THE PARAMOUNT DECREES RECONSIDERED

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I

INTRODUCTION

The Supreme Court's decision in the *Paramount* case[1] brought to an end decades of control of the motion picture industry in violation of the antitrust laws. The subsequent decrees enjoining restrictive trade practices and ordering divorcement of theaters brought radical changes to the marketing of motion pictures.[2] The question treated in this study is the extent to which these decrees brought competition to the industry. The economic framework of the inquiry, like all studies of industrial organization, concerns the smallest size of firm which can achieve the economies of scale that exist at its level of production or marketing. In motion pictures, the three levels are production (making of pictures), distribution (marketing of pictures to exhibitors), and exhibition (operation of theaters).

In the thirty years since the *Paramount* decision, other major factors have had great impact on the motion picture industry. The most significant of these is television. Some classes of features, such as musicals, have been virtually replaced by television programs. The sale of theatrical motion pictures to television within a few years after first run has made television a continuous competitor for feature film customers. It has also wiped out most of the theater market for reruns of classic features. As the quality of films produced specifically for television has increased over the years, competititon has provoked motion picture producers to concentrate efforts and assets on fewer, more expensive films. These and other competitive factors have had profound effects on the economic structure and output of the industry which one must attempt to distinguish from the impact of the antitrust decrees.

One result of the rivalry of television and increased public interest in other forms of recreational activities was a sharp decline in motion picture attendance for about fifteen years. Estimated attendance of indoor theaters dropped from 3,352 million in 1948[3] to 1,011 million in 1958[4] and to 553 million in 1967.[5]

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

2. See M. CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY (1960) for a review of the early impacts of the decrees. The most recent economic survey of the industry is WHO OWNS THE MEDIA?: CONCENTRATION OF OWNERSHIP IN THE MASS COMMUNICATIONS INDUSTRY, ch. 5 (B. Compaigne ed. 1979).

3. U.S. BUREAU OF THE CENSUS, CENSUS OF BUSINESS, SELECTED SERVICE INDUSTRIES, SUMMARY STATISTICS 9.08 (1948).

Thereafter, attendance began to recover. In 1972 indoor theater attendance was estimated at 942 million,[6] and in 1979 the estimate was 1,120 million.[7] Domestic theater admission revenues dropped from $1,245 million in 1948[8] to about $900 million in 1963[9] and then recovered to $1,082 million in 1967.[10] Thereafter, revenues increased, especially in the late 1970s. Admission revenues reached $1,570 million in 1972[11] and an estimated $2,165 million in 1977.[12]

II

THE PARAMOUNT DECREES

The *Paramount* case was a civil antitrust action against the eight major motion picture distributors. Before the *Paramount* decision, the motion picture industry was effectively controlled by five major producer-distributors who were also exhibitors. These were Loew's (MGM), Paramount, R.K.O., Twentieth Century-Fox and Warner Brothers. These five companies owned chains of first-run theaters, each of them concentrated primarily in one section of the country. Through a broad policy of reciprocity, each of the five, as distributor, agreed to give first-run status to the theaters of the other four. In effect, their control of exhibition was a bottleneck on the final market. It enabled the five majors to control distribution, production and the key personnel who were inputs to production.

Of the three minor distributors, Columbia and Universal were producer-distributors, and United Artists was only a distributor for independent producers. Since the three owned no theaters, they had much less bargaining power than the five majors in securing exhibition in the first-run theaters of the latter.[13]

The combination fixed admission prices, clearances between runs of films, and other marketing practices. Since the details of the conspiracy are reported elsewhere,[14] only the elements of the resultant decrees will be summarized here. The decree of December 1946 prohibited the defendants as distributors from engaging in the following practices: (1) fixing admission prices in film licenses; (2) maintaining systems of clearances; (3) maintaining clearances between theaters not in

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4. U.S. BUREAU OF THE CENSUS, CENSUS OF BUSINESS, SELECTED SERVICE INDUSTRIES, SUMMARY STATISTICS 8-16 (1958).

5. U.S. BUREAU OF THE CENSUS, 1967 CENSUS OF SELECTED SERVICES, MOTION PICTURES 4-15 (1970).

6. U.S. BUREAU OF THE CENSUS, 1972 CENSUS OF SELECTED SERVICE INDUSTRIES 3-14.

7. U.S. DEP'T OF COMMERCE, 1981 U.S. INDUSTRIAL OUTLOOK 530.

8. U.S. BUREAU OF THE CENSUS, CENSUS OF BUSINESS, SELECTED SERVICE INDUSTRIES, SUMMARY STATISTICS 9.03 (1948).

9. U.S. BUREAU OF THE CENSUS, CENSUS OF BUSINESS, SELECTED SERVICE INDUSTRIES, SUMMARY STATISTICS 8-12 (1958).

10. U.S. BUREAU OF THE CENSUS, 1967 CENSUS OF SELECTED SERVICES, MOTION PICTURES 4-9 (1970).

11. U.S. BUREAU OF THE CENSUS, 1972 CENSUS OF SELECTED SERVICE INDUSTRIES 3-11.

12. U.S. BUREAU OF THE CENSUS, 1977 CENSUS OF SELECTED SERVICE INDUSTRIES, MOTION PICTURE INDUSTRY 4-15.

13. *See* M. CONANT, *supra* note 2, at 204-207, concluding that the three minor distributors were mostly victims of the illegal monopoly of the five majors and that the three minor distributors should not have been made defendants in the *Paramount* case.

14. *Id.* at ch. 5.

substantial competition; (4) continuing clearance in excess of what was "reasonably necessary" to protect the licensee in the run granted; (5) franchising; (6) engaging in formula deals and master agreements; and (7) conditional block booking.[15] Where an exhibitor chose to license films in groups, he was to be given the right to reject 20 percent of such films. All pooling agreements and joint interests in theaters of two defendants or a defendant and independents were ordered terminated.[16]

The district court had denied the government's plea that the five majors be required to divorce their theaters. Instead it had ordered competitive bidding for licensing of each film in each run to be open to all theaters.[17] On appeal, the Supreme Court ordered divorcement but not competitive bidding.[18] This was followed by consent decrees in which each of the five firms divorced its theater circuit and disposed of individual theaters in towns where the majors had a monopoly on exhibition.[19] The five divorced circuits were prohibited from acquiring additional theaters unless they established to the satisfaction of the district court that such acquisitions would not unreasonably restrain trade.[20]

One significant effect of the *Paramount* decision was that hundreds of private treble-damage actions were filed by exhibitors against the eight Paramount defendants. Since others have reported on these cases[21] they will not be reviewed here.

III

PRODUCTION

A. Economic Factors

The key characteristic of motion pictures is that each one is unique. Imperfect competition in motion picture marketing begins with this underlying fact. It is not accurate to think of all pictures on release at the same time as significant rival services. If any picture gains good reviews and positive initial acceptance, large segments of the public will allocate income for tickets. Instead of thinking of two films which have received positive initial sales as rivals, the movie-going public will allocate recreational funds to attend both. The most important factor in public acceptance of new films in an era when television constantly offers reruns of the

15. *Id.* at 98-99.

16. *Id.* at 99-100.

17. United States v. Paramount Pictures, 66 F. Supp. 323, 358 (S.D.N.Y. 1946); 70 F. Supp. 53, 74 (S.D.N.Y. 1947).

18. United States v. Paramount Pictures, 334 U.S. 131, 161-66 (1948).

19. United States v. Paramount Pictures, Inc., 1948-1949 Trade Cas. ¶ 62,335 (S.D.N.Y. 1948) (RKO Consent Decree); United States v. Paramount Pictures, Inc., 1948-1949 Trade Cas. ¶ 62,377 (S.D.N.Y. 1949) (Paramount Consent Decree); United States v. Loew's Inc., 1950-1951 Trade Cas. ¶ 62,765 (S.D.N.Y. 1951) (Warner Consent Decree); United States v. Loew's Inc., 1950-1951 Trade Cas. ¶ 62,861 (S.D.N.Y. 1951) (Twentieth Century-Fox Consent Decree); United States v. Loew's Inc., 1952-1953 Trade Cas. ¶ 67,228 (S.D.N.Y. 1952) (Loew's Consent Decree). Subsequent references to these decrees will be made without reporter citation.

20. United States v. Loew's Inc., 1950-51 Trade Cas. ¶ 62,573, at 63,679 (S.D.N.Y. 1950).

21. *See* R. CASSADY & R. CASSADY, THE PRIVATE ANTITRUST SUIT IN AMERICAN BUSINESS COMPETITION: A MOTION-PICTURE INDUSTRY CASE ANALYSIS (1964).

old films is novelty. The limited supply of creative writing that will appeal to substantial segments of the viewing public is a primary factor in the declining supply of new films.

The great uncertainties that make motion picture production more of a gamble than a rational endeavor are clearly illustrated by Columbia Pictures Industries, Inc. In fiscal 1970 Columbia had income before taxes of $10.9 million[22] and management was lauded. In 1971 it lost $40.7 million.[23] In 1972 the pretax loss was only $665,000, while in 1973 it was $65 million[24] Its net worth declined to $8 million[25] and its loans payable reached $183 million.[26] Columbia chairman Abe Schneider and production head Mike Frankovich, Jr., were discharged.[27] As *Forbes* reported, Columbia wrote off about $75 million in inventory losses on such forgettable Frankovich films as *Castle Keep*, *Lost Horizon*, and *Oklahoma Crude*.[28] Allen Hirschfield was hired as Columbia's new chief executive, but before his decisions could have impact, fortunes changed and Columbia had three successes, *Funny Lady*, *Shampoo*, and *Tommy*. Columbia reported profits from filmed entertainment of $24.9 million in 1974, $33.2 million in 1975, $28.3 million in 1976, $30.8 million in 1977[29] and $80.1 million in 1978.[30] *Close Encounters of the Third Kind* had total worldwide box office gross of $182 million in fiscal 1978.[31] If film rentals on this picture approximated the industry average of 45 percent of box office gross,[32] this one film earned 30 percent of Columbia's 1978 total theatrical film rentals of $269 million.[33] The 1978 net income of $68.8 million was 101.5 percent of shareholders' equity as of the beginning of the fiscal year.[34]

More than half the pictures that are produced fail to earn rentals sufficient to recover their production and marketing costs. In 1967 it was estimated that 75 percent failed to recover their costs.[35] Although *Zorba the Greek* cost $700,000 and earned $10 million profits,[36] few low-budget films succeed. Producers, with great uncertainty about whether the story behind the film will succeed, feel they greatly reduce uncertainty by employing the best known and therefore the most expensive actors. But scarcity of stars means fewer total films. The movement to fewer, more expensive films has increased the uncertainties in film production. In 1977 it was

22. COLUMBIA PICTURES INDUSTRIES, INC., 1971 ANNUAL REPORT 5.
23. *Id.*
24. COLUMBIA PICTURES INDUSTRIES, INC., 1973 ANNUAL REPORT 9.
25. *Id.* at 11.
26. *Id.* at 17.
27. *Only in Hollywood*, FORBES, Nov. 1, 1977, at 77.
28. *Id.*
29. COLUMBIA PICTURES INDUSTRIES, INC., 1978 ANNUAL REPORT 51, reporting earnings by operating divisions for years 1974 to 1978.
30. *Id.*
31. *Id.* at 12, 51.
32. *See Coming Attractions: Cable TV and Videocassettes Portend Bleak Future for Theaters that Show Movies*, Wall St. J., Aug. 19, 1981, at 19, col. 2.
33. COLUMBIA PICTURES INDUSTRIES, INC., 1978 ANNUAL REPORT 51.
34. *Id.* at 38, 41.
35. *How a New Film Maker Made it in Hollywood*, BUSINESS WEEK, Sept. 16, 1967, at 189, 192. *See MGM Film Gives Small Investors a Chance to Share in Rising Cost of Making Movies*, Wall St. J., Aug. 13, 1981, at 21, col. 4.
36. *Id.*

reported that about twelve of the most expensive pictures would have to earn $400 million in film rentals to recover their production and marketing costs.[37] This was equal to the film rentals of all nine leading distributors in 1971.[38] The investment is made in the hope of large returns such as the $100 million in film rentals Warner Communications received from *The Exorcist* in 1974[39] or the $200 million in rentals that Universal earned from *Jaws* in 1975.[40] The effect of concentrated investment in a few pictures per year is to aggravate the fluctuations in income.

