Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry

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NOTE

PARAMOUNT REVISITED: THE RESURGENCE OF VERTICAL INTEGRATION IN THE MOTION PICTURE INDUSTRY

As in all industries, those few individuals who control the motion picture industry have, from the start, vehemently sought to guarantee their control and shape growth. With this desire to control comes an inevitable conflict with the policies that underlie antitrust regulation. In the motion picture industry, absolute control is derived from the domination of its three divisions: production, distribution, and exhibition. This Note will examine the trend, rekindled during the Reagan administration, of major movie producers and distributors reentering, through the acquisition of both individual theaters and large motion picture theater circuits, the business of exhibiting "first run" motion pictures in the United States.

This exploration will commence with a brief historical overview of the monopolistic practices that existed in the industry and the resulting divorce of the business of motion picture exhibition from distribution and production, which took place in the 1940s as a result of United States v. Paramount Pictures, Inc. The focus will next shift to the deregulatory scheme of the Reagan Administration, with specific attention paid to that Administration's policies towards anti-


2. To obtain the maximum revenue from motion pictures, they are released in a series of runs to theaters across the country. "First run" indicates a picture's initial widespread release to "high gross" theaters. Subsequently, the films are released to lower gross theaters until the "earning capacity of the film is finally depleted." See Cassady, supra note 1, at 152; see also JOHN IZOD, HOLLYWOOD AND THE BOX OFFICE 1895-1986, 19 (1988). Recently, with the advent of the VCR and cable television, subsequent runs for motion pictures have been all but eliminated. These alternative outlets for exhibition have captured the dollars once available for second, third, or fourth run movie theaters. See United States v. Columbia Pictures Inc., 507 F. Supp. 412, 418-19 (S.D.N.Y. 1980); see also Harry Boudwin, Product Market Definition for Video Programming, 86 COLUM. L. REV. 1210, 1229 (1986).

trust laws, and the motion picture industry in particular. Finally, the effects that the Reagan Administration's deregulations have had on the entire motion picture industry will be examined.

I. THE PARAMOUNT CASE

Since the formation of the motion picture industry by individuals such as Thomas Edison, Louis and August Lumière, C. Francis Jenkins, and Thomas Armat in the 1880s, movie producers and distributors have attempted to control the industry by engaging in a multiplicity of anti-competitive tactics. Originally, monopolies were attempted through the ownership and protection of patents on the equipment and technology needed to produce and exhibit motion pictures. As technology advanced, the power that these patents could provide decreased. In an attempt to maintain control, industry leaders, led by Edison, merged their companies and formed a cartel, the Motion Picture Patents Company (the "MPPC"). At first, the MPPC wielded its power by pooling all of the licenses and patents that its individual members held, and it defended its position by bringing

