

3-1-1993

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Recommended Citation

Brian J. Wolf, *The Prohibitions against Studio Ownership of Theatres: Are they an Anachronism?*, 13 Loy. L.A. Ent. L. Rev. 413 (1993).
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ARTICLES

THE PROHIBITIONS AGAINST STUDIO OWNERSHIP OF THEATERS: ARE THEY AN ANACHRONISM?

Brian J. Wolf *

I. INTRODUCTION

Since the late 1940's, the distribution and exhibition of motion pictures in the United States have been controlled by the Supreme Court's decision in *United States v. Paramount Pictures, Inc.*¹ That case resulted in a series of consent decrees negotiated by the defendant studios and the Department of Justice ("Paramount Consent Decrees"). These judgments included licensing prohibitions and divestiture orders requiring the separation of exhibition from production and distribution.²

Today, many, including the Department of Justice, consider the decrees to be obsolete or redundant.³ On February 7, 1992, the United States District Court for the Southern District of New York approved an order terminating the following judgments: the 1952 Loew's Consent Judgment, the 1980 Loew's Modification Order and the 1987 Tri-Star Order ("Loew's Consent Judgments").⁴

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The author wishes to dedicate this article to his family. The author also thanks Professor Lionel Sobel for his assistance, insight and comments.

1. *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323 (S.D.N.Y. 1946), *aff'd in part and rev'd in part*, 334 U.S. 131 (1948), *on remand*, 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 984 (1950).

2. Affidavit of Benjamin Klein in Support of Loew's Motion to Terminate the 1952 Consent Decree at 11, *United States v. Loew's Inc.*, 705 F. Supp. 878 (S.D.N.Y. 1988) (No. 89 Civ. 6159) [hereinafter Klein Affidavit]; Memorandum of the United States in Response to Motion of Loew's To Terminate The 1952 Loew's Consent Judgment at 5, *United States v. Loew's Inc.*, 705 F. Supp. 878 (S.D.N.Y. 1988) (No. 89 Civ. 6159) [hereinafter Government Memorandum].

3. Memorandum of Loew's Theater Management Corp. and Sony Pictures in Support of Their Motion for Termination of the 1952 Loew's Consent Judgment at 12, *United States v. Loew's Inc.*, 705 F. Supp. 878 (S.D.N.Y. 1988) (No. 89 Civ. 6159) [hereinafter Loew's Memorandum].

4. *United States v. Loew's Inc.*, 783 F. Supp. 211 (S.D.N.Y. 1992).

Proponents of repealing the decrees argue that the general antitrust laws are sufficient protection against anti-competitive behavior. For example, laws such as the Sherman, Clayton and Hart-Scott-Rodino Acts provide the same prohibitions against price fixing, unreasonable restraints of trade and covert agreements as the *Paramount* case.⁵ Furthermore, technological innovations as well as changes in consumer demand have radically altered the marketing and distribution of motion pictures. Unlike the 1940's, a wide range of alternative distribution systems such as videocassettes and pay television are now available to the public.

This article begins with a historical analysis of vertical integration in the motion picture industry.⁶ In the past, vertical integration was associated with anti-competitive practices.⁷ However, vertical integration is not the source of harmful behavior such as "block booking,"⁸ price fixing and illegal restraints of trade. Moreover, there is no realistic possibility of a return to the economic structure or potential anti-competitive business practices of the 1930's and 1940's.

Studio ownership of theaters is one of several issues arising out of the relationship between distributors and exhibitors.⁹ However, it would be beyond the scope of this analysis to discuss each anti-competitive practice in depth. Accordingly, this paper focuses on vertical integration in the motion picture industry and answers the question of whether or not the prohibitions against studio ownership of theaters are a historical hangover that have long since outlived their usefulness.¹⁰

5. Claudia Eller, *Palmieri Death Raises Issue of Consent Decrees' Survival*, THE HOLLYWOOD REP., June 19, 1989, at 1, 16.

6. See *infra* Part II. Vertical integration is when two or more companies at different levels of a particular activity merge. An example is when a producer or a distributor of a specific product or service merges with a retailer. PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 207 (1980).

7. MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 1, 16 (1960).

8. Block booking is the process whereby a studio will only release pictures in groups. Thus, the only way a theater may secure access to potential "blockbusters" is to also agree to show other movies that have less widespread appeal.

9. For purposes of this article, the word "studio" denotes a major producer who also distributes motion pictures.

10. See *infra* part III.

II. HISTORICAL PERSPECTIVE

A. *Vertical Integration*

Vertical integration in the motion picture industry surfaced in 1917 when twenty-six of the largest first-run theater chains formed a combine for buying and booking films into their theaters. Combines enabled exhibitors of films to bargain as a group rather than individually against distributors and producers. By combining forces, exhibitors increased their leverage in negotiations for films and apportioned costs based on projected earnings for each theater chain.¹¹

As power of the combines increased, studios responded by purchasing their own theaters. By securing first-run theater outlets, studios could decrease uncertainty in negotiations, eliminate monopoly premiums and reduce costs.¹² Ralph Cassady summarized the advantages and potential abuses of theater ownership as follows:

The ownership of theaters . . . not only provided companies with markets for films but provided them with a powerful instrument for gaining competitive advantages over others. Theater control gave rise to discriminatory first-run privileges, arbitrary clearance arrangements, and monopolistic influences on the sales policies of other distributors. Integrated operation permitted manipulation of admission prices to the advantage of the affiliated theaters.¹³

Loew's Incorporated ("Loew's"), an exhibitor, entered production and distribution when it purchased Metro Pictures Corporation in 1920. In 1924, Loew's merged Goldwyn Pictures with Metro to form Metro-Goldwyn-Mayer.¹⁴ Warner Brothers ("Warner") and Radio-Keith Orpheum ("RKO") rose to predominance with the arrival of sound pictures. Warner introduced talking pictures in order to gain a foothold in exhibition. Due to the phenomenal success of "The Jazz Singer" in 1927, Warner was able to purchase over 300 theaters by 1930.¹⁵ The Radio Corporation of America formed RKO in 1928 to exploit the Photophone sound-on-film

11. CONANT, *supra* note 7, at 24.

12. Tino Balio, *A Mature Oligopoly, 1930-1948*, in *THE AMERICAN FILM INDUSTRY* 253, 260-61 (Tino Balio ed., 1985).

13. Ralph Cassady Jr., *Impact Of The Paramount Decision On Motion Picture Distribution and Price Making*, 31 S. CAL. L. REV. 150, 156 (1958).