One result from the concentration of production in fewer big-budget pictures is that some pictures have been coproduced by two major companies. Columbia Pictures Industries, for example, coproduced *1941* with Universal and *All That Jazz* with Twentieth Century-Fox.[41] In both cases the picture was distributed by the coproducer rather than Columbia. A number of other such coproductions have been reported.[42] These joint ventures are analogous to two major oil companies joining in a venture in oil drilling. No single firm wishes to risk such large amounts of capital in a single uncertain venture. Joint ventures are a risk-sharing device. Although they might result in antitrust prosecution, they are presumptively legal.[43]

Another result of the decline in feature film output, which was only partially offset by productions for television, was idle studio space. Paramount's Marathon Studio in Hollywood, for example, is 52 acres of urban land with 32 stages and 1200 employees.[44] Metro-Goldwyn-Mayer's studios in Culver City, California, have 24 sound stages[45] on 44 acres[46] while Twentieth Century-Fox has 63 acres in Los Angeles.[47] Universal has the largest production facilities in the world with 420 acres and 33 sound stages.[48]

In order to meet the issue of too many studios and rising urban land values, some studios have been dismantled. Twentieth Century-Fox sold a major part of its studio property for urban development.[49] It also negotiated unsuccessfully to merge its remaining production facilities with MGM.[50] Columbia and Warner agreed in 1972 to combine studio properties, and Columbia production was moved to Warner's Burbank studio.[51] Parts of the former Columbia studios were leased to independent producers and the rest sold for alternate uses. Warner executives estimated that each firm would save two to three million dollars per year from

37. *Is It Worth Making Blockbuster Films*, BUSINESS WEEK, July 11, 1977, at 36.
38. *Id.*
39. *Id.*
40. *Id.*
41. COLUMBIA PICTURES INDUSTRIES, INC., 1979 ANNUAL REPORT 14-15.
42. WHO OWNS THE MEDIA?, supra note 2, at 224.
43. *See* United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964), *decision on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff'd per curiam*, 389 U.S. 308 (1967).
44. Gulf & Western Industries, Inc., Form 10K Report to the SEC 29 (1977).
45. METRO-GOLDWYN-MAYER, INC., 1978 ANNUAL REPORT 6.
46. *Id.* at 16.
47. MOODY'S INDUSTRIAL MANUAL 2655, 3210 (1979).
48. *Id.* at 3948.
49. MOODY'S INDUSTRIAL MANUAL 2818 (1973).
50. *Fox-MGM Merger is Put on Ice*, BROADCASTING, Feb. 1, 1971, at 47.
51. Columbia Pictures Industries, Inc., Form 10K Report to the SEC 10 (1979).

joint use of the Burbank studios, the largest part being labor savings.[52]

The most significant impact of the Paramount decrees on motion picture production was the great increase in the number of independent producers.[53] Although exact figures are not available, industry sources state that a substantial majority of films are independently produced. Since major distributors could no longer control the channels of distribution, they lost control of their input markets. Successful producers, directors and actors chose to form their own production companies. First Artists Production Co., Ltd., for example, was organized mainly by such actors as Paul Newman, Sidney Poitier and Barbra Streisand.[54] In 1975 First Artists had film rentals of $1.8 million,[55] and in 1980 film rentals were $10 million.[56] With output declining, the leading producer-distributors competed to lease space to independent producers. In most cases, the distributors contributed part of the financing for the independent producers and secured distribution rights to their pictures.

B. Remedies Available to Independent Producers

Since independent producers were the group most obviously injured by the conspiracy of the five majors to control the entire industry through the exhibition markets before the *Paramount* decision, one would expect many treble-damage actions by them. In one of the few reported cases, the complaint was dismissed.[57] Other actions may have been filed and settled and are therefore unreported. There are only two reported decisions of actions by independents against one or more of the five major defendants that went to trial, and one precedent-setting suit was lost.

In *Eagle Lion Studios, Inc. v. Loew's, Inc.*,[58] the plaintiffs charged Loew's and RKO Theaters, the two large affiliated circuits in the New York metropolitan area, with conspiracy to exclude the majority of plaintiffs' films from first subsequent run between 1946 and 1951. Although the original *Paramount* judgment was entered in 1945, the plaintiffs argued correctly that the same pattern of control persisted until the final order in the case in 1950.[59] The court of appeals, by a 2-1 vote, affirmed a trial court judgment for the defendants.[60] The most important issue was the breadth assigned to section 5 of the Clayton Act,[61] which makes a final judgment or decree in an antitrust action by the government prima facie evidence against defendants in subsequent actions by injured parties. A finding of

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52. *Economics v. Egos: Film Firms Mull Merging Studio Facilities, Seeking to Cut Costs, Revive Industry*, Wall St. J., July 13, 1971, at 34, col. 1.

53. *See* M. CONANT, *supra* note 2, at 112-18.

54. *See Barbra & Paul & Steve & Sydney*, FORBES, Jan. 15, 1972, at 14.

55. FIRST ARTISTS PRODUCTION CO., 1979 ANNUAL REPORT 3.

56. STANDARD & POORS, STANDARD CORPORATION DESCRIPTIONS 9088 (Feb. 1981).

57. Independent Prod. Corp. v. Loew's, Inc., 24 F.R.D. 360 (S.D.N.Y. 1959). *See also* M. CONANT, *supra* note 2, at 36-38.

58. 248 F.2d 438 (2nd Cir. 1957), *aff'd by equally divided court*, 358 U.S. 100 (1958).

59. United States v. Paramount Pictures, Inc., 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 974 (1950).

60. 248 F.2d at 449.

61. 38 Stat. 731 (1914)(current version at 15 U.S.C. § 16 (1979 Supp.)).

fact in the Paramount case had been that, in New York City, Loew's and RKO had divided neighborhood prior runs so that there would be no competition between them in obtaining films from the other defendants.[62] One conclusion of law was that Loew's and RKO had conspired to monopolize and had monopolized first neighborhood runs in New York City.[63] The trial court had held that the findings and conclusion were not evidence that there was no competition between Loew's and RKO to obtain films from independent producers.[64] The majority of the appeals court held that other evidence was not sufficient to justify reversal of the trial court.[65] Judge Clark, dissenting, said the trial courts gave the *Paramount* judgment not only a niggardly construction, but one quite opposite to its intended meaning.[66]

In *Twentieth Century-Fox Film Corp. v. Goldwyn*,[67] Samuel Goldwyn and associated independent producers recovered $300,000 treble damages against Fox and its National Theatres and Fox West Coast Theatres subsidiaries. The circuit buying power of the defendants had enabled them to set fixed runs and clearances so that a producer of outstanding pictures could not bargain for more first-run time. It had enabled the defendants to bargain to pay significantly lower film rentals than the market would have otherwise provided. The fact that Goldwyn pictures were distributed by RKO, one of the *Paramount* defendants, was not relevant when the case centered on circuit buying power of National and Fox in the western United States, where they were dominant. This ruling recognized that the bottleneck on first-run exhibition of the five majors was their key source of monopoly power. Although the trial judge had ruled that the *Paramount* findings could not be admitted as prima facie evidence under section 5 of the Clayton Act, the plaintiff established the liability of all defendants for the years 1947 to 1950.[68] The court of appeals held that the exclusion of the *Paramount* findings had been in error, as was the exclusion of the claims regarding the years 1935 to 1947.[69] Under section 5 of the Clayton Act, the statute of limitations was suspended from 1938 to 1950 during the litigation of the *Paramount* case. The case was remanded for further proceedings on the claims for the earlier period.[70]

C. Industry Self-censorship

In the period before the *Paramount* decrees, the Motion Picture Production Code was also used by the major companies to reinforce their illegal cartel.[71] No potential entrant to motion picture production could treat controversial subjects and expect to find a national distributor. Following the *Paramount* decrees, the

62. United States v. Loew's Inc., No. 87-273, Finding of Fact No. 154(d) (S.D.N.Y. 1950).
63. United States v. Loew's Inc., No. 87-273, Conclusion of Law No. 16 (S.D.N.Y. 1950).
64. Eagle Lion Studios, Inc. v. Loew's Inc., 141 F. Supp. 658, 667 (S.D.N.Y. 1956).
65. 248 F.2d at 444-45.
66. 248 F.2d at 449.
67. 328 F.2d 190 (9th Cir. 1964), *cert. denied*, 379 U.S. 880 (1964).
68. Samuel Goldwyn Prods., Inc. v. Fox West Coast Theatres Corp., 194 F. Supp. 507, 512-13 (N.D. Cal. 1961) (citing M. CONANT, *supra* note 2).
69. 328 F.2d at 220-21.
70. *Id.* at 226.
71. *See* M. CONANT, *supra* note 2, at 113.

code was greatly liberalized in 1956. In 1968 the Motion Picture Association of America adopted a system of rating films according to their suitability for various age groups.[72] Most persons in the industry felt there was no longer any barrier to entry. The view of industry executives was that this limited control by the industry would prevent more serious attempts at censorship by the states.[73] The American Civil Liberties Union charged that the rating code was unevenly enforced,[74] but a congressional investigation found no evidence of any discrimination against independent productions by the rating system.[75]

One legal action was brought alleging that an "X", adults only, rating of a film was a barrier to the market, and hence a group boycott. In *Tropic Film Corp. v. Paramount Pictures Corp.*,[76] a preliminary injunction to eliminate the rating "X" for the film *Tropic of Cancer* was denied. The court found that submission of a picture for rating by the Rating Program of the Motion Picture Association of America was purely voluntary even though all unsubmitted pictures were rated "X". At least at the preliminary hearing, there was no evidence that any exhibitor had agreed not to show the picture. It was impossible to determine if the "X" rating would hurt or help the film's marketing.[77]

D. Feature Production by Television Networks

Television networks had been licensees of older motion picture features from their earliest days of operation. Feature films eventually became a significant portion of prime-time television. In 1967 both CBS and ABC announced plans to enter feature motion picture production.[78] Even before this, NBC had established a program for the financing of feature pictures for its television network, but Universal Pictures had been employed to do the production. CBS, which had leased the former Republic Pictures Corp. studio facilities since 1963, purchased the seventy acre property in 1967 for $9.5 million.[79] ABC established its production jointly with a subsidiary of Cinerama, Inc., which announced an intention to open ten branch offices in the United States.[80]

An immediate result of the beginning of feature film production by CBS and ABC was a complaint to the Justice Department by the Motion Picture Associa-

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72. *See* INTERNATIONAL MOTION PICTURE ALMANAC 36A (1981). *See generally* Ayer, Bates & Herman, *Self-Censorship in the Movie Industry: An Historical Perspective on Law and Social Change*, 1970 WIS. L. REV. 791; Friedman, *Motion Picture Rating System of 1968: A Constitutional Analysis of Self-regulation by the Film Industry*, 73 COLUM. L. REV. 185 (1973); Note, *Antitrust Challenge to the GGPRX Movie Rating System*, 6 HARV. CIVIL RIGHTS L. REV. 545 (1971).