4. See infra notes 89-183 and accompanying text.
5. See infra notes 184-225 and accompanying text.
6. See ROBERT H. STANLEY, THE CELLULOID EMPIRE 1-49 (1978); see also IZOD, supra note 2, at 1-7.
7. See MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 16-17 (1960); see also IZOD, supra note 2, at 1-38; Cassady, supra note 1, at 153.
8. Patents were held for the raw film and cameras needed to make motion pictures and for the projectors that were needed to exhibit them. As technology in the motion picture business was still in a pre-industrialized stage, ownership of these patents gave Edison and his contemporaries an opportunity to control the entire business. These individuals defended their power vigorously by bringing a continuum of lawsuits against anyone who infringed on any of their patent rights. See e.g., Edison v. American Mutoscope & Biograph Co., 151 Fed. 767 (2d Cir. 1907); Edison v. American Mutoscope & Biograph Co., 144 Fed. 121 (C.C.S.D.N.Y. 1906); American Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 Fed. 262 (C.C.D.N.J. 1905); Edison v. American Mutoscope & Biograph Co., 127 Fed. 361 (C.C.S.D.N.Y. 1904); Armat v. Edison, 125 Fed. 939 (2d Cir. 1903); Edison v. Lubin, 122 Fed. 240 (3d Cir. 1903); Edison v. American Mutoscope & Biograph Co., 114 Fed. 926 (2d Cir. 1902). For a thorough discussion of the use of law suits to defend these patents, see IZOD, supra note 2, at 1-6.
9. The members of the MPPC were: Biograph, Edison, Essanay, Gaumont, Kalem, Lubin, Méliès, Pathé Frères, Selig, and Vitagraph. For a detailed study of the history of the MPPC, see Ralph Cassady, Jr., Monopoly in Motion Picture Production and Distribution: 1908-1915, 32 S. CAL. L. REV. 325, 329-50 (1959).
10. See RAISE V. JENKINS, IMAGES AND ENTERPRISE: TECHNOLOGY AND THE AMERICAN PHOTOGRAPHIC INDUSTRY 1839 TO 1925, 285 (1975). The trust operated by licensing its patents to exhibitors on the condition that these exhibitors not use machinery and materials on or together with the machinery and materials that the MPPC had licensed.
numerous lawsuits against those who infringed on their rights. At the same time, motion picture exchanges developed to distribute the movies that the MPPC was producing. These exchanges became quite profitable and as they cultivated, the MPPC "initiated forward vertical integration" by purchasing most of the major exchanges in the nation. As the MPPC appropriated exchanges, they instituted practices that were designed to increase their bargaining power and their ability to control the exhibitors who needed their product. Using their patents to force compliance from exhibitors, the MPPC imposed restrictions on these exhibitors which included using a system of distribution based on runs, zones, and clearances. The MPPC's successful control over distribution was short-lived though. It came to an end with the first motion picture antitrust action, which was ini-

11. See, e.g., Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 F. 398 (1916), aff'd, 243 U.S. 502 (1917); Motion Picture Patents Co. v. Independent Motion Pictures Co., 200 F. 411 (2d Cir. 1912); Motion Picture Patents Co. v. Laemmle, 186 F. 641 (C.C.S.D.N.Y. 1911); Motion Picture Patents Co. v. Champion Film Co., 183 F. 986 (C.C.S.D.N.Y. 1910); Motion Picture Patents Co. v. Laemmle, 178 F. 104 (C.C.S.D.N.Y. 1910); Motion Picture Patents Co. v. Ullman, 186 F. 174 (C.C.S.D.N.Y. 1910); Motion Picture Patents Co. v. New York Motion Picture Co., 174 F. 51 (C.C.E.D.N.Y. 1909).

12. Motion picture exchanges were the first attempt at organized distribution. They pooled pictures from many different producers and distributed them to theaters across their region. See CONANT, supra note 7, at 18.

13. See JENKINS, supra note 10, at 287. With vertical integration a company acquires the firms above and below it on the production line. In the motion picture industry, vertical integration refers to one company that produces, distributes and exhibits films. PAUL SOLMAN & THOMAS FRIEDMAN, LIFE AND DEATH ON THE CORPORATE BATTLEFIELD—HOW COMPANIES WIN, LOSE, SURVIVE 84 (1982).

14. These acquisitions were made by the General Film Company. The General Film Company was a licensee of the MPPC and was operated by members of the MPPC. The company was created specifically for the purpose of acquiring exchanges. See Cassady, supra note 9, at 355-59; see also IZOD, supra note 2, at 18; JENKINS, supra note 10, at 287.

15. See infra note 2.

16. "Zones" are geographic boundaries. Within each zone a distributor would only release a particular motion picture to one theater for exhibition. This practice ensures that the distributor will obtain the largest audience for a film and it prevents other theaters in close proximity from competing for the same customers who might wish to see the particular movie. See MAB DENA HUETTIG, ECONOMIC CONTROL OF THE MOTION PICTURE INDUSTRY 125 (1944). Giving preference to MPPC-licensed exhibitors through the use of overly broad zones would prohibit nonmember exhibitors from the competition for audience dollars.