14. Tino Balio, *Struggles for Control, 1908-1930*, in *THE AMERICAN FILM INDUSTRY* 103, 121 (Tino Balio ed., 1985).

15. *Id.* at 127-28.

system. RKO was a combination of a production-distribution company and the 200 screen Keith-Albee-Orpheum Theater circuit.¹⁶

By 1930, the motion picture industry was a mature oligopoly dominated by five vertically integrated companies: Warner, Paramount, Loew's, RKO and Fox.¹⁷ These five major studios not only produced motion pictures, but operated worldwide distribution networks and owned circuits of theaters. In this way the major companies could cooperate within their own circle where each entity would guarantee that the other's films would receive guaranteed play dates.¹⁸ The three "mini-majors," Universal, Columbia and United Artists, both produced and distributed motion pictures, but did not own their own theaters.¹⁹ These three smaller entities were nonetheless part of the cooperative scheme between the studios for domination of the market.²⁰

Together, these eight studios pooled their interests, acted in concert and established a market cartel.²¹ In 1945, the five major studios owned approximately 17% of theaters nationwide, (3,137 out of 18,076).²² Although this was not a major percentage of the national market, the holdings of these five studios included the great majority of first-run theaters in the largest metropolitan regions.²³ Studio-produced pictures were released to their own theaters. They delayed release to non-studio-owned theaters until film-goers had already paid to see the release in a studio-owned theater. As a result, these studios controlled 70% of the national box office receipts and collected 95% of all film rentals.²⁴ In this way, these five major distributors monopolized first-run exhibition and discriminated against independent exhibitors.

The studios also instituted a series of anti-competitive practices. One such practice was setting unreasonable clearance dates, which prevented

16. *Id.* at 130.

17. *Id.* at 130. An oligopoly is where a few sellers have a dominant share of the market. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 220 (1977).

18. Balio, *supra* note 12, at 253.

19. *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 330 (S.D.N.Y. 1946), *aff'd in part and rev'd in part*, 334 U.S. 131 (1948), *on remand*, 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 984 (1950).

20. *Id.*

21. A cartel is an organization of companies whose purpose is to control or fix prices and the conditions of sale. MARTIN BRONFENBRENNER ET AL., *MICROECONOMICS* 293 (1984).

22. *United States v. Paramount Pictures, Inc.*, 334 U.S. at 167.

23. *Id.*

24. *Id.*

non-studio-owned theaters from showing the first-run films too early.²⁵ Studios also began block booking and general price fixing in order to maximize profits and subordinate all independent operators. For example, distributors arranged marketing patterns so the newest and best pictures played initially in a downtown, studio-controlled theater. These theaters charged the highest admission price.²⁶ "Sub-run" theaters, owned by independents, were relegated to "the lowest status in the hierarchy."²⁷ Thus, independents were allowed to run pictures only after the clearance period. By controlling clearance times, the major studios sustained the preferred status of their own theaters.

Block booking also provided a useful means to discriminate against independents. Only unaffiliated theaters were required to purchase blocks of films. Thus, the major studios were able to select "only the best of each other's pictures," at the expense of independent exhibitors.²⁸

The major studios also restrained trade by fixing prices.²⁹ For instance, distributors stipulated minimum admission prices in their licensing agreements and controlled prices in their own theaters. This practice eliminated price competition and held prices artificially high.³⁰

B. The Paramount Decisions

The *Paramount* decisions were a response by independent theater owners to years of anti-competitive treatment. The Department of Justice filed the first suit on July 20, 1938.³¹ The government accused the five major studios of restraining trade by monopolizing the production, distribution and exhibition of motion pictures in violation of the Sherman

25. Clearance is defined as the number of days that must pass before a picture that has opened in the theater can open in another theater in certain areas. *United States v. Paramount Pictures, Inc.*, 334 U.S. at 144 n.6. "Unreasonable clearance" is a restrictive trade practice that stifles competition since studios control clearance periods and when pictures can be run. They also segment the theater market by manipulating locations and prices. See Balio, *supra* note 12, at 258; *United States v. Paramount Pictures, Inc.*, 66 F. Supp. at 330.

26. Balio, *supra* note 12, at 259.

27. CONANT, *supra* note 7, at 68.

28. Balio, *supra* note 12, at 258; *United States v. Paramount Pictures, Inc.*, 334 U.S. at 156-57.

29. CONANT, *supra* note 7, at 58; *United States v. Paramount Pictures, Inc.*, 334 U.S. at 141-42.

30. CONANT, *supra* note 7, at 70; Balio, *supra* note 12, at 260; *United States v. Paramount Pictures, Inc.*, 334 U.S. at 144-46.

31. *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323 (S.D.N.Y. 1946).

Antitrust Act.³² The government also charged Columbia, Universal and United Artists of combining with the five vertically integrated companies to restrain trade and monopolize commerce.³³

Preliminary negotiations between the government and the defendants resulted in a consent decree entered into on November 20, 1940.³⁴ Without admitting guilt, the eight defendants agreed to modify or eliminate certain trade practices in exchange for the government's agreement not to seek separation of the studios from their theaters. For example, the studios agreed to limit block booking to groups of five films, allow arbitration for disputes over runs and clearances, and suspend future theater purchases.³⁵

The first consent decree provided that after three years the government could apply to the court for modification. Because illegal practices continued, the government exercised its option to revise the case and moved for trial in 1944 to seek divorcement of production-distribution from exhibition. A trial resulted in the conviction of the eight studio defendants for conspiracy in restraint of trade.³⁶ The district court held that the following practices were illegal: 1) fixing admission prices,³⁷ 2) uniform systems of runs and clearances,³⁸ 3) formula deals,³⁹ 4) block booking,⁴⁰

32. Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." Section 2 states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize any part of the trade or commerce among the several States . . . shall be guilty of a felony . . ." 15 U.S.C. §§ 1, 2 (1982).

33. The five major defendants ("the five majors") included Paramount Pictures, Inc. ("Paramount"); Loew's Inc. ("Loew's"); Twentieth Century-Fox ("Fox"); Radio-Keith Orpheum Corporation ("RKO"); and Warner Bros. Pictures, Inc. ("Warner"). The three minor defendants ("the three minors") included Universal Corporation ("Universal"); Columbia Pictures Corporation ("Columbia"); and United Artist Corporation ("UA"). The three minors produced and distributed motion pictures, but did not own theaters. CONANT, *supra* note 7, at 94; Gerald F. Phillips, *The Recent Acquisition of Theater Circuits by Major Distributors*, THE ENT. & SPORTS LAW., Winter 1987, at 21 n.5.

34. *United States v. Paramount Pictures, Inc.*, 334 U.S. at 141 n.3. A consent decree is an agreement by the defendants to discontinue practices declared to be illegal by the government. BLACK'S LAW DICTIONARY 214 (abr. 5th ed. 1983).

35. Cassady, *supra* note 13, at 157; CONANT, *supra* note 7, at 95; *United States v. Paramount Pictures, Inc.*, 66 F. Supp. at 331-33.