73. Randall, *Censorship: From the Miracle to Deep Throat*, in THE AMERICAN FILM INDUSTRY 432, 445 (T. Balio ed. 1976).

74. *See* Gumpert, *Movie Industry Code is Unevenly Enforced and Causing Protests*, Wall St. J., Oct. 10, 1969, at 13, col. 1.

75. HOUSE COMM. ON SMALL BUSINESS, MOVIE RATINGS AND THE INDEPENDENT PRODUCER, H. R. REP. NO. 996, 95th Cong., 2d Sess. 77 (1978).

76. 319 F. Supp. 1247 (S.D.N.Y. 1970).

77. *Id.* at 1255.

78. *See CBS Moves Into Moviemaking*, BROADCASTING, Mar. 20, 1967, at 70; *ABC Leaps Into Motion Pictures*, BROADCASTING, Aug. 21, 1967, at 52.

79. MOODY'S INDUSTRIAL MANUAL 313 (1968), MOODY'S INDUSTRIAL MANUAL 1974 (1971).

80. *ABC Leaps into Motion Pictures*, BROADCASTING Aug. 21, 1967, at 52.

tion of America on behalf of the leading motion picture distributors.[81] Vertical integration by television broadcasters to the feature production function was alleged to violate the antitrust laws. The former *Paramount* defendants, who were barred from integrating forward into exhibition, opposed the backward integration of certain of their best customers.[82] In 1970 the leading distributors filed an antitrust action against CBS and ABC which charged monopolizing and attempting to monopolize feature film production and distribution for television.[83] The plaintiffs also charged that the entry of defendants into production would reverse the divorcement of exhibition for two of the firms. ABC operated the 418 theaters of the former Paramount Theater circuit and its distributor, Cinerama, Inc., had ties to the 115-unit Pacific Theatres Corp. CBS had contracted with National Theatres Corp., the divorced Twentieth Century-Fox circuit, to distribute its features. National had about 250 theaters at that time.

ABC responded to the lawsuit by the motion picture distributors with a $100 million counterclaim.[84] ABC charged the plaintiffs and the Motion Picture Association of America with conspiring to monopolize feature film production and distribution. It also alleged that the plaintiffs had block-booked features in licensing to television broadcasters. CBS followed with a similar counterclaim.[85]

By 1972 ABC had produced thirty-nine feature films and stopped production. Its annual reports noted that motion picture production was not profitable.[86] CBS produced twenty-seven feature films by the end of 1971 and also announced it was considering termination of production.[87]

In 1972 ABC released one of the feature films it had produced over its own network and the plaintiffs filed an objection with the district court where the litigation was pending.[88] The judge warned ABC that it was proceeding on its own responsibility.[89] In 1973 ABC announced it would exhibit four of its own films on television and the plaintiffs moved for an injunction. They asked that ABC be prohibited from exhibiting on television any theatrical films it had produced or financed during the pendency of the litigation. The injunction was denied.[90] The plaintiffs were unable to demonstrate probable success on the merits and possible irreparable injury. ABC contended that it was merely integrating vertically by internal expansion. It cited the *Paramount* decision for the proposition that vertical

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81. Penn, *Movie Producers Complain to Justice Unit of Network, National General Film Plans*, Wall St. J., Oct. 5, 1967, at 32, col. 1.

82. *Id.*

83. Penn, *Movie Concerns Sue CBS, ABC on Making Films*, Wall St. J., Sept. 30, 1970, at 2, col. 4.

84. *See ABC Asks Damages Totalling $100 Million Against Movie Group*, Wall St. J., Apr. 14, 1971, at 5, col. 3.

85. Columbia Pictures Indus., Inc. v. American Broadcasting, Cos., 501 F.2d 894, 895 (2d Cir. 1974).

86. AMERICAN BROADCASTING COS., 1969 ANNUAL REPORT 19, 1970 ANNUAL REPORT 13, 1971 ANNUAL REPORT 14.

87. COLUMBIA BROADCASTING SYSTEM, 1971 ANNUAL REPORT 9.

88. Columbia Pictures Indus. Inc. v. American Broadcasting Cos., 1974-1 Trade Cas. ¶ 74,912, at 96,094 (S.D.N.Y. 1974).

89. *Id.*

90. Columbia Pictures Indus. Inc. v. American Broadcasting Cos., 1974-1 Trade Cas. ¶ 74,912 (S.D.N.Y. 1974), *aff'd*, 501 F.2d 894 (2d Cir. 1974).

integration was not illegal per se.[91] This follows accepted economic analysis that vertical integration cannot by itself create economic power. The court found the television networks to be in vigorous competition with each other. It noted the shortage of available feature films and the uncertainties attendant in successful television programming. Its preliminary conclusions were that the defendants had acted without apparent intent to injure the plaintiffs, and their primary concern was to increase the supply of motion pictures available for television exhibition.

The action of Columbia and the other producers against ABC and CBS has not gone to trial. In April 1975 all parties agreed to suspend the action pending disposition of subsequent lawsuits brought by the Antitrust Division of the Justice Department againt the television networks.[92] In December 1974 the United States filed complaints against ABC, CBS and NBC charging violation of sections 1 and 2 of the Sherman Act in producing, procuring, and distributing prime-time television programs.[93] Only two of the five classes of acts allegedly used to monopolize the market for prime-time television programming pertained to motion pictures. These included: (1) controlling the prices paid by the networks for motion picture feature films; and (2) obtaining a competitive advantage over other producers and distributors of television programs and motion pictures.[94] The remedy sought was a prohibition on television networks showing any program, including feature films, produced by a television network. In essence, the remedy would end vertical integration in television.

The television networks moved to dismiss the complaint, primarily on the ground of implied immunity from antitrust law because of the pervasive regulation of television by the Federal Communications Commission.[95] Following the holding of *United States v. RCA*,[96] implied immunity was not recognized by the court. Although the FCC may consider antitrust policy in its regulatory decisions, the Communications Act did not expressly authorize or direct the FCC to resolve antitrust questions bearing on matters within its jurisdiction.[97]

In 1978 NBC reached a settlement of the issues with the Antitrust Division and a consent decree was approved by the district court.[98] Section 5 of the consent decree was the most controversial since it set for ten years the hours NBC could exhibit programs that it had produced internally. The restriction was two and one-half hours per week during prime time, eight hours per week during daytime hours and eleven hours per week during fringe hours. The provision did not take

91. United States v. Paramount Pictures, 334 U.S. 131, 174 (1948).

92. Warner Communications Inc., Form 10K Report to the SEC 22-23 (1978).

93. United States v. American Broadcasting Cos., No. 74-3600HP; United States v. Columbia Broadcasting Sys., Inc., No. 74-3599DWW; United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978). These suits were similar to 1972 suits against the three major networks which were dismissed without prejudice when the government refused to turn over an investigation by the Watergate Special Prosecution Force as to any "improper motivation" underlying the filing of these suits. *See* United States v. National Broadcasting Co., 65 F.R.D. 415 (C.D. Cal. 1974).

94. United States v. National Broadcasting Co., 449 F. Supp. 1127, 1130 (C.D. Cal. 1978).

95. United States v. CBS Inc., 1977-1 Trade Cas. ¶ 61,327 (C.D. Cal. 1977).

96. 358 U.S. 334 (1959).

97. United States v. CBS Inc., 1977-1 Trade Cas. ¶ 61,327 (C.D. Cal. 1977).

98. 449 F. Supp. at 1127.

effect until similar relief was obtained against CBS and ABC in 1980.[99] Among the other restrictions were those precluding reciprocal dealing between NBC, CBS and ABC and a prohibition on the exclusive licensing of feature films from other distributors.[100]

Pursuant to the Antitrust Procedures and Penalties Act,[101] the leading motion picture distributors and leading independent television producers had filed comments in opposition to the NBC consent decree. These nonnetwork suppliers of programming for television had objected that NBC was permitted to produce internally two and one-half hours of prime-time programs per week while, at the time, NBC was producing only one hour of such programs per week.[102] The commentators had urged a total ban on NBC internal production.[103] Motion picture distributors argued that NBC would increase internal productions to drive down the price of features bought from them. Notwithstanding these objections, the court approved the consent decree as being in the public interest.[104] As an incident of this litigation, the court held that CBS could not intervene formally as a party to the proposed consent decree of NBC.[105]

In January 1977 the FCC began an inquiry into the television industry that covers almost every issue treated in the antitrust case.[106] This inquiry continues. Meanwhile, in July 1979 ABC announced plans to resume feature film production after a hiatus of seven years.[107] The plan is to produce three or four theatrical films per year. Management felt that uncertainties of the industry were less than in the past as theater admissions have increased.

IV

DISTRIBUTION

A. Market Structure

The structure of motion picture distribution in the United States is determined primarily by the number of pictures produced for the U.S. market and the optimum size of firm for efficient national distribution. The Motion Picture Association of America reported the number of new pictures released by national dis-

99. United States v. CBS Inc., 1980-81 Trade Cas. ¶ 63,594 (Consent decree, July 3, 1980); United States v. American Broadcasting Cos. [1981-1 Transfer Binder] TRADE REG. REP. (CCH) ¶ 64,150 (Consent decree, Nov. 14, 1980).

100. 449 F. Supp. at 1132-33.

101. 15 U.S.C. § 16 (1979 Supp.).

102. 449 F. Supp. at 1135.

103. Id. at 1135-36.

104. 449 F. Supp. at 1145.

105. CBS and five of the nonnetwork producers had petitioned to intervene as parties in order to be able to appeal the NBC decree. The court held that the movants had failed to make a strong showing that the United States inadequately represented their interests. Denial of these petitions was affirmed by the court of appeals. United States v. National Broadcasting Co., Nos. 77-381, 78-1068 (C.D. Cal. June 4, 1979), *aff'd mem.*, 603 F.2d 227 (9th Cir. 1979), *cert. denied sub. nom.*, Columbia Pictures Indus., Inc. v. United States, 444 U.S. 991 (1979). *See Justices Reject CBS Intervention in an NBC Suit*, Wall St. J., Dec. 11, 1979, at 8, col. 2.

106. 449 F. Supp. at 1139.