17. "Clearance" relates to the amount of time that, by contract, must elapse between the end of the first run of a motion picture and the beginning of its subsequent runs. Longer clearances provide more first run revenues for a picture. If a clearance is long enough, a picture will have no subsequent run value. See Cassady, supra note 1, at 334 n.49. With the reduction in subsequent run value, those exhibitors which showed later runnings of a film were effectively put out of business.

18. United States v. Motion Picture Patents Co., 225 F. 800 (E.D. Pa. 1915), appeal
tiated by the head of one of the few exchanges that the MPPC did not operate. This case stripped the trust of its power by holding that the defendants had used their patents to unreasonably restrain trade. As a result of their use of unreasonable restrictions, the defendants had "monopolized a large part of the interstate commerce in films, cameras, projecting machines, and other articles of commerce accessory to the motion picture business." The trust was terminated because they could no longer use their patents to impose undue restrictions. As one commentator has explained, "a patent owner could not extend the scope of the patent by restricting the use to materials necessary for the operation but forming no part of the patented invention."

Although this decision brought an end to the MPPC, it was not successful in curtailing the control that motion picture producers and distributors had by now gained. From the ashes of the MPPC arose the first attempt at a national distribution system, and this eventually led to the first fully integrated studio, Paramount Pictures Corporation ("Paramount"). Paramount, as a producer, had contracts with many of the most popular film stars. They were able to use the box office appeal of their stars, together with their new national distribution capabilities, to create a new mechanism for control, block booking. While Paramount was a dominant force in the industry, other
companies also gained controlling interests by engaging in similar practices. Needless to say, block booking along with the now well established run-zone-clearance system angered the exhibitors who were forced to suffer the consequences of their use. In response to these practices, and in an attempt to gain some bargaining power in the industry, exhibitors began to join together to form chains and circuits. By 1917, the First National Exhibitors Circuit was formed. This was the first national merger of high quality first run theaters. "Circuit booking, as it came to be called, became a recognized method of defense on the part of exhibitors against the dominant producers."

By the 1920s, these circuits had gained substantial market domination by engaging in anti-competitive practices of their own. As a natural consequence of the power that these circuits had gained, "control of these cinemas meant control of the [entire] industry, and they became targets for purchase by the big producers." The studio's purchasing was influenced by the realization that if they could control every level in the motion picture industry, from production down to exhibition, they would not only be able to control prices and ensure access to screens for the exhibition of their own pictures, but they would also be able to prevent competition from small independent producers and thus gain complete control over the entire industry. As the studios continued to purchase exhibitors, they began to engage in practices that were designed to make this complete control a reali-

26. These other "principal concerns" were: First National, Fox, Metro (controlled by Loew's, Inc.), Pathé, United Artists, Universal, Vitagraph, and Warner Brothers. See Cassady, supra note 1, at 155.
27. See supra notes 15-17 and accompanying text; see also IZOD supra note 2, at 40.
28. See IZOD, supra note 2, at 48-49; JENKINS, supra note 10, at 294; Whitney, supra note 22, at 163.
30. HUETTIG, supra note 16, at 22.
31. Many circuits were eventually charged with violating the Sherman Act. See infra note 36; see also HUETTIG, supra note 16, at 22-23 (describing the case of the Stanley Booking Corporation of Philadelphia).
32. See IZOD, supra note 2, at 40-41.
33. See Cassady, supra note 1, at 156.
34. See CONANT, supra note 7, at 37 ("By monopolizing the final marketing outlet they [the majors] successfully curtailed entry by independent producers.").
ty. These activities included giving exhibition preferences to their own pictures and to those of the other major studios by using extended clearances, creating overly broad zones for affiliated exhibitors, and refusing to exhibit pictures produced by independent producers. With such policies and preferential practices quickly becoming the rule in the industry, and studio owned circuits gaining command over entire exhibition markets, the government began an attempt at intervention.  