36. CONANT, *supra* note 7, at 97-98; *United States v. Paramount Pictures, Inc.*, 334 U.S. at 141 n.3; Phillips, *supra* note 33, at 10.

37. *United States v. Paramount Pictures, Inc.*, 66 F. Supp. at 334, 340.

38. *Id.* at 343.

39. A formula deal is where a film is licensed to an entire circuit instead of a particular theater. *Id.* at 347.

40. *Id.* at 350.

and 5) pooling agreements.⁴¹ The decrees also required that each picture be licensed on a "theater-by-theater basis without discriminating against affiliated circuits or theaters."⁴²

The district court, in its initial opinion, did not order separation of production and distribution from exhibition. The court's reasoning was based upon the fact that the defendants only controlled around one-sixth of the total screens in the United States. Therefore, it was unlikely that the studios could exert enough monopoly power to warrant "the drastic remedy of complete divestiture."⁴³ Rather than ordering divestiture, the district court established a mandatory system of competitive bidding.⁴⁴ The district court believed "the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary."⁴⁵

According to the court, ownership of theaters was not the "root of the difficulties."⁴⁶ Vertical integration was only a "means of carrying out the restraints and conspiracies."⁴⁷ Certainly, the major studios denied independent exhibitors access in many key markets. However, this foreclosure problem did not stem from the vertical structure of the industry per se. Rather, independents could not obtain films because of a horizontal conspiracy among the studios to fix prices and discriminate in favor of their own theaters.⁴⁸ The concentrated market structure in exhibition facilitated horizontal collusion and the subsequent foreclosure of independents, due to the limited number of theaters in any particular area. The majors turned to building and acquiring theaters regionally to avoid competing directly in the same markets.⁴⁹

41. Pooling is an agreement between two or more exhibitors to operate collectively with prearranged percentages. *Id.* at 350-51.

42. *United States v. Paramount Pictures, Inc.*, 66 F. Supp. at 358.

43. *Id.*

44. Phillips, *supra* note 33, at 10; CONANT, *supra* note 7, at 102; *United States v. Paramount Pictures, Inc.*, 66 F. Supp. at 353, 358.

45. *United States v. Paramount Pictures, Inc.*, 66 F. Supp. at 353.

46. *Id.* at 355; Phillips, *supra* note 33, at 11.

47. *United States v. Paramount Pictures, Inc.*, 85 F. Supp. at 893; Phillips, *supra* note 33, at 11.

48. *United States v. Paramount Pictures, Inc.*, 85 F. Supp. at 884, 893; *see also* William J. Borner, *Motion Picture Split Agreements: An Antitrust Analysis*, 52 *FORDHAM L. REVIEW* 159, 168-80 (1983).

49. Cities with populations of less than 100,000 people were generally monopolized by one studio. For example, each of the following four studios enjoyed monopoly status in the corresponding percentage of those markets in which they had an interest: Warner, 89%; Paramount, 88%; Loew's, 77%; and RKO, 96%. *United States v. Paramount Pictures, Inc.*, 85 F. Supp. at 889-90; CONANT, *supra* note 7, at 52.

Furthermore, the studios practiced a "broad policy of reciprocity" and gave each other preferential treatment in securing bookings.⁵⁰ For example, in markets like Chicago, where Paramount was the dominant exhibitor, the four other majors agreed to release their pictures exclusively to Paramount's theaters. In exchange, Paramount respected the "preemptive claim" on first-run films in markets with theaters affiliated with one of the other majors.⁵¹ In return for allowing Paramount films to play in another studio's controlled market, Paramount agreed to give preferential treatment to that studio's theaters in Chicago.

On appeal, the Supreme Court refused to hold that vertical integration was illegal under the Sherman Act.⁵² However, the Court held there were instances when vertical integration could be illegal. For instance, vertical integration was unlawful if created with the intent to monopolize a market or accompanied by an intent to control a market.⁵³ The Supreme Court rejected the district court's remedy of competitive bidding because the practice was ineffective and too difficult to administer.⁵⁴

The Supreme Court remanded the case so the district court could reconsider the divestiture issue.⁵⁵ On remand, the district court reversed its initial position regarding divestiture. The court determined that the five major defendants monopolized the first-run theater business through a horizontal conspiracy to fix prices, runs and clearances. Moreover, because the conspiracy was "powerfully aided by the system of vertical integration," vertical integration was illegal in this case.⁵⁶ As a result, separation of exhibition from distribution was "the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power on the part of the remaining defendants."⁵⁷

A series of consent decrees entered into between 1948 and 1952 outlined the specific aspects of the separation of studios from their theaters.⁵⁸ The district court ordered the five major defendants to divest

50. Michael Conant, *The Paramount Decrees Reconsidered*, 44 LAW & CONTEMP. PROBS. 79, 80 (1981).

51. *Id.* at 155.

52. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

53. *Id.* at 174-75.

54. *Id.* at 161, 165-66.

55. *Id.* at 178.

56. *United States v. Paramount Pictures, Inc.*, 85 F. Supp. at 893.

57. *Id.* at 896; *see also* Phillips, *supra* note 33, at 10.

58. The original consent decrees are reported as follows: *United States v. Paramount Pictures, Inc.*, 1948-49 Trade Cas. (CCH) ¶ 62,335 (S.D.N.Y. Nov. 8, 1948) (RKO); *United States v. Paramount Pictures, Inc.*, 1948-49 Trade Cas. (CCH) ¶ 62,377 (S.D.N.Y. Mar. 3, 1949) (Paramount); *United States v. Loew's Inc.*, 1950-51 Trade Cas. (CCH) ¶ 62,573 (S.D.N.Y. Feb.

their theaters. Warner, Fox and Loew's were prohibited from reentering the exhibition arena without prior court approval.⁵⁹ All defendants were required to license films on a theater-by-theater basis without discrimination.⁶⁰

RKO and Paramount agreed to divorce their theater holdings before the district court rendered this decision. In exchange for this settlement with the government, RKO and Paramount received more lenient terms than the other studios. For example, RKO and Paramount were not required to seek court approval to purchase theaters in the future as were Warner, Fox and Loew's. United Artists, Universal and Columbia owned no theaters during the Paramount litigation and were not precluded from theater ownership in the future. However, these minor defendants were subject to the same prohibitions against price-fixing and other anti-competitive practices.⁶¹ Furthermore, even though the court ordered the majors to divest all theater holdings, no court has ever held that it is illegal under the antitrust laws for studios to own theaters.⁶²

C. *The Impact of The Paramount Decrees*

The Paramount Decrees changed the structure and marketing practices of the motion picture industry. It is unknown to what extent the new competition reduced ticket prices, encouraged independent production and affected the quality, content and diversity of films. Under the provisions of the decrees, unaffiliated exhibition subsidiaries were formed from the divested theaters. However, during the 1950's, theater attendance dropped markedly because audiences changed their movie-going habits. Intrigued by the novelty of television, people found little time to patronize the motion picture theaters. As audience sizes declined, theater prices increased. By 1956, over 4,000 theaters had closed.⁶³

During the 1950's and 1960's, populations moved out of the inner cities. Drive-ins and multiplex theaters emerged in the suburbs. Distribu-

8, 1950) (Columbia, Universal and UA); *United States v. Loew's Inc.*, 1950-51 Trade Cas. (CCH) ¶ 62,861 (S.D.N.Y. June 7, 1952) (Fox); *United States v. Loew's Inc.*, 1950-51 Trade Cas. (CCH) ¶ 62,765 (S.D.N.Y. Jan. 4, 1951) (Warner); *United States v. Loew's Inc.*, 1952 Trade Cas. (CCH) ¶ 67,228 (S.D.N.Y. Feb. 7, 1952) (Loew's).