107. *See ABC Plans to Produce 3 or 4 Theatrical Films a Year for $25 Million*, Wall St. J., July 13, 1979, at 6, col. 3.

tributors as follows: 425 films by 15 firms in 1950, 233 films by 12 firms in 1960, 267 films by 22 firms in 1970, and 154 films by 16 firms in 1977.[108] These figures aggregate domestic and foreign productions, including foreign language films. In fact, only eleven firms had effective national distribution systems in 1970.[109] The leading seven were the remaining Paramount defendants. (RKO had closed its exchanges and left motion picture distribution in 1957.[110]) The other four national distributors of significance were Allied Artists, Avco Embassy, Buena Vista (Disney), and American International. The eleven leaders together released 198 films in 1970 and 114 in 1977, the share being 74 percent of total national releases in each year.[111]

The charge is made that motion picture distribution is still controlled by the seven former Paramount defendants. In 1970 they released 76 percent of the films that earned $1 million or more in rentals, and in 1978 they released 89 percent of these successful films.[112] Given the declining film production, however, entry of new national distributors or growth of the smaller ones was unlikely. Efficient marketing required screening rooms for exhibitors or their booking agents in each major metropolitan area.[113] Paramount, for example, operated twenty branch offices in the United States, one in Puerto Rico, and six in Canada for licensing and distribution of motion pictures.[114] To compete, other national distributors needed similar marketing organizations. With the great increase in independent productions, a distribution system could operate efficiently only by securing distribution contracts with a significant number of independent producers. In fiscal 1973, for example, Paramount produced ten of the twenty-two pictures it distributed, and in 1974 it produced fourteen of the twenty-five pictures it distributed.[115] In 1975, however, Paramount produced only four of the twenty pictures it distributed.[116] In 1976 it distributed seventeen pictures and ceased releasing information on how many it produced.[117]

Metro-Goldwyn-Mayer, Inc. terminated its distribution activities entirely. It had adopted a policy of reduced production and was not prepared to finance independent producers to secure their distribution contracts in order to have the critical minimum films necessary to cover the costs of an efficient national distribution system of about twenty branches.[118] In 1973 MGM sold its seven domestic branches and its thirty-seven overseas branches.[119] It announced it would reduce its production from approximately nineteen pictures per year to approximately

108. WHO OWNS THE MEDIA?, *supra* note 2, at 214-15.
109. *Id.* at 222-23.
110. M. CONANT, *supra* note 2, at 132.
111. WHO OWNS THE MEDIA?, *supra* note 2, at 222.
112. *Id.* at 223.
113. *See* M. CONANT, *supra* note 2, at 118-20.
114. Gulf & Western Industries, Inc., Form 10K Report to the SEC 6 (1979).
115. GULF & WESTERN INDUSTRIES, INC., 1974 ANNUAL REPORT 19.
116. GULF & WESTERN INDUSTRIES, INC., 1975 ANNUAL REPORT 34.
117. GULF & WESTERN INDUSTRIES, INC., 1972 ANNUAL REPORT 15.
118. *See* Gottschalk, *MGM to Sell Studio, Give up Film Distribution,* Wall St. J. Sept. 18, 1973, at 40, col. 1.
119. *MGM, United Artists Sign Distribution Pact*, Wall St. J., Oct. 19, 1973, at 2, col. 2; *MGM to Sell Theaters Abroad for $17.5 Million to MCA, G&W Group*, Wall St. J., Oct. 31, 1973, at 6, col. 2.

seven.[120] The decision in part resulted from net losses on a number of pictures in 1973,[121] which indicated to management that only "special," high-cost films should be produced. MGM signed a ten-year contract with United Artists Corp. to distribute its productions in the United States and Canada.[122] It contracted with Cinema International Corporation to distribute its films in foreign countries and sold its interest in thirty-five foreign theaters to that firm.[123] Cinema International is a joint venture of Paramount and Universal for foreign distribution with eighty-eight branch offices in the free world.[124] Thus, one sees cost structures dictating joint marketing ventures of leading distributors, both domestically and overseas.

In 1980 MGM decided to increase production substantially and determined to reenter film distribution via acquisition.[125] In 1981 MGM purchased United Artists Corp. from its parent, Transamerica Corp., for about $380 million.[126] The Antitrust Division of the Department of Justice was expected to investigate the merger.

The *Paramount* decrees had one significant effect on the relative importance of the leading distributors. Before the decrees, MGM (Loew's, Inc.), as one of the five majors that controlled the industry, was the industry leader. It had long-term contracts with more leading actors than any other producer-distributor.[127] This enabled it to earn larger film rentals than any other distributor. In 1946, for example, MGM had $61 million in domestic film rentals while the three minor distributors, Columbia, Universal, and United Artists, had domestic film rentals of $23 million to $27 million.[128] By 1978 MGM ranked seventh in film rentals among the seven surviving *Paramount* defendants.[129] It had worldwide film rentals of $97 million in 1978, $68 million of which were domestic,[130] and, therefore, also

120. Wall St. J., Sept. 18, 1973, *supra* note 118.

121. *Id.*

122. Wall St. J., Oct. 19, 1973, *supra* note 119.

123. Wall St. J., Oct. 31, 1973, *supra* note 119.

124. Gulf & Western Industries, Inc., Form 10K Report to SEC 6 (1979). In 1977, Cinema International accounted for one-third of foreign rentals of all U.S. films with revenues of about $133 million. *See* WHO OWNS THE MEDIA?, *supra* note 2, at 221.

125. *MGM Film Bid to Buy United Artists Marks Push for Fast Success*, Wall St. J., May 18, 1981, at 1, col. 6; *MGM Film Offers to Buy United Artists*, Wall St. J., May 18, 1981, at 23, col. 1; *MGM Film Signs Accord to Acquire United Artists Corp.*, Wall St. J., May 22, 1981, at 14, col. 3; *MGM Film Discloses Plans for Purchase of United Artists, Financing of Movies*, Wall St. J., July 7, 1981, at 8, col. 2; *Holders of MGM Film Approve Moves to Aid United Artists Bid*, Wall St. J., July 28, 1981, at 34, col. 5.

126. *MGM Filing Discloses Transamerica Dispute Over United Artists*, Wall St. J., July 30, 1981, at 36, col. 1.

127. *Cf. Loew's, Inc.*, 20 FORTUNE 25, 104-105 (Aug. 1939)(noting that MGM had "more stars than there are in heaven").

128. M. CONANT, *supra* note 2, at 46.

129. Annual reports to stockholders of the seven companies show the ranking in worldwide theatrical film rentals in 1978 to be as follows: Twentieth Century-Fox Film Corp. $309.9 million (TWENTIETH CENTURY-FOX FILM CORP., 1978 ANNUAL REPORT 3); MCA, Inc. (Universal) $318.7 million (MCA, INC., 1978 ANNUAL REPORT 16); Gulf & Western Industries, Inc. (Paramount) $ 287.0 million (GULF & WESTERN INDUSTRIES, INC., 1978 ANNUAL REPORT 8); Columbia Pictures Industries, Inc. 269.0 million (COLUMBIA PICTURES INDUSTRIES, INC., 1978 ANNUAL REPORT 51); Warner Communications, Inc. $261.3 million (WARNER COMMUNICATIONS, INC., 1978 ANNUAL REPORT 17).

130. MOODY'S INDUSTRIAL MANUAL 2655 (1979).

part of United Artists' $294 million worldwide rentals.[131] In 1978, Universal had worldwide rentals of $318.7 million[132] and Columbia had $269 million.[133] Thus, in a freer market, the minor distributors, who had never been part of the illegal exhibition cartel that dictated first-run theater priorities, became equal competitors with the four surviving majors. Their much larger film rentals indicate that they were able to succeed.

B. Control by Conglomerates

The highly fluctuating income of motion picture distributors due to the uncertainty of public reception of each film and the distributors' need for sources of risk capital make film distributing corporations likely targets for control by conglomerate corporations. Paramount Pictures Corp. is owned by Gulf & Western Industries, Inc. Paramount's 1979 aggregate revenues of $664 million from motion pictures, television films and foreign theaters[134] were only 10.2 percent of Gulf & Western's 1979 revenues.[135] Universal is owned by MCA, Inc. Universal's $724 million revenues from filmed entertainment in 1978 were 64.6 percent of MCA's revenues.[136] United Artists Corp. was owned by Transamerica Corp. United Artists' revenues of $462.3 million were 11.4 percent of Transamerica's revenues.[137] Warner Communications, Inc. had 1978 revenues from filmed entertainment of $393 million, which was 30 percent of Warner's revenues.[138] Another 47 percent was from recorded music and music publishing.[139]

Other leading motion picture distributors have also diversified. Metro-Goldwyn-Mayer, Inc. reduced investment in highly uncertain motion picture distribution and made large investments in two major hotels and gambling casinos.[140] In 1980, however, motion picture production was transferred to a separate corporation, Metro-Goldwyn-Mayer Film Co.[141] Twentieth Century-Fox diversified into soft drink bottling, television broadcasting, film processing and record and music publishing.[142] Its 1978 revenue from filmed entertainment of $408 million was 66.8 percent of its total revenue.[143] Columbia Pictures Industries, Inc., was the least diversified of the former *Paramount* defendants. Its 1979 revenues from filmed entertainment were $458 million or 74.7 percent of its total revenues.[144]

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131. TRANSAMERICA CORP., 1979 ANNUAL REPORT 35.
132. MCA, INC., 1978 ANNUAL REPORT 16.
133. COLUMBIA PICTURES INDUSTRIES, INC., 1978 ANNUAL REPORT 51.
134. GULF & WESTERN INDUSTRIES, INC., 1979 ANNUAL REPORT 20.
135. *Id.* at 54.
136. *See* MCA, INC., 1978 ANNUAL REPORT 16.
137. *See* TRANSAMERICA CORP., 1979 ANNUAL REPORT 30.
138. *See* WARNER COMMUNICATIONS INC., 1978 ANNUAL REPORT 17, 78.
139. *Id.* at 78.
140. METRO-GOLDWYN-MAYER INC., 1979 ANNUAL REPORT 1, noting MGM revenue from filmed entertainment was $193 million or 39.3 percent of its total revenue.
141. *See* METRO-GOLDWYN-MAYER FILM CO., 1980 ANNUAL REPORT 2; *MGM Film Co.'s First Holders Meeting Focuses on Roles of Kerkorian, Begelman,* Wall St. J., Jan. 12, 1981, at 12, col. 3.
142. TWENTIETH CENTURY-FOX FILM CORP., 1978 ANNUAL REPORT 32.
143. *Id.*
144. *See* COLUMBIA PICTURES INDUSTRIES, INC., 1979 ANNUAL REPORT 47.

