritative foundation for the district court's finding of *per se* illegality. In *United States v. Trenton Potteries*, 273 U.S. 392, 397-98 (1927), the Court concluded:

The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), the Court added: Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Acts places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

For two more recent cases, similarly holding price-fixing agreements to be illegal *per se*, see *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) and *Catalano v. Target Sales, Inc.*, 446 U.S. 643 (1980). *Capitol Serv.*, 568 F. Supp. at 150.

15. 568 F. Supp. at 155. The court relied upon *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-95 (1950) as authority for its broad order. While not appealing the sub-

The decision of the Wisconsin district court represents the second of two recent attacks on theatre split arrangements. In the case of *General Cinema Corp. v. Buena Vista Distribution Co.*,¹⁶ a distributor challenged a series of split arrangements entered into by the nation's largest motion picture exhibitor.¹⁷ The *General Cinema* court held that each of the challenged agreements constituted a *per se* violation of the Sherman Act.¹⁸

Should the trend established through these decisions remain intact, the enforced proscription of theatre splits could place theatre owners between the horns of a dilemma. Unable to rely upon the traditionally effective operation of the split, theatre owners could be forced to adopt more overt measures to adopt the high costs of licensing films, *e.g.*, further increases in currently steep box office prices. Such a situation would be untimely, with the video cassette and subscription television industries already impacting heavily upon theatre attendance.

Already forced to contend with dropping attendance at their theatres, the recent decisions against theatre splits can hardly be comforting to theatre owners. Yet the ban of split arrangements appears to be the reality they must face. If recent decisions indicate the prevailing trend, theatre split arrangements may be headed the route of the silent film and ten cent popcorn.

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stantive finding of the district court that theatre splits are *per se* illegal, the Milwaukee defendants did appeal the validity of the court's nation-wide injunction. Telephone interview with Trevor J. Will, Foley & Lardner, attorneys for defendants (Sept. 7, 1984).

16. 532 F. Supp. 1244 (C.D. Cal. 1982). *See supra* note 9.

17. *General Cinema* itself had brought the original action, challenging Buena Vista's imposition of minimum film rental payments as unlawful price-fixing under the Sherman Act. Buena Vista then counterclaimed, challenging *General Cinema's* participation in splits.

18. 532 F. Supp. at 1279.