59. Phillips, *supra* note 33, at 11; Conant, *supra* note 50, at 105.

60. See Klein Affidavit, *supra* note 2, at 11; Government Memorandum, *supra* note 2, at 6.

61. Phillips, *supra* note 33, at 11; Conant, *supra* note 50, at 105.

62. Phillips, *supra* note 33, at 11 & 21 n.6.

63. Tino Balio, *Retrenchment, Reappraisal, and Reorganization, 1948-*, in *THE AMERICAN FILM INDUSTRY* 401 (Tino Balio ed., 1985).

tors responded to these changes by altering their marketing patterns.⁶⁴ For example, wide releases replaced the system of runs and clearances, where a picture would open in a downtown theater and play for several weeks before being released to subrun. Today, distribution targets mass audiences with multiple theaters playing the same picture simultaneously, supported by extensive advertising expenditures.⁶⁵

In *The Paramount Decrees Reconsidered*, Michael Conant argued, “[a]fter the decrees a much freer market was created.”⁶⁶ For example, after the major distributors relinquished control of the theaters, the door opened for independent producers.⁶⁷ On the other hand, the decrees did not significantly reduce barriers to entry in distribution.⁶⁸ Furthermore, competition from television caused studios to produce fewer and more expensive films. A trend toward higher budget motion pictures and a concurrent reduction in movie-going resulted in further uncertainty and increased risks within the film industry. The effect was that independent exhibitors “found themselves bidding for a smaller supply of films in a more competitive market.”⁶⁹

III. ARE THE PARAMOUNT DECREES OBSOLETE?

A. *The Return Of Vertical Integration*

In 1981, the Justice Department began an investigation into the possibility of vacating the consent decrees in *United States v. Paramount*

64. Conant, *supra* note 50, at 95-96.

65. See *United States v. Loew's Inc.*, 705 F. Supp. 878, 881 (S.D.N.Y. 1988), *remanded*, 882 F.2d 29, 30 (2d Cir. 1989); Charles W. McCoy Jr., *The Paramount Cases: Golden Anniversary in a Rapidly Changing Marketplace*, ANTITRUST, Summer 1988, at 32, 34.

66. Conant, *supra* note 50, at 107.

67. *Id.* at 84.

68. *Id.* at 90.

69. *Id.* at 107. After the decrees, distributors employed competitive bidding as a means to conform to the prohibition against block booking and comply with the requirement of licensing each picture “theater-by-theater.” Exhibitors responded to this increase in competition by product splitting. *Id.* at 104. A product split is an agreement between exhibitors to allocate motion pictures among themselves in order to eliminate competitive bidding. See *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 483-84 (9th Cir. 1988). The Justice Department and many courts consider product splits to be illegal. See Conant, *supra* note 50, at 106; *United States v. Capitol Serv., Inc.*, 756 F. 2d 502, 506 (7th Cir. 1985), *cert. denied*, 474 U.S. 945 (1985); *General Cinema Corp. v. Buena Vista Distrib. Co.*, 532 F. Supp. 1244, 1279 (C.D. Cal. 1982).

*Inc.*⁷⁰ In February 1985, the Justice Department announced that it would not seek termination or modification of the decrees due to a lack of interest by most of the distributor defendants.⁷¹ The Justice Department stated that a decree that is initially pro-competitive and in the public interest could "have unintended effects after the passage of time."⁷² As a result, the Justice Department stated it may set a termination date in the future. Therefore, the original decrees still impact the operations of the majority of distributors and some exhibitors such as Cinamerica.⁷³

Loew's however, is no longer constrained by consent judgments. Loew's filed a motion with the District Court for the Southern District of New York on November 6, 1991 for an order terminating the consent judgments.⁷⁴ The court granted Loew's motion on February 7, 1992. According to the court, changes in the marketing and distribution of films since 1952 eliminate any "persuasive reason for maintaining the Judgment and subjecting Loews to restrictions that do not bind other exhibition circuits."⁷⁵

Columbia was the first major distributor to enter the theater business after the Justice Department's 1985 review. In September of 1985, Columbia paid \$19.9 million for a 58% interest in the Walter Reade theater chain, located in New York.⁷⁶ On May 12, 1986, MCA, the parent company of Universal, paid \$162 million for a 50% interest in the Canadian theater company, Cineplex-Odeon.⁷⁷ Tri-Star Pictures, a subsidiary of Sony Pictures Entertainment Inc., acquired Loew's Theater Management Corp in 1986.⁷⁸ The Justice Department permitted this

70. Suzanne Ilene Schiller, *The Relationship Between Motion Picture Distribution and Exhibition: An Analysis of the Effects of Anti-Blind Bidding Legislation*, 9 COMM/ENT L.J. 131, 145 (1986).

71. Kim Isaac Eisler, *Movie Distribution Won't Be Touched By Antitrust Unit*, L.A. DAILY J., Feb. 7, 1985, at 1.

72. *Justice Department Decides Not To Seek Modification of Paramount Antitrust Consent Decrees*, ENT. L. REP., Feb. 1985, at 21.

73. *Id.*

74. Loew's Memorandum, *supra* note 3, at 1.

75. *United States v. Loew's Inc.*, 783 F. Supp. 211, 215 (S.D.N.Y. 1992).

76. Alex Ben Block, *Garth Drabinsky's Pleasure Domes*, FORBES, June 2, 1986, at 90, 93.

77. *Id.* at 92.