C. Decline of Smaller Distributors

The smaller national distributors have felt the impact of declining domestic motion picture production the most. The new, extravagant pictures usually can be secured for distribution only if the distributor supplies millions of dollars in financing. Marketing costs will also require millions of dollars. A small firm, with fewer branch offices than the larger distributors and distributing only a few pictures a year, risks a much larger percentage of its assets and credit on any single picture. Avco-Embassy pictures is an example. Embassy Pictures Corp. was acquired by Avco Corp., a large financial institution, in 1968, and in 1977 it supplied only 1.2 percent of Avco's revenues.[145] In spite of the fact that Avco Corp. can supply it with financing, it has not been successful. In 1977 Avco-Embassy released six pictures,[146] down from fifteen in 1975.[147] Its 1977 film rentals were $19 million and its net loss was $4.3 million.[148] In fact, its annual revenues had declined from $34 million in 1974 and it had five straight years of net losses.[149] This was in spite of the fact that in both 1977 and 1978 it had two new pictures with over $2 million in film rentals.[150]

American International Pictures, Inc., was founded in 1956 as a distributor and expanded into production after 1960. It has offices in twenty-six cities in the United States.[151] In each of the three years, 1976 to 1978, it had $51 million in revenues,[152] about 96 percent of which was film rentals from theaters and television.[153] Its 1978 net profits before taxes were $2.34 million on total assets of $50.9 million and in 1979 its net loss before tax credits was $4.3 million.[154] American International released eighteen pictures in 1977, down from twenty-eight in 1972.[155] In 1977 it distributed eight of the seventy-eight total U.S. films released with rentals of over $2 million, but in 1978 it distributed only one of the eighty-two new films with over $2 million rentals.[156] While American International seems to survive the great uncertainties of the industry, its return on investment is much lower than the uncertainties warrant. This may have made it a takeover candidate. Filmways, Inc., merged with American International on July 12, 1979.[157] Filmways, with $153.4 million in revenues in 1979, received only $28.1 million from its entertainment division, primarily television films.[158] The division also includes motion picture production, recording studios, music publishing and

145. Motion picture revenues were $19 million and total revenues were $153.8 million. AVCO CORP., 1977 ANNUAL REPORT 2-3.
146. *Id.* at 12.
147. WHO OWNS THE MEDIA?, *supra* note 2, at 222.
148. AVCO CORP., 1977 ANNUAL REPORT 2-3.
149. *Id. See* AVCO CORP., 1976 ANNUAL REPORT 12.
150. WHO OWNS THE MEDIA?, *supra* note 2, at 220.
151. MOODY'S INDUSTRIAL MANUAL 1392 (1979).
152. *Id.*
153. *Id.*
154. *Id.*
155. WHO OWNS THE MEDIA?, *supra* note 2, at 222.
156. *Id.* at 220.
157. MOODY'S INDUSTRIAL MANUAL 2155 (1980).
158. FILMWAYS INC., 1979 ANNUAL REPORT 34. *See Filmways Gets Buyer for Unit, Loan Extension,* Wall St. J., Mar. 6, 1981, at 7, col. 1.

other activities. Its studio in New York with two sound stages will complement the American International distribution system.

Allied Artists Pictures Corp. was formerly Monogram Pictures, a producer of "B" grade films before the *Paramount* decrees. After the decrees it was able to enter the market to distribute "A" grade films.[159] In 1976 it was merged with Kalvex, Inc., and became Allied Artists Industries, Inc.[160] Of its 1977 revenues of $53.2 million, only $12.5 million was in filmed entertainment.[161] Excluding tax credits for loss carryover, it had net losses in all four years—1975 to 1978.[162] In the eight years, 1970 to 1977, it distributed a total of forty-four pictures,[163] an average of five and one-half per year. In April 1979 Allied Artists Industries filed petitions under Chapter 11 of the Federal Bankruptcy Act to operate under protection of the federal court against creditor lawsuits while it tried to work out a plan to pay its debts.[164] In February 1980 the federal judge approved the sale of Allied Artists Pictures Corp. and its television corporations to Lorimar Productions, Inc.[165] Allied maintained that its relatively small size and the 1976 change in the federal income tax laws wiping out motion picture tax shelters limited its sources of funds and spelled its doom.[166] Outsiders attributed part of Allied's trouble to lack of competent management.[167] It is clear that Allied was below the critical minimum size for national distribution. In 1973, for example, 86 percent of its gross revenues were rentals on one picture, *Cabaret*, and in 1974, 80 percent of gross revenues were from *Papillon* and 13 percent from *Cabaret*.[168] In such circumstances, one or two net-loss films could cause insolvency.

D. Distribution by Divorced Circuits

Under the *Paramount* decrees, the corporations succeeding to the theater circuits of the five major producer-distributors were barred from engaging in production or distribution of pictures without special permission of the district court. Few such applications were filed since the theater corporations did not have the systems of distribution centers necessary to execute successful marketing. A few applications were made for distribution by the circuits as they strove to find, and even finance, additional film production. The first significant case was the permission granted Stanley Warner Corp. to produce and distribute the experimental

159. *See* M. CONANT, *supra* note 2, at 128-29.

160. MOODY'S INDUSTRIAL MANUAL 1371 (1979). *See* Penn, *Film Fade-Out: How 'Little Guy' Allied Artists Tumbled from Moviemaking Role Into Chapter 11,* Wall St. J., May 4, 1979, at 38, col. 1.

161. WHO OWNS THE MEDIA?, *supra* note 2, at 203.

162. MOODY'S INDUSTRIAL MANUAL, *supra* note 160; Wall St. J., May 4, 1979, *supra* note 160.

163. WHO OWNS THE MEDIA?, *supra* note 2, at 222.

164. *See* Wall St. J., May 4, 1979, *supra* note 160.

165. MOODY'S INDUSTRIAL NEWS REPORTS, Feb. 26, 1980, at 2801. In 1979, Lorimar Productions entered a three year contract for United Artists to distribute thirteen motion pictures which it was producing. TRANSAMERICA CORP., 1979 ANNUAL REPORT 22; *Lorimar Finds its Success in Television Doesn't Carry Over Into Moviemaking,* Wall St. J., Aug. 4, 1981, at 38, col. 3.

166. Wall St. J., May 4, 1979, *supra* note 160, at 40.

167. *Id.*

168. Allied Artists Picture Corp., Notice of Meeting, Jan. 20, 1976, at 85.

Cinerama pictures.[169] In 1963, as picture output declined, National General Corp., the theater successor of Twentieth Century-Fox, was granted permission to produce and distribute films for six years.[170] Between 1963 and 1969 National distributed six pictures, two of which it produced itself.[171] In 1969 the permission was extended for three years on the condition that National continue to refrain from giving exhibition preferences to its own theaters.[172] Later in 1969 the court approved a distribution agreement between National General and First Artists Production Company, Ltd.[173] National was allowed to distribute nine pictures, three each featuring Paul Newman, Sidney Poitier, and Barbra Streisand. This permit also was strictly conditioned to prevent preferences to National theaters in its operating areas.

Loew's Corp. was granted permission by the district court in 1980 to engage in motion picture production and distribution.[174] This permit to resume production after a hiatus of twenty-eight years was strictly conditional. Loew's was prohibited from distributing its productions to its own theaters.

E. Marketing Policies

Marketing policies of distributors have changed radically as population has moved to the suburbs and the number of films has declined. In the period before 1960 most distributors followed the pre-1940 pattern of first run in one theater in the central business district of cities followed by a period of clearance before multiple second runs in other neighborhoods and the suburbs. As long as each distributor made the decision individually to continue this pattern (*i.e.*, without agreement with other distributors, or without agreement with one exhibitor to refrain from licensing to another), the practice was legal.[175] Mere conscious parallelism of action, without agreement, does not violate the language of section 1 of the Sherman Act.[176] But where the owner of a drive-in theater demonstrated that exactly the same pattern of runs and clearances as existed in a metropolitan area before 1945 still prevailed after the *Paramount* decrees, this was sufficient additional evidence to find conspiracy.[177] Since conspiracy usually must be found from circumstantial evidence, different triers of fact in two separate cases can reach opposite results upon considering substantially similar evidence from the same market area.[178]

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169. United States v. Loew's Inc., 1969 Trade Cas. ¶ 72,767 (S.D.N.Y. 1969), at 86,761 (not reported officially, but noted by Judge Palmieri).

170. *Id.*

171. *Id.* at 86,762.

172. United States v. Loew's Inc., 1969 Trade Cas. ¶ 72,767 (S.D.N.Y. 1969).

173. United States v. Loew's Inc., 1970 Trade Cas. ¶ 72,992 (S.D.N.Y. 1969).

174. United States v. Loew's Inc., 1980-81 Trade Cas. ¶ 63,662 (S.D.N.Y. 1980). *See Loew's Intends to Sell Warwick Hotel, Wins Right to Make Movies,* Wall St. J., Feb. 29, 1980, at 5, col. 1.

175. Theatre Enterprises v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-42 (1954).

176. Naumkeag Theatres Co. v. New England Theatres, 345 F.2d 910, 911 (1st Cir. 1965), *cert. denied,* 382 U.S. 906 (1965).

177. Basle Theatres, Inc., v. Warner Bros. Pictures Distrib. Corp., 168 F. Supp. 553 (W.D. Pa. 1958). *See* Conant, *Consciously Parallel Action in Restraint of Trade,* 38 MINN. L. REV. 797 (1954).

178. *See* Fox West Coast Theatres Corp. v. Paradise Theatre Building Corp., 264 F.2d 602, 605 (9th Cir. 1958).

As central cities declined and many persons refused to enter these areas at night, new, smaller theaters were being built in new shopping centers in the suburbs. Since many of these suburbs were on opposite sides of cities and many miles apart, it made sense for distributors to modify their release patterns to multiple first runs. This increased the complexity of negotiating rentals since many theater owners could argue that there was some rivalry between theaters in adjacent suburbs.

One charge of violation of its 1951 consent decree was made against Warner Brothers, Inc., to stop the practice of four-walling.[179] Under this method, a distributor leased the theater for the period of screening a particular feature film. The theater owner received a fixed rental payment. The distributor operated the theater and set admission prices. In 1976 Warner Brothers entered a consent decree to discontinue the practice for a period of ten years.[180] While this enforces the plain language of the decree, its effect may be unfortunate. A lease of one theater for exhibiting one picture is not reentry into exhibition by Warner in any more than a trivial sense. A vertical agreement with one customer cannot create monopoly power, since market power must be measured horizontally. If Warner Brothers had a higher evaluation of the earnings probabilities of a picture than did the exhibitor, leasing the theater was a method by which the distributor could bear the uncertainties of exhibition in the theater and reap the profits if the picture was successful.

One of the key issues was competitive bidding by exhibitors for the first run of pictures. In *Paramount* the district court mandate of competitive bidding had been reversed by the Supreme Court when it ordered the alternative remedy of divorcement of the five affiliated circuits. While one would expect distributors to adopt competitive bidding between exhibitors in order to maximize film rentals, only a small proportion of film licensing is subject to bidding.[181] One problem is that bids may not be comparable. A dollar bid, a percentage bid, a percentage bid on admission revenues above a stated weekly theater expense, or a percentage bid with a guaranteed minimum rental are some of the various possibilities. There can be comparable bids only if a distributor sets strict limits on the method of bidding. The more important reason that few film licenses are subject to competitive bidding is that the exhibitors dislike it. Film rentals are raised to their true competitive price. Competition in film licensing in any city, town or section is highly imperfect because so many theaters are owned by local circuits. Either individually or in concert with other exhibitors in their area, they refuse to engage in competitive bidding. Collusion of exhibitors to allocate or to split distributors' pictures is discussed below in the section concerning exhibition.

In those cases where competitive bidding was used and all theaters in a market were allowed to bid, it was unlikely that any single exhibitor could show antitrust

179. United States v. Warner Bros. Pictures, Inc., 1979-1 Trade Cas. ¶ 62,504 (S.D.N.Y. 1976). *See Warner Bros. Inc. Theater Rentals Spur U.S. Action,* Wall St. J., Apr. 5, 1976, at 5, col. 1.

180. *Id.*

181. *See* Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making,* 31 SO. CALIF. L. REV. 150, 160-65 (1958).

violations by distributors. As one court noted, bidding was the truly competitive method of motion picture distribution as long as it was open to all rivals.[182] If each distributor, acting independently, set his own bidding zones for theaters in a city, no single exhibitor could legally complain that the zone system made him bid in a run against theaters against which he would prefer not to bid.[183] No firm can legally demand isolation from competition. This does not mean the volume of antitrust litigation in the industry subsided. As reviewed in detail below, issues relating to circuit buying power and to exhibitors' splits of the available pictures led to large series of lawsuits.

F. Block Booking

The prohibitions in the *Paramount* decrees against block booking effectively required the defendant distributors to license each film in each theater individually. There have been few charges of violation of this section of the decrees, but one major action was brought under section 1 of the Sherman Act for block booking of pre-1948 pictures for television exhibition. In *United States v. Loew's, Inc.*,[184] six distributors were charged with block booking successful films with inferior films in licenses to television stations. The distributors were not charged with conspiring with each other. Following the rationale of the *Paramount* case, the court held that tying two or more copyrighted films in a single license was a per se violation of the Sherman Act.[185] The one reported contempt citation for block booking took place in 1978. Twentieth Century-Fox was cited as a result of a New York grand jury investigation in which twenty-five New England theater owners provided evidence.[186] The charge was block booking *The Other Side of Midnight* with *Star Wars*. Twentieth Century-Fox pleaded *nolo contendere* to the charge of criminal contempt and was fined $25,000.[187] The block booking occurred in only two of the company's twenty-six film exchange areas. The company asserted that certain employees had violated a longstanding policy of strict compliance with the 1951 decree. Its license agreements clearly state the policy.

One reported exception to the prohibition of block booking was permitted by a district court in 1972.[188] Columbia Pictures petitioned the court for permission to block release a series of eight to twelve pictures. The "Repertory Cinema" plan was to produce and distribute a set of pictures based on literary works or stage productions that had received critical acclaim. Each theater would set aside two days per month to show these films and theaters would take public subscriptions in advance. The project was not economically feasible unless Columbia could license

182. Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246, 250 (2d Cir. 1959).

183. *See* A.L.B. Theatre Corp. v. Loew's Inc., 355 F.2d 495, 500 (7th Cir. 1966).

184. 371 U.S. 38 (1962). *See* Stigler, *United States v. Loew's Inc.: A Note on Block-Booking,* in THE SUPREME COURT REVIEW 152 (P. Kurland ed. 1963).

185. 371 U.S. 45-47.

186. *See Fox Films Says It Faces Possible Indictments From Booking Probe,* Wall St. J., Mar. 8, 1978, at 10, col. 3.

187. *Fox Film is Fined $25,000 on a Charge of Forcing Block-Booking on Theaters,* WALL ST. J., Sept. 13, 1978, at 8, col. 2.

188. United States v. Loew's Inc., 1972 Trade Cas. ¶ 74,017 (S.D.N.Y. 1972).

the package to individual theaters in advance. Since the concept was new and had not been considered at the time of the *Paramount* decrees, the court permitted the experimentation for one year.

V

EXHIBITION

A. Market Changes

Motion picture exhibition in theaters has changed radically in the last thirty years. This is due mostly to demographic changes, but is in part also a result of television competition and costs of theater operation. The great demographic change has been the movement of population to the suburbs and the resultant construction of suburban shopping centers with new theaters. The 1972 census reported 12,699 theaters.[189] There were 11,670 theaters with payrolls, of which 8,328 were indoor and 3,342 were drive-ins.[190] Of these, 37.7 percent of the indoor theaters and 44.5 percent of the drive-ins were constructed after 1954.[191] Essentially all of these are in the suburbs. In 1979 the Department of Commerce estimated there were 9,021 indoor theaters with 13,331 screens and 3,197 drive-ins with 3,570 screens.[192]

The average indoor theater declined in size from 750 seats in 1950 to 500 seats in 1977.[193] The movement to smaller theaters and multiscreens was related to the decline in paid admissions resulting from the competition of television and other recreational activities and to the costs of operation. In 1970 United Artists Theatre Circuit reported it could operate a new small theater with two employees, a manager-projectionist and a cashier-candy seller.[194] A small theater, showing films on first or second run in the suburbs, can avoid booking those films that have failed on prior first runs in other areas of the state or nation and thereby reduce uncertainty. Likewise, the shift to multiscreen theaters enables owners to offset low revenues from a failing film in one auditorium with larger revenues of a successful film in an adjacent auditorium. Since one projectionist serves all the screens of a multiscreen theater, there is no extra labor cost.[195]

General Cinema Corp., with the largest chain of theaters in the country, is illustrative of the dramatic changes in exhibition. It was incorporated in 1950 as a developer of drive-in theaters. It has become the leading builder of multiscreen indoor theaters in suburban shopping centers. By 1970 General Cinema had 203 theaters with 256 screens.[196] In October 1979 it had 337 theaters with 843 screens in thirty-seven states and the District of Columbia.[197] Its theater revenues in 1979

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189. U.S. BUREAU OF THE CENSUS, 1972 CENSUS OF SELECTED SERVICE INDUSTRIES 3-17 (1972).
190. *Id.*
191. *Id.*
192. U.S. DEP'T OF COMMERCE, 1981 U.S. INDUSTRIAL OUTLOOK 530 (1981).
193. INTERNATIONAL MOTION PICTURE ALMANAC 30A (1981). *See* M. CONANT, *supra* note 2, at 48.
194. *Movie Theater Gets Cut to Size*, BUSINESS WEEK, Mar. 14, 1970, at 29.
195. *See* Edmands, *Twin, Quad, and Six-Plex,* BARRONS, June 28, 1971, at 11; Gottschalk, *Film Exhibitors Face a Financial Crisis As Hollywood Studios Slash Production,* WALL ST. J., Feb. 8, 1977, at 46, col. 1.
196. MOODY'S INDUSTRIAL MANUAL 421 (1971).
197. GENERAL CINEMA CORP., 1979 ANNUAL REPORT 8. The ranking of U.S. theater chains in 1977-

were $266.5 million. General Cinema illustrates the trend away from drive-ins as suburban land values increase and alternative indoor theaters are built in shopping centers. Its number of drive-ins declined from thirty-six in 1966[198] to ten in 1978.[199] Little of General Cinema's growth is due to purchase of existing theaters. In 1970 it acquired the fifteen theaters of Mann Theatre Circuit of Minneapolis.[200] This acquisition resulted in a divorcement action by the Justice Department, charging violation of section 7 of the Clayton Act. In 1973 a consent decree ordered sale of ten of General's twenty-one theaters in Minneapolis.[201] In 1972 General Cinema purchased forty-eight indoor theaters from Loew's Corp.,[202] twenty-one of which were sold in 1973.[203]

United Artists Theatre Circuit, Inc. (unrelated to United Artists Corp.), the second largest chain, had 835 screens and theater revenues of $223.5 million in 1980.[204] It, too, has been a leader in the trend to build multiscreen theaters in suburban shopping centers. But its one major acquisition of existing theaters had antitrust consequences. In 1968 United Artists Theatre Circuit acquired Prudential Theatres Co., Inc., which had eighty-five theaters in New York, New Jersey, Connecticut and Wisconsin.[205] In 1971 the Justice Department brought a civil action charging United with violation of section 7 of the Clayton Act.[206] In 1976 the case was settled by a consent decree requiring United to divest twenty-three theaters in the New York metropolitan area within five years and barring it from acquiring any other theaters in those counties for ten years unless it obtained prior consent of the Justice Department or approval of the court.[207]

Another striking change in exhibition has been the growing importance of refreshment sales. Census reports indicate such sales at 13 to 15 percent of total theater revenues.[208] At drive-in theaters, food and drink sales are even more important. Commonwealth Theatres, with 252 conventional theaters and 106 drive-ins in 1979, reported 23 percent of revenues from refreshments and miscellaneous sales.[209] Since these sales are in an isolated market, being made after tickets are collected, the markups are higher than in food stores. For many exhibitors,

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78, according to number of screens, is as follows: General Cinema, 791; United Artists Theatre Circuit, 712; American Multi-Cinema, 462; Plitt Theatres, 412; Commonwealth, 347; Mann Theatres, 310; Fuqua (Martin Theatres), 283; Kerasotes, 180; Cinemette, 160; Stewart and Everett, 138; Loew's, 127; Cablecom-General, 125; Pacific Theatres, 125; Cobb, 125; Gulf States, 120; Cooperative Theatres of Michigan, 105. *See* WHO OWNS THE MEDIA?, *supra* note 2, at 226.

198. *Movies, Soda Pop Enable General Cinema to Grow,* BARRONS, Oct. 14, 1974, at 39.

199. *Movie Theaters, Soft Drinks Prove Profitable Combo for General Cinema,* BARRONS, July 10, 1978, at 32, 33.

200. MOODY'S INDUSTRIAL MANUAL 748 (1979).

201. United States v. General Cinema Corp., 1973-1 Trade Cas. ¶ 74,569 (S.D.N.Y. 1973).

202. *General Cinema: King of the Flicks,* BUSINESS WEEK, May 20, 1972, at 31.

203. MOODY'S INDUSTRIAL MANUAL 748 (1979).

204. STANDARD & POOR, STANDARD CORPORATION DESCRIPTIONS 2463 (Mar. 1981).

205. MOODY'S OTC INDUSTRIAL MANUAL 1522 (1980).

206. United States v. United Artists Theatre Circuit, Inc., 1971 Trade Cas. ¶ 73,751 (E.D.N.Y. 1971).

207. United States v. United Artists Theatre Circuit, Inc., 1977-1 Trade Cas. ¶ 61,389 (E.D.N.Y. 1976). Modification of this decree was denied in 1980. United States v. United Artists Theatre Circuit, 1980-2 Trade Cas. ¶ 63,549 (E.D.N.Y. 1980).

208. *See* U.S. BUREAU OF THE CENSUS, 1972 CENSUS OF SELECTED SERVICE INDUSTRIES 3-11.

209. STANDARD OTC STOCK REPORTS, MAY 9, 1980, AT 3586.

refreshment profits are a major part of net earnings and theaters would close without such sales. As a consequence, an exhibitor can bid for a popular film 90 percent of box office receipts above a house allowance for expenses. The large attendance will enable him to make his main profit on refreshments.

B. Divorced Theater Circuits

The five successor corporations that had acquired the theater chains of the five major *Paramount* defendants met the dynamic changes in exhibition under the disadvantages of the severe restrictions of the decrees. They could acquire theaters to replace those sold but could acquire no new theaters unless they could convince the district court that the acquisition would not unduly restrain competition.

Each petition of one of the successor theater companies to acquire one or more theaters required a hearing before the district court and probable opposition by attorneys from the Department of Justice. An exceptions clause in the decrees for acquiring substantially equivalent replacements for theaters closed by one of the five circuits was narrowly construed. Closing of an old downtown theater and purchasing a new one in a suburban shopping center was held not to be substantially equivalent. The court treated this in the same way as a net addition to the circuit and required proof that it would not unduly restrain competition.[210] It was not until 1974 that the district court agreed to an exception to this rule for theaters newly constructed by one of the five circuits.[211] And this exception did not apply to theaters constructed by others, such as developers of shopping centers, and then leased or sold to one of the circuits.