78. Will Tusher, *Green Light For Acquisition of Half-Interest in G&W's 470-Screen U.S. Holdings*, DAILY VARIETY, Dec. 23, 1987, at 1, 22.

acquisition pursuant to a 1980 motion by Loew's for relief from its consent decree.⁷⁹

As a result of its review of this acquisition, the Justice Department proposed a six-part test for evaluating "the competitive effects of a vertical merger" in the motion picture business.⁸⁰ Vertical mergers and acquisitions were to be evaluated based upon: 1) whether the relief would foreclose other exhibitors from access to motion pictures or competitive terms; 2) whether other distributors were foreclosed from access to theaters; 3) whether competitors were forced to vertically integrate to compete without foreclosure; 4) whether such integration, if required, would be difficult to achieve; 5) whether the market is conducive to non-competition performance when vertical integration is required and cannot be achieved; and 6) whether there are any offsetting positive benefits as a result of the vertical merger.⁸¹

The government concluded that the relief sought by Tri-Star and Loew's would not cause foreclosure, or force new entrants to vertically integrate in order to compete. Furthermore, the Justice Department was so convinced that the Tri-Star/Loew's acquisition would not create harmful market power that it did not analyze the last three elements of the six-part test.⁸²

In 1986, Paramount acquired 119 theaters for \$285,000,000. Included in this acquisition were the western regional chains of Mann Theaters and Festival Enterprises as well as an eastern regional acquisition, Trans-Lux (located in Connecticut and the upper east side of Manhattan). Paramount combined those screens into one circuit called Cinamerica Theaters, L.P. ("Cinamerica").⁸³ Warner believed it was competitively disadvantaged because most of its competitors could purchase theaters without restrictions. As a result, Warner filed a motion in August, 1986, with the District Court

79. In 1980, Loew's filed for permission to distribute motion pictures. The court granted the motion on the condition that Loew's not exhibit pictures which it also distributed. In 1986, Tri-Star acquired Loew's. Due to the 1980 order, Tri-Star was prevented from playing its own films in Loew's theaters. As a result, Tri-Star and Loew's petitioned the court to allow Loew's to exhibit Tri-Star's pictures. Even if Loew's had failed to seek authorization, Tri-Star could have purchased Loew's without court permission. In addition, since Tri-Star was a "non-Paramount" distributor, Tri-Star would not have been restricted in its dealings with Loew's. The court granted the request without abandoning the conduct limitations of the 1952 Consent Judgment until February 7, 1992. Loew's Memorandum, *supra* note 3, at 2, 5-6; Paul J. Tagliabue, *Antitrust Developments in Sports and Entertainment*, 56 ANTITRUST L.J. 343, 344 (1987); *United States v. Loew's Inc.*, 783 F. Supp. 211, 212 (S.D.N.Y. 1992).

80. Tagliabue, *supra* note 79, at 345.

81. *Id.*

82. *Id.* at 346.

83. *United States v. Loew's Inc.*, 882 F.2d 29, 31 (2d Cir. 1989).

for permission to engage in exhibition without prior court approval.⁸⁴ Warner argued that theater ownership would permit it to "compete on an equal footing with its principle rivals," and diversify in a closely related business.⁸⁵ Judge Edmund Palmieri, the guardian of the consent decrees for almost thirty years, issued an opinion granting Warner's motion on the condition that Warner hold any acquired theaters separately and seek court approval after a review by the Justice Department.⁸⁶

Pursuant to Palmieri's 1986 opinion requiring court approval of future theater acquisitions, Warner, in 1987, notified the Justice Department of its intent to purchase an interest in Cinamerica.⁸⁷ Following the Tri-Star/Loew's guidelines, the Justice Department's investigation concluded that the Paramount-Warner acquisition would have no significant impact on other exhibitors' access to films. As a result, the Justice Department declined to challenge Warner's acquisition. According to Fred Haynes, of the Justice Department's antitrust division, the foreclosure potential was "not sufficiently significant to raise a problem under the antitrust laws."⁸⁸

B. Antitrust Policy Objectives and Vertical Integration

In its petition to the district court seeking approval to purchase an interest in Cinamerica, Warner relied on affidavits of Maurice Silverman, a former government attorney responsible for monitoring the Paramount consent decrees.⁸⁹ Silverman argued that the antitrust laws are adequate protection to insure competition in the motion picture industry.⁹⁰ Judge Palmieri responded that he did not "believe that the mere existence of the antitrust laws . . . is enough to permit us to sit back and allow the dismantling of the consent judgments."⁹¹

Both Palmieri and Silverman presided over the administration of the consent decrees for over twenty-five years. Thus, the question arises as to

84. *United States v. Loew's Inc.*, 705 F. Supp. 878, 879 (S.D.N.Y. 1988), *remanded*, 882 F.2d 29, 30 (2d Cir. 1989).

85. *United States v. Loew's Inc.*, 705 F. Supp. at 884.

86. *Id.* at 885. The original consent decree, which required Warner's to divest itself of all theaters, also prohibited Warner from entering the exhibition market without applying to the Attorney General. *United States v. Loew's Inc.*, 882 F.2d at 30.

87. *United States v. Loew's Inc.*, 882 F.2d at 31.

88. Tusher, *supra* note 78, at 22; *United States v. Loew's Inc.*, 705 F. Supp. at 879.

89. *United States v. Loew's Inc.*, 882 F.2d at 31.

90. *United States v. Loew's Inc.*, 705 F. Supp. at 892.

91. *Id.* at 885.

which of these two preeminent authorities is correct. The answer depends on whether antitrust policies should promote goals other than economic efficiency. In general, there are two divergent positions regarding the appropriate policy objectives of antitrust laws. Palmieri follows the populist view that antitrust laws are designed to prevent large firms from exploiting smaller enterprises. For populists, if not subject to regulation and control, vertical integration may give rise to abuses.⁹² On the other hand, "the Chicago School" and Silverman argue that vertical integration is completely innocent and that the goal of antitrust law is to serve economic efficiency.⁹³

1. Populists Arguments and Vertical Integration

Advocates of governmental regulation emphasize the need to promote entrepreneurial innovation which creates opportunities for individuals or smaller enterprises to excel.⁹⁴ The goal of antitrust law, for populists, is to protect access to the market for smaller firms and prevent economic abuse from large, politically powerful corporations.⁹⁵ Populists assert "[a] policy that protects opportunities for powerless businesses helps consumers and fosters efficiency when carried out wisely."⁹⁶ Their fear is that giant firms will wield too much political influence over our lives if left unregulated. Furthermore, populists believe it is better for people to own their own businesses because that structure results in the lowest prices and best service for consumers.⁹⁷

Populists' primary concerns are that vertical integration will increase barriers to entry and foreclose competitors from markets.⁹⁸ In the motion picture industry, foreclosure occurs if an exhibitor is excluded as a buyer from a vertically integrated distributor favoring its own theaters or if a vertically integrated exhibitor is unreasonably denying other distributors access to its screens.⁹⁹ Fear of such foreclosure was a primary concern of

92. *Id.* at 983.

93. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?, Appendix: Rewriting The Lexicon*, 62 N.Y.U. L. REV. 969, 970, 983 (1987).

94. *Id.* at 983.

95. *Id.* at 987.