The series of decisions by the district court on petitions of the divorced circuits to acquire theaters show no clear standards.[212] American Broadcasting Companies, owner of the former Paramount Theatres, was allowed to acquire four drive-ins in Knoxville, Tennessee, even though it would substantially increase its market share, because the former owners had died and ABC had made the highest bid for the theaters.[213] Conversely, ABC owned only two of the twenty-two theaters in the Wilkes-Barre, Pennsylvania, area when it was denied permission to acquire a drive-in there.[214] Stanley Warner Corp. and National General Corp. were permitted to buy whole circuits of thirty-seven[215] and thirty-one theaters,[216] respec-

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210. United States v. Paramount Pictures, Inc., 1963 Trade Cas. ¶ 70,760 (S.D.N.Y. 1963).

211. United States v. Paramount Pictures, Inc., 1974-2 Trade Cas. ¶ 75,378 (S.D.N.Y. 1974).

212. *See* Note, *Experiment in Preventive Anti-Trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees,* 74 YALE L.J. 1041 (1965). The number of petitions of the divorced circuits to acquire new theaters were as follows:

1960: 10	1965: 47	1970: 30	1975: 3
1961: 15	1966: 74	1971: 25	1976: 2
1962: 13	1967: 50	1972: 12	1977: 1
1963: 11	1968: 50	1973: 32	1978: 2
1964: 27	1969: 55	1974: 26	1979: 1

United States v. Paramount Pictures, 1980-2 Trade Cas. ¶ 63,553, at 76,953 (S.D.N.Y. 1980).

213. United States v. Paramount Pictures, Inc., 1969 Trade Cas. ¶ 72,720 (S.D.N.Y. 1968).

214. United States v. Paramount Pictures, Inc., 1962 Trade Cas. ¶ 70,519 (S.D.N.Y. 1962).

215. United States v. Warner Bros. Pictures, Inc., 1962 Trade Cas. ¶ 70,512 (S.D.N.Y. 1962).

216. United States v. Loew's, Inc., 1967 Trade Cas. ¶ 72,243 (S.D.N.Y. 1967).

tively. The court, in both instances, held that circuit buying power was effectively curtailed by other provisions of the *Paramount* decrees requiring licensing of each film to each theater separately.

In a leading decision, the district court permitted National General Corp., whose theaters were mainly in the West, to acquire a small chain of eight theaters in New York and Rhode Island.[217] The government argued that the acquisition would not only violate the standards of the decrees but also the potential competition doctrine the Supreme Court had adopted in interpreting section 7 of the Clayton Act. The court rejected the argument. National General was not shown to be a potential competitor in the East as a possible builder of new theaters. Hence, its acquisition of an existing small circuit did not eliminate it as a potential competitor. Since National had declined to one-half the number of theaters permitted by the consent decree,[218] it was allowed this expansion in large markets with large populations marked by active competition in the exhibition field. In an analogous case, ABC, whose Paramount Theatres group had never operated in Sacramento, California, was permitted to acquire two dual theaters in two shopping centers.[219] As in many earlier cases, a rival circuit sought to intervene as a party to oppose the acquisition here. Following prior precedents the court denied intervention, holding that the Attorney General adequately represented the public in preserving a competitive system.[220]

The cases demonstrate that a costly litigation process was added to any plans of the five divorced circuits to follow the demographic trend and expand into the suburban shopping centers. The result was that the five circuits declined as the major central cities where most of their theaters were located decayed. By 1979 only one of the five former circuits was still operated by its original successor corporation.

Loew's, Inc., which controlled 129 theaters in 1952[221] when the consent decree separated it from MGM, was still operating theaters in 1980. In 1959, after divesting 17 theaters pursuant to the decree and closing unprofitable ones, it operated 111 theaters.[222] By 1978 Loew's had only 61 theaters with 127 screens.[223] Its primary business was operating hotels. Its 1978 theater revenues of $47.3 million were only 1.4 percent of its total revenues.[224]

American Broadcasting Companies, Inc. resulted from the 1953 merger of the former ABC into United Paramount Theatres, Inc., the successor company that acquired the theaters of Paramount Pictures. In 1949, the year of its consent decree, this largest of the five major circuits had 1,424 theaters.[225] After the specific theater divestitures ordered in the decree, it had only 534 theaters in 1957.[226]

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217. United States v. Loew's, Inc., 251 F. Supp. 201 (S.D.N.Y. 1966).
218. *Id.* at 209.
219. United States v. Paramount Pictures, Inc., 333 F. Supp. 1100 (S.D.N.Y. 1971).
220. *Id.* at 1102-03.
221. M. CONANT, *supra* note 2, at 108.
222. MOODY'S INDUSTRIAL MANUAL 2750 (1960).
223. *See* LOEW'S INC., 1978 ANNUAL REPORT 14.
224. *Id.*
225. M. CONANT, *supra* note 2, at 108.
226. *Id.*

By the end of 1970 ABC operated only 411 theaters.[227] In 1974 the northern group of 123 ABC theaters was sold to a newly formed firm, Plitt Theaters, Inc., for $25 million.[228] H. G. Plitt, organizer of the new firm, had been a theater executive of ABC's northern group. In 1978 ABC left the theater business as it sold the rest of its theaters to Plitt Theaters, Inc. for about $50 million.[229] The 173 theaters operated by ABC at the end of 1977 had included 91 single screens, 79 twin screens, and 3 triple screens.[230] By 1977 theater revenues of $81.2 million had constituted only 5 percent of ABC's total revenues.[231] As noted, ABC has entered motion picture production and was sued on this account by major distributors and by the Department of Justice. Sale of its theaters eliminates one possible basis for a holding that its entry into feature production was anticompetitive.

National General Corp., successor to the theaters of Twentieth Century-Fox, controlled 549 theaters at the time of the 1951 consent decree.[232] After specific divestitures, it controlled 321 theaters in 1957.[233] By 1970 it had closed and disposed of unprofitable theaters and reduced its total to 301.[234] In June 1973 National General had only 240 theaters and sold all the assets of its theater business to Mann Theatre Corp. of California for an estimated $67.5 million.[235]

RKO Theatres Corp., exhibition successor to RKO Corp., controlled 124 theaters at the time of its consent decree in 1948.[236] Pursuant to the decree, Howard Hughes sold his controlling interest in RKO theaters in 1953 to Albert A. List[237] and the company was renamed List Industries Corp. In 1959 List Industries Corp. was merged into Glen Alden Corp.[238] By 1967 the RKO division of Glen Alden operated only 32 theaters.[239]

Stanley Warner Corp., successor to Warner Bros. theater division, controlled 436 theaters at the time of the 1951 consent decree.[240] After divestitures pursuant to the decree, it had 297 theaters in 1957.[241] By 1960 it had only 225 theaters in 17 states and the District of Columbia.[242] In August 1967 Stanley Warner had 162 theaters in 97 cities, of which 139 were indoor and 19 were drive-ins.[243] Theater and television revenues declined from $40.4 million in 1960 to $38.4 million in

227. 333 F. Supp. at 1104.

228. *See ABC Plans to Sell Northern Theaters to Plitt for Cash,* Wall St. J., Oct. 18, 1973, at 14, col. 1; MOODY'S INDUSTRIAL MANUAL 83 (1973).

229. MOODY'S INDUSTRIAL MANUAL 585 (1980). *See* BROADCASTING, Nov. 13, 1978, at 45; *American Broadcasting Cos. Complete the Sale of Unit,* Wall St. J., Nov. 30, 1978, at 4.

230. *ABC is Negotiating $50 Million Sale of Its Theater Unit,* Wall St. J., March 31, 1978, at 4, col. 3.

231. MOODY'S INDUSTRIAL MANUAL 90 (1978).

232. M. CONANT, *supra* note 2, at 108.

233. *Id.*

234. MOODY'S INDUSTRIAL MANUAL 2190 (1971).

235. *See National General to Sell Theaters to Mann Theatre,* Wall St. J., March 30, 1973, at 16, col. 1.

236. M. CONANT, *supra* note 2, at 108.

237. *Id.* at 109.

238. *See Glen Alden Holders Approve List Merger,* Wall St. J., April 22, 1959, at 18, col. 3.

239. Glen Alden Corp, Notice of Special Meeting of Stockholders, Nov. 20, 1967, at 39.

240. M. CONANT, *supra* note 2, at 108.

241. *Id.*

242. MOODY'S INDUSTRIAL MANUAL 1391 (1961).

243. Glen Alden Corp. *supra* note 239, at 49.

1967.[244] In 1967 Stanley Warner Corp. was merged into Glen Alden Corp.[245] Under the RKO consent decree of 1948, Glen Alden, as successor to RKO Theatres, was required to secure permission of the district court to acquire Stanley Warner.[246] However there is no reported decision that such permission was secured. Glen Alden combined its two theater groups into RKO-Stanley Warner Theatres, Inc., and in 1971 sold this subsidiary to Cinerama Inc. for $21.5 million.[247] In 1977 Cinerama Inc. reported that its RKO-Stanley Warner circuit had only 54 theaters.[248] These and another 28 theaters held by its Cinerama Theaters subsidiary had combined 1977 admission revenues of $34.7 million.[249]

C. Prices and Price Policies

Theater admission prices have risen with the general inflation. Average admission prices for 1978 were $2.34 for all theaters including drive-ins[250] and $2.40 for indoor theaters only.[251] Based on a 1967 price index of 100, the 1978 estimates have index numbers for indoor admission prices at 194, and for drive-ins it was 203.[252] While more recent data are not available for motion pictures alone, the index for all admissions to entertainment showed prices to have risen 25.1 percent between the end of 1977 and May 1981.[253]

The highly imperfect competition between pictures and the geographical distance set by distributors between theaters showing the same feature greatly limits competition between exhibitors. Consequently, interfirm price rivalry between exhibitors is very limited. Even without the distributor control of admission prices which existed before the *Paramount* decrees, admission prices for films that are not hits and that leave theaters largely empty do not result in admission-price cutting. The exhibitors generally consider demand to be relatively inelastic. The question is whether they have tested this hypothesis with price changes for films of different quality.

D. Collusion of Exhibitors

As has been noted, the freer market for the distribution of motion pictures after the *Paramount* decrees led to the adoption of competitive bidding by distributors in some markets. The negative reactions of exhibitors, who would assume a large part of the market uncertainties if required to bid with guaranteed minimum rentals, led to the discontinuance of most bidding. One must conclude that circuit

244. STANLEY WARNER CORP., 1964 ANNUAL REPORT 2; STANLEY WARNER CORP., 1967 ANNUAL REPORT 2.

245. *See Glen Alden Corp., Stanley Warner Agree to Merge,* Wall St. J., Aug. 7, 1967, at 24, col. 1; *Stanley Warner Corp., Glen Alden Corp. Boards Approve Merger Plan,* Wall St. J., Aug. 21, 1967, at 2, col. 5.

246. Glen Alden Corp., Notice of Meeting, Nov. 21, 1967, at 40.

247. MOODY'S INDUSTRIAL MANUAL 1497 (1978).

248. CINERAMA INC., 1977 ANNUAL REPORT 22.

249. *Id.* at 23.

250. U.S. DEP'T OF COMMERCE, 1980 U.S. INDUSTRIAL OUTLOOK 493 (1980).

251. Estimated from data in U.S. DEP'T OF COMMERCE, 1979 U.S. INDUSTRIAL OUTLOOK 503 (1979).

252. *Id.*

253. U.S. BUREAU OF LABOR STATISTICS, CPI DETAILED REPORT 27 (May 1981).

bargaining power was sufficient to enable exhibitors to force negotiated licensing rather than competitive bidding.

In many markets exhibitors went further and actually colluded to divide the product of the various distributors among them. This was called a split.[254] Under the antitrust laws one would expect division of product to be treated the same way as division of territories. It should be illegal per se under the rule of the *Addyston* case.[255] The courts held otherwise.[256] This type of combination was ruled to be legal provided the distributors did not participate in the split and deny any exhibitor the opportunity to bid for films. The early approach of the antitrust division was to acquiesce in this view.[257] The leading case upholding the legality of exhibitor splits of product was the *Viking* case,[258] which was affirmed by an equally divided Supreme Court. Plaintiff theater owner sued the two local exhibitor circuits in Philadelphia and the six major distributors, maintaining that the division of product denied him access to a market. The district court directed a verdict for the defendants, and this was affirmed on appeal. The plaintiff did not argue that all split systems were illegal, but that failure to include all exhibitors made them illegal. Thus, his argument was that failure to include all rivals in an anticompetitive scheme was the factor which made it illegal. The court found against the plaintiff on this limited claim and, in the absence of evidence convincing the court that the split unreasonably restricted the competitive market, the claim failed. The court noted that the plaintiff had been able to license some pictures of each distributor in spite of the split.

The *Viking* precedent has caused later courts to rule for defendants in other cases challenging splits. In *Seago v. North Carolina Theatres, Inc.* [259] a summary judgment against the plaintiff exhibitor was granted. Even assuming the existence of the split and its effect of limiting competition among exhibitors, the court held it would not have damaged the plaintiff. The admitted fact was that the plaintiff was able to bid against any of the exhibitors in the split. The split merely reduced the number of rivals against whom the plaintiff would have to bid. Hence, there was no evidence in the depositions that the plaintiff was foreclosed from a competitive market.

A similar ruling occurred in the grant of summary judgment in *Dahl, Inc. v. Roy Cooper Co.* [260] The plaintiff had converted stores to establish an art theater. When he subsequently bid for first-run pictures, he found that most had been allocated to conventional theaters in a split. The evidence on discovery showed Dahl was allowed to bid against exhibitors in the split and did obtain a few first-run films. The court of appeals concluded, "there is no evidence that the agreement,

254. *See* M. CONANT, *supra* note 2, at 61-65.

255. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899).

256. Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1140 (4th Cir. 1980).

257. Gordon, *Horizontal and Vertical Restraints of Trade: The Legality of Motion Picture Splits Under the Antitrust Laws,* 75 YALE L. J. 239, 240 (1965).

258. Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285 (3d Cir. 1963), *aff'd per curiam,* 378 U.S. 123 (1964).

259. 42 F.R.D. 267 (N.C. 1967), *aff'd per curiam,* 388 F.2d 987 (4th Cir. 1967), *cert. denied,* 390 U.S. 959 (1968).

260. 448 F.2d 17 (9th Cir. 1971).

although anticompetitive in character and as such subject to complaint by the distributors, served to exclude Dahl from the market or give it any antitrust claim."[261] The court referred to the *Goldwyn*[262] case, where a split of exhibitors without consent of the distributors had been held illegal.

In the *Cinema-Tex*[263] case of 1975, a district court held that a split agreement of all exhibitors in an area was illegal per se. The plaintiff had been dissatisfied with the films he got from the split and, when his financial position became untenable, he had sold out to one of the defendants. The court distinguished the *Viking* case, because the distributors were not a party to the split in this case and their solicitations of bids were ignored by exhibitors.[264] The plaintiff claimed he did not respond to the solicitations because he was afraid of reprisals by the members of the split. Despite the finding that the split was illegal per se, the defendants' motion for directed verdict was granted because the plaintiff failed to show that harm was proximately caused by the violation. The court of appeals upheld the ruling that the plaintiff had failed to show damage, but it reversed the conclusion that the split was illegal per se.[265] It held that conclusion was unnecessary in deciding the case.[266]

In *Admiral Theatre Corp. v. Douglas Theatre Co.*,[267] another directed verdict for defendants was affirmed on appeal. The plaintiff, operator of three theaters in Omaha, was never a member of the splits adopted by the defendant exhibitors in operating fifteen theaters in the area. The plaintiff contended that the split had caused it to be successful in licensing only the lower quality first-run films. The evidence showed it was able to obtain 60 percent of the pictures on which it made specific offers. The court found that in no case was a bid by plaintiff demonstrably superior to that of the competitor who successfully licensed a picture.[268] It also found that the distributor defendants did not acquiesce in the split and therefore did not make the bidding process a sham.[269]

The court rejected the argument that the split agreement of exhibitor defendants was illegal per se, although it held it did not have to make a final decision on the issue because plaintiffs failed to show legal injury, proximate cause and damages sufficient to get to the jury. After an extensive review of the many indirect methods of price fixing discussed in the *Socony-Vacuum*[270] case, the court rejected its application here. "Thus while it appears that price fixing may not necessarily require a 'fixed price' or a 'fixed price range,' it is unclear whether an agreement to reduce competitive bidding in private business activities is sufficient to be catego-

261. *Id.* at 20.
262. Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 204 (9th Cir. 1964), *cert. denied,* 379 U.S. 880 (1964).
263. Cinema-Tex Enterprises, Inc., v. Santikos Theaters, Inc., 414 F. Supp. 640 (W.D. Tex. 1975).
264. 414 F. Supp. at 643.
265. Cinema-Tex Enterprises, Inc. v. Santikos Theaters, Inc., 535 F.2d 932 (5th Cir. 1976).
266. *Id.* at 933.
267. 585 F.2d 877 (8th Cir. 1978).
268. *Id.* at 885.
269. *Id.* at 887-88.
270. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

rized as price fixing and thus per se illegal."[271] This narrow view of *Socony-Vacuum* was followed by a ruling that, even if price effects were not the central issue, splits were not illegal per se. This was the rule of the *Viking* case.

Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.[272] was one of the most recent in the series of cases attacking splits. The facts were similar to the *Admiral* case, and the trial court granted defendants' motion for a directed verdict.[273] The three defendant exhibitors in the Norfolk-Virginia Beach area admitted the existence of the split. The court of appeals followed the standing law that an exhibitor does not have a claim against other film exhibitors who, without distributor involvement, split the films they will bid on. In this case, however, there was material evidence that six major distributors were participants in the split. Consequently, the court of appeals vacated the directed verdict, holding there was sufficient proof against defendants to warrant submission of the case to a jury. It also found sufficient proof of injury to be considered by a jury. Furthermore, evidence that the plaintiff was denied first-run films by the split was a sufficient basis for a futility theory of damages.

Critics of the decisions validating splits of available films by exhibitors have continued to argue that division of product, like division of territories, should be held illegal per se under section 1 of the Sherman Act.[274] The avowed purpose of splits is to end bidding in the free market for licensing of pictures. In April 1977 the antitrust division finally announced that it was reversing its earlier view and now considered all splits illegal.[275] Notice to the exhibitors to cease the practice pointed out that splits were virtually indistinguishable from bidrigging practices, which clearly violate the antitrust laws. The Justice Department indicated that if splits continued, it would bring prosecutions to stop the practice. The immediate response of large exhibitors was negative. General Cinema Corp., the largest circuit in the country, said it viewed the warning with regret but would abide by the ban.[276]

While most exhibitors terminated splits in response to the warning of the antitrust division, some did not. In August 1977 a Virginia theater company filed suit to challenge the government's new position on splits. The suit went to trial on May 6, 1980.[277] On that same day the Justice Department filed a civil suit against United Artists Theatre Circuit and three other exhibitors in Milwaukee charging illegal allocation of feature films between them.[278] While the defendants are confi-

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271. 585 F.2d at 887-88.

272. Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135 (4th Cir. 1980).

273. 1979-2 Trade Cas. ¶ 62,886 (E.D. Va. 1979).

274. *See* Gordon, *supra* note 257.

275. *Movie Industry's Distribution Practices May Spark Antitrust Action, U.S. Warns,* Wall St. J., April 4, 1977, at 4, col. 2.

276. *General Cinema Critical of U.S. Proposal to End "Split" Exhibition Pacts,* Wall St. J., April 5, 1977, at 7, col. 1.

277. *Justice Agency Sues to Block Allocating of Feature Films by Theater Companies,* Wall St. J., May 6, 1980, at 21, col. 2. This action by Greenbrier Cinemas Inc., on behalf of the National Association of Theater Owners, is unreported.

278. United States v. Capitol Services Inc., 1981-1 Trade Cas. ¶ 63,972 (E.D. Wis. 1981). *See* Wall St. J., *supra* note 277.

dent that long usage will be important in sustaining their anticompetitive practice, few disinterested observers believe there can be a successful defense.

VI

CONCLUSIONS

The unique character of each unit of input and output makes the motion picture industry one of highly imperfect competition. Within the constraints of these product and market structures, the *Paramount* decrees had profound effects on the industry. Before the decrees, the five major firms controlled the industry by virtue of their control on first-run theaters and the system of reciprocity in access to each other's theaters administered by their illegal cartel. After the decrees, a much freer market was created. The *Paramount* defendants lost control of motion picture production. In the freer market, the independent producer, not the studio owners, proved to be the optimum production unit. The six remaining *Paramount* defendants which owned studios became primarily lessors of studio space and financiers of independent producers. On the distribution level, the *Paramount* decrees did not promote the entry of significant new rivals. The concurrent rise of television and increased public interest in other recreational activities created great competition for motion pictures. Mediocre pictures no longer had a market, and the output of motion pictures dropped sharply. Since the optimum domestic marketing firm structure required approximately twenty branch offices with screening rooms and sales forces, entry of new distributors in a declining total market was unlikely. In fact, MGM left motion picture distribution, and minor distributors have been merging in an effort to reach optimum size. The decrees have provoked greater competition in marketing by barring block booking and requiring that each picture be licensed to each theater separately.

On the exhibition level, the *Paramount* decrees have had significant effects. Independent exhibitors, that majority not formerly part of the illegal cartel, have found themselves bidding for a smaller supply of films in a more competitive market. They have sought ways to reduce the intensity of competition. One of these is the horizontal division of product in their local markets, which is now under attack by the Antitrust Division. The five theater circuits of the major *Paramount* defendants have been especially impaired by the decrees. As population moved to the suburbs, they were prohibited from acquiring new theaters there without costly legal proceedings. All five circuits contracted in size and four have been sold to new owners. While the input side of exhibition, the licensing of films, is now an open market, the output side does not seem highly competitive. Unique product and geographical separation of theaters in any metropolitan area results in little admission price rivalry between theaters.