96. *Id.*

97. AREEDA & TURNER, *supra* note 6, at 22.

98. HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 201 (1985).

99. AREEDA & TURNER, *supra* note 6, at 208.

Judge Palmieri in his opinion in 1988 denying Warner's motion for approval of an interest in Cinamerica.

In the Cinamerica petition, Warner asserted that the factual circumstances of the industry had changed so dramatically in the past forty years that, "the antitrust concerns then present do not exist today."¹⁰⁰ For example, "aftermarkets," such as videocassettes and television, lowered barriers to entry and market concentration. Moreover, because Cinamerica accounts for only about 2% of the nation's 22,000 screens, Warner argued it could not possibly restrain competition.¹⁰¹

Judge Palmieri recognized that changes in the marketplace were "important considerations."¹⁰² However, Palmieri rejected Warner's contention that no anti-competitive impacts would result from its acquisition. The court pointed out that Cinamerica had a substantial local market share in many areas including the Westwood area of Los Angeles, California and Fairfield, Connecticut. In those areas, there was a potential for foreclosure of access to screen space. Additionally, even though Cinamerica only comprises about 2% of the nation's screens, together, Warner and Paramount make up about 30% of the national distribution market, which is a substantial interest.¹⁰³

Despite the endorsement from the Attorney General, Judge Palmieri stated "Warner had failed to carry its burden of demonstrating that the requested relief would not unreasonably restrain competition."¹⁰⁴ As a result, the district court held that Warner could keep its interest in Cinamerica only if it agreed to the terms and conditions outlined in the August 27, 1986 order. The initial restrictions prohibited Warner from participating in Cinamerica's management, operations and internal affairs.¹⁰⁵

Palmieri firmly rejected the view that federal antitrust law, standing alone, was sufficient to ensure that the motion picture industry remains competitive. Furthermore, according to Palmieri, the motion picture business "has shown a proclivity for anti-competitive behavior when given the opportunity."¹⁰⁶ As recently as 1988, Twentieth-Century Fox, a major defendant in the Paramount case, was found guilty of criminal contempt for

100. *United States v. Loew's Inc.*, 882 F.2d 29, 31 (2d Cir. 1989).

101. *Id.*

102. *United States v. Loew's Inc.*, 705 F. Supp. 878, 881 (S.D.N.Y. 1988).

103. *Id.* at 886-88.

104. *United States v. Loew's, Inc.*, 882 F.2d at 32.

105. *Id.*

106. *United States v. Loew's, Inc.*, 705 F. Supp. at 885.

failing to comply with the injunction against block booking, one of the illegal practices enjoined by the Paramount Consent Decrees.¹⁰⁷

While Palmieri has maintained his populist views for over twenty-five years, other industry leaders have been less consistent regarding whether studios should be in the theater business. In a 1988 interview, A. Alan Friedberg, who at the time was President of the independently owned U.S.A. Cinemas, articulated populists' fears of foreclosure from vertical integration.¹⁰⁸ Friedberg predicted a scenario in which a theater owner would not be able to play a film because the picture was "running in a competing theater, a theater operated by the studio that produced it."¹⁰⁹ Furthermore, according to Friedberg, "[s]omewhere along the line . . . an exhibitor in that situation thus discriminated against, thus precluded from the marketplace, is going to go to court—and you're going to have a new consent decree, just like you had in 1948."¹¹⁰

The advantages and disadvantages of vertical integration should be examined with regard to the source. In 1990 Friedberg became Chairman of the Board of Loew's Theatre Management Corp. ("Loew's").¹¹¹ Loew's, with 866 screens, is the fifth largest exhibitor in the nation.¹¹² Loew's is also one of the largest vertically integrated circuits. Loew's is a subsidiary of Sony, the parent company of Tri-Star and Columbia Pictures.¹¹³ Either people do not always say what they mean at the moment or their views depend on when they said it, because in 1991, Friedberg completely reversed his opinion of the effects of vertical integration. In an affidavit supporting Loew's petition to terminate its consent decree, Friedberg testified "elimination of the 1952 Consent judgment will have no adverse anti-competitive effect."¹¹⁴

To support his new position, Friedberg cited changes in the distribution and marketing of motion pictures from the exclusive releases of the 1940's to the current practice of multiple release patterns. Today, most broad-

107. See *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989).

108. Nat Segaloff & Daniel M. Kimmel, *Are Owners of Theater Chains Playing Monopoly?* BOSTON HERALD, Jan. 24, 1988, at S2.

109. *Id.*

110. *Id.*

111. Daniel F. Cuff, *New Loews Chairman Held 'Ideally Qualified,'* N.Y. TIMES, May 3, 1990, at D5.

112. Klein Affidavit, *supra* note 2, at 46.

113. Loew's Memorandum, *supra* note 3, at 1.

114. Affidavit of A. Alan Friedberg filed in support of the joint motions of Loew's and Sony at 6, *United States v. Loew's Inc.*, 783 F. Supp. 211 (S.D.N.Y. 1992) (89 Civ. 6159) [hereinafter Friedberg Affidavit].

based commercial films are released nationwide to 1800 or more theaters simultaneously. Since Loew's only accounts for 195 actual theaters, it is impossible for Loew's to support a national release on the scale of most commercial distribution. According to Friedberg, "Tri-star . . . would suffer financial ruin if it attempted to limit distribution of its film product to Loew's theaters."¹¹⁵ Furthermore, Loew's contends "it cannot engage in competitive foreclosure" because Loew's possesses less than 4% of the nation's screens and Tri-Star only about 7% film rental share.¹¹⁶

While it is true that no distributor or exhibitor could survive without dealing with competitors, there is still some foreclosure potential in highly concentrated markets without sufficient theaters. In the exhibition industry, market concentration occurs in local areas and on a regional basis. Theater markets are divided into zones or areas where theaters compete for exclusive rights to obtain a film.¹¹⁷ Due to the limited number of theaters in a particular zone, they compete for a limited audience.

Examples of this are the downtown areas of Boston and Cambridge, Massachusetts, where Loew's is the only exhibitor.¹¹⁸ Boston, with one of the largest student populations in the country, is the sixth largest motion picture market.¹¹⁹ In downtown Boston, Loew's controls all twenty-two screens and in Cambridge, Loew's controls all twenty-eight screens.¹²⁰ Even though Loew's controls all the theaters in downtown Boston and Cambridge, these zones are only a small part of the total first-run market in the greater Boston area. Loew's does not control the suburbs and outlying areas where there is vigorous competition between other theater chains.¹²¹

The potential for foreclosure depends on supply and demand. When distributors glut the market by producing too many films, theaters have considerable leverage over which pictures to play. Conversely, if there are

115. *Id.*

116. Klein Affidavit, *supra* note 2, at 4.

117. Conant, *supra* note 50, at 58.

118. Because Loew's is the only exhibitor in the area, it has a monopsony. "Monopsony" refers to a market where there is a single buyer. Monopsony power is monopoly power exerted by the buyer rather than the seller. Monopsonists in the film industry tend to exercise their power against distributors by demanding lower licensing terms rather than through higher ticket prices to moviegoers. *United States v. Syufy Enterprises*, 903 F.2d 659, 663 n.4 (9th Cir. 1990).

119. Nat Segaloff and Daniel M. Kimmel, *Diversity at Issue*, BOSTON HERALD, Jan. 24, 1988, at S2.

120. This information comes from the most recent listing of movie theaters in the Boston area. BOSTON GLOBE, Apr. 11, 1993, at B9.

121. *Id.*

an abundance of screens and insufficient films, studios are able to command a larger share of box office receipts at the expense of exhibitors.¹²²

Because of the cyclical nature of the theatrical market, some non-vertically integrated entities will be competitively disadvantaged. For example, when there are too many films and too few screens a vertically integrated exhibitor has an incentive to favor its distributor's product. In this way, integrated theaters could deny access to competing distributors. Similarly, in the event of a product shortage, the vertically integrated exhibitor may also be inclined to favor its own films and possibly foreclose competing exhibitors. These scenarios are obviously aggravated when a vertically integrated entity denies competitors the opportunity to make a reasonable offer.

Although there is some foreclosure potential when studios own their own theaters, this threat is limited. Foreclosure will only occur if there are insufficient screens to service the supply of film. Situations where a distributor has enough films to support its own theaters are extremely rare.¹²³ Most multiplexes have eight to twelve screens. As a result, no distributor could survive without showing their competitor's films. Nevertheless, the very purpose of studio ownership of theaters is to give distributor-controlled theaters the ability to guarantee outlets for their own films, reduce uncertainty and promote efficiency.

As the following analysis will demonstrate, from an efficiency perspective, it makes no economic sense to continue enforcing a decision which deters producers and distributors from also pursuing a theater business. Arguably, the prohibitions against studio ownership of theaters actually thwart populist goals since they tend to create a class of theater owners who are "dependent on legislative or judicial protection for their survival."¹²⁴ In this way, the Consent Decrees undermine "the Jeffersonian ideal of entrepreneurs who are independent both of monopolists and of government."¹²⁵

2. Vertical Integration: Economic Efficiency Arguments

The goal of the Chicago School antitrust policy is to improve the efficiency of markets and promote competitive conduct, rather than protect

122. MARK LITWAK, REEL POWER: THE STRUGGLE FOR INFLUENCE AND SUCCESS IN THE NEW HOLLYWOOD 255-56 (1986).

123. Klein Affidavit, *supra* note 2, at 23.

124. AREEDA & TURNER, *supra* note 6, at 24.

125. *Id.*

individual competitors. According to this theory, "[i]n most markets the government would be best off if it left entry and exit unregulated."¹²⁶ Some proponents of the Chicago School argue that vertical mergers should be lawful because they enhance efficiency and innovation.¹²⁷

Economic efficiency advocates criticize populists for discouraging conduct, like vertical mergers, that promotes efficiency.¹²⁸ For instance, vertical mergers enhance a business' productive efficiency by either allowing the firm to reduce its price and increase its market share or earn greater profits without raising prices.¹²⁹ Furthermore, according to Harvard law professors Phillip Areeda and Donald Turner, "In the vast majority of instances, integration reflects adaptation to more efficient ways of doing business or, less frequently but also desirably, an effort to overcome high prices or other poor competitive performance in vertically related markets."¹³⁰

There has been little opposition by the Justice Department to consolidation in the motion picture industry because the government follows the economic efficiency rationale that vertical integration is not illegal.¹³¹ The position that vertical integration is not illegal "follows accepted economic analysis."¹³² For example, a vertical merger does not add to or create economic power.¹³³ Not only is "there nothing inherently anti-competitive about a vertical merger," it is unlikely that a vertical merger by itself would raise entry barriers.¹³⁴ Thus, vertical mergers do not result in a "substantial lessening of competition," nor do they "eliminate a competing buyer or seller from the market."¹³⁵

Another justification for vertical integration is that no matter how vertically integrated a firm is, it cannot add to its market power by vertical linkages alone. Businesses are "profit-maximizers." Managers make business decisions they expect will result in the greatest profit for their divisions.¹³⁶ Distributors will sell their product to buyers that offer the

126. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 227 (1985).

127. AREEDA & TURNER, *supra* note 6, at 208; ROBERT BORK, *THE ANTI-TRUST PARADOX* 226, 245 (1978).

128. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987).

129. Hovenkamp, *supra* note 126, at 238.

130. AREEDA & TURNER, *supra* note 6, at 206.

131. *United States v. Paramount Pictures, Inc.*, 334 U.S. 130, 174 (1947).

132. Conant, *supra* note 50, at 88.

133. AREEDA & TURNER, *supra* note 6, at 207.

134. *Id.* at 253.

135. *Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979).

136. Hovenkamp, *supra* note 126, at 228.

most advantageous terms or the best profit potential. If an unaffiliated exhibitor offers a distributor a better deal or a higher grossing theater, then the distributor will license its picture to the unaffiliated theater. Similarly, if Paramount owns theaters in a particular market and could make more money by playing a Warner film, Paramount will play the competition's films over its own. In short, vertical integration is essentially harmless because no one would pass up more profit for the sake of their own theaters.

The Justice Department has decided not to enforce the Paramount Consent Decrees. Joining Warner in its appeal of Judge Palmieri's decision prohibiting participation in Cinamerica's management, operations or internal affairs, the Justice Department argued that Warner had met its burden under the consent decrees. Furthermore, the government contended that not only was "there nothing inherently anti-competitive about a vertical merger . . . the evolution of the motion picture industry since *Paramount Pictures* makes it improbable that Warner could or would . . . stifle competition."¹³⁷ The court of appeals agreed with the Justice Department and the court held that Warner's interest in Cinamerica was not likely to increase barriers to entry, restrain competition or foreclose competing exhibitors or distributors.¹³⁸ On remand, the court of appeals instructed the district court to eliminate all restrictions accompanying Warner's ownership and operation of Cinamerica.¹³⁹

The Justice Department's rationalization of its support for deregulating the exhibition industry is that the industry has drastically changed. For instance, the studios operate in a completely different marketing environment than during the time of the *Paramount* decisions. Because of new channels of distribution, competition for the consumers' entertainment dollar is significantly greater today than during the 1930's and 1940's.¹⁴⁰ This is reflected in the motion picture revenue mix. Distributors produce income by licensing theatrical, television and videocassette rights. Additionally, studios now earn more revenue from home video than from theatrical distribution.¹⁴¹

The impact of technological innovations is further reflected in changes in demand for moviegoing. Ticket sales declined from a high of 4.1 billion in 1946, to 1.08 billion in 1962, and for the past twenty-five years,

137. *United States v. Loew's Inc.*, 882 F.2d at 32-33.

138. *Id.* at 33.

139. *Id.* at 34.

140. *Id.* at 31-32.

141. *Filmed Entertainment Growth: A Five-Year Forecast*, BOXOFFICE, Oct. 1990, at 54.

admissions have remained at around one billion.¹⁴² Americans attended approximately twenty-nine movies a year in 1946 as compared to five times a year in 1984.¹⁴³ Furthermore, in 1988, nearly four times as many consumers watched films on videocassette than went to theaters.¹⁴⁴

Another reason for not enforcing the prohibition against theater ownership is because it is unfair to hold Warner, MGM and Fox to a different standard. Paramount has always been able to acquire theaters without court approval. Universal has never been enjoined from owning theaters.¹⁴⁵ In addition, there are several new studios and national theater circuits which have entered the market since the *Paramount* decision who are not bound by the decrees.¹⁴⁶ New entrants in production and distribution include Tri-Star, Orion and Buena Vista. In exhibition, independent theater circuits like General Cinema, United Artists Theater Circuit and American MultiCinema have significant market power.¹⁴⁷ Finally, after the 1992 motion to terminate Loew's consent judgments, Cinamerica is now the only major theater circuit that is still directly constrained by the Paramount Consent Decrees.¹⁴⁸

Judge Conner notes in his opinion that anti-competitive practices prohibited by the consent decrees are still forbidden by existing law. Moreover, the motion picture industry is "fully subject to the antitrust laws of general application."¹⁴⁹ If a vertically integrated distributor tries to foreclose competitors from access to theaters or pictures, the injured party has the remedy of treble damages through a private civil action.¹⁵⁰ "Treble damages provide a powerful incentive for parties to detect and sue for antitrust violations, and they discourage illegal conduct by increasing the probability of suits and the cost to the violator."¹⁵¹ Furthermore,

142. A.D. Murphy, *Lousy Pics Sole Valid Scapegoat*, VARIETY, July 16, 1986, at 3.

143. McCoy, *supra* note 65, at 32, 34.

144. *Id.* at 33.

145. Phillips, *supra* note 33, at 11.

146. McCoy, *supra* note 65, at 32; *United States v. Loew's Inc.*, 882 F.2d at 31.

147. McCoy, *supra* note 65, at 32-33; Klein Affidavit, *supra* note 2, at 30.

148. *United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992). Although Tri-Star never owned theaters, it was necessary for its owner, Sony, to petition for termination of a 1987 order resulting from Tri-Star's acquisition of Loew's. That order forced Tri-Star and Loew's to be bound by the distributor conduct restrictions of the 1980 Loew's order. See *supra* note 79 and accompanying text.

149. *United States v. Loew's Inc.*, 783 F. Supp. at 214.

150. Peter J. Dekom, *Counseling Clients in the Entertainment Industry*, in *THE MOTION PICTURE IN 1987: A STUDY IN ECONOMIC TURMOIL*, at 149, 153 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. 237, 1987).

151. Milton Handler, *Foreword*, 75 CAL. L. REV. 787, 811 (1987).

judicial scrutiny governs all future vertical acquisitions.¹⁵² Based on the above measures and the threat of treble damages, there is adequate protection in the antitrust laws.

Loew's, in its memorandum to vacate its 1952 consent decree, argued that termination of the judgment is "in the public interest."¹⁵³ The government agreed, contending that conduct restrictions are no longer necessary and some of the prohibitions are actually pro-competitive:

The Government sees no current need for Loew's to be subject to legal constraints beyond those generally applicable to all other exhibition companies, including Loew's competitors. Continuation of the 1952 Loew's Judgment . . . appears unnecessary and their perpetuation might deter otherwise permissible and desirable competitive behavior. Consequently, the government has tentatively concluded that the public interest would be best served by the entry of a suitable termination order.¹⁵⁴

For example, Loew's is unable to enter into a proposed joint venture with a real estate development group. The developers have other theater holdings, and Loew's is prohibited by the consent decree from participating in any joint ownership with an actual or potential independent exhibitor.¹⁵⁵ Thus, the judgment restricts "the availability of investment capital for theatre expansion and . . . the availability of qualified and competent personnel who may want to have an equity interest with Loew's."¹⁵⁶

The judgment also prohibits franchise agreements, formula deals, master agreements and joint ventures. These prohibitions are no longer anti-competitive and could be pro-competitive. Master agreements and formula deals are enjoined under the *Paramount* case because they facilitated the horizontal conspiracy in which the major studios gave each other's theaters preferential treatment in securing bookings.¹⁵⁷ Today, studios no longer control exhibition. Mann Theaters, a West Coast subsidiary of Cinamerica, only comprises about 1.9% of the nation's screens and Loew's only about 3.8%. Furthermore, no vertically integrated studio dominates first-run

152. "[P]roposed vertical mergers [receive] careful scrutiny to ensure that any proposed integration will not unreasonably restrain competition in the motion picture industry." *United States v. Loew's Inc.*, 882 F.2d at 34. Premerger notification and waiting requirements for corporations planning to consummate large mergers and acquisitions are also governed by statute. *Id.*; see, e.g., 15 U.S.C. § 18a (1988).

153. Loew's Memorandum, *supra* note 3, at 8.

154. Government Memorandum, *supra* note 2, at 10.

155. *Id.* at 9; Friedberg Affidavit, *supra* note 114, at 2.

156. Friedberg Affidavit, *supra* note 114, at 3.

157. Loew's Memorandum, *supra* note 3, at 26.

theaters on the same scale as the major studios of the 1940's. As a result, the possibility of horizontal collusion on the same scale as in the 1940's is highly unlikely.¹⁵⁸ Even if horizontal collusion occurs, the general antitrust laws offer sufficient protection for independents.¹⁵⁹

IV. CONCLUSION

The motion picture business is inherently volatile and uncertain. History reveals that when studios attempt to control distribution systems, anti-competitive business practices often result. However, horizontal conspiracies rather than vertical integration are the source of the problem.

The purpose of the prohibitions against studio ownership of theaters is to prevent horizontal conspiracies, not to protect small, independently owned theaters. Changes in demand, technological innovations and market structure have permanently altered the structure and nature of the motion picture industry from the era when the decrees were originally imposed. As a result, there is no realistic possibility of a return to the economic structure or collusive business practices that gave rise to the consent decrees. Finally, the prohibitions against studio ownership of theaters may actually deter efficient, pro-competitive behavior. In short, these prohibitions are an anachronism that make no economic sense in today's marketplace.

158. *Id.* at 24.

159. *Id.* at 26.