The government’s response to these practices came in the form of numerous law suits and court cases brought against both the circuits and the distributors. Two of the most notable attacks were the government’s antitrust charges brought against distributors and exhibitors in both the Los Angeles and Chicago markets. These suits charged the defendants with illegally restraining trade by adopting various anti-competitive practices including the use of arbitrary clearances, discriminatory zoning methods, and block booking. Although the government succeeded in forcing the defendants to sign consent decrees restricting their conduct, they ultimately lost the battle. These cases, like their predecessors, had very little effect on curtailing the growing anti-competitive atmosphere that, by this time,

35. See id. at 43-57.
37. In addition to these two cases, the government’s suit against the Paramount Famous Lasky studio was as equally well-known. This suit charged the defendants with the use of nefarious arbitration practices and unfair penalties when dealing with independent theaters. The use of these practices was found to be a violation of the Sherman Act. See United States v. Paramount Famous Lasky Corp., 34 F.2d 984 (S.D.N.Y. 1929), aff’d 282 U.S. 30 (1930).
38. See United States v. Fox West Coast Theaters, 1932-1939 Trade Cas. (CCH) ¶ 55,018 (S.D. Cal. 1932).
40. See supra notes 38-39. The Fox decree enjoined the defendants from the use of certain alleged unfair discriminations in the method of zoning theaters for exhibition of motion pictures. The Balaban & Katz decree enjoined the defendants from: (1) granting unreasonable clearances; (2) restraining unaffiliated theaters from contracting for first run pictures; (3) acquiring the management or booking control, without a substantial proprietary interest, of motion picture theaters; and (4) leasing more first run pictures than is reasonably necessary for the conduct of their respective businesses.
had taken over the industry.\footnote{1}{See Cassady, supra note 1, at 156.}

By the end of the 1930s, with its laissez-faire attitude, the majority of the most powerful circuits had been purchased by the major studios.\footnote{2}{See CONANT, supra note 7, at 82.} Blatantly anti-competitive activity became the norm in the industry, and as a result, the government rejuvenated its attempts at curtailing these practices. The Justice Department started to bring more lawsuits in an attempt to enjoin the monopolistic activities of these circuits,\footnote{3}{See, e.g., Schine Chain Theaters v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); United States v. Interstate Circuit Inc., 20 F. Supp. 868 (N.D. Tex. 1937).} and in 1938 finally took a major step in seeking to end the now rampant activity. In 1938, after “15 years of intensive investigation,”\footnote{4}{See, e.g., Schine Chain Theaters v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); United States v. Interstate Circuit Inc., 20 F. Supp. 868 (N.D. Tex. 1937).} the government, with the conviction that it had a strong enough case against the nation’s leading motion picture studios,\footnote{5}{STANLEY, supra note 6, at 113.} filed the Paramount case.

The suit against the predominant motion picture studios was brought under § 4 of the Sherman Act.\footnote{6}{29 Stat. 209 (1890) (codified in 15 U.S.C. §§ 1-7 (1982)).} The defendants were divided into three groups and were classified as either “major” or “minor” defendants.\footnote{7}{Cassady, supra note 1, at 157.} The major defendants were Loew’s, Inc., Paramount Pictures, Inc., Radio-Keith-Orpheum Corp., Twentieth Century-Fox Film Corp., and Warner Bros. Pictures, Inc., all of whom produced, distributed, and exhibited motion pictures.\footnote{8}{United States v. Paramount Pictures, Inc., 66 F. Supp. at 329-30. For the purposes of this Note, all the defendants will be referred to as the “Paramount defendants,” unless otherwise specified.} The minor defendants were Columbia Pictures Corp. and Universal Corp. both of whom produced and distributed motion pictures, and United Artists Corp., which only distributed motion pictures. Only the major defendants owned or controlled motion picture theaters. “The complaint charged that the producer defendants had attempted to monopolize and had monopolized the production of motion pictures.”\footnote{9}{Id.} Furthermore, the complaint charged that all of the defendants had attempted to and did constrain and monopolize interstate trade in the distribution and exhibition of motion pictures.\footnote{10}{Id.}
Before the case came to trial, the government yielded to pressure from the studios, and the major defendants were allowed to settle with the government by signing a consent decree on November 20, 1940. The government, relying on the faith of the defendants to curtail their past behavior and the strength of the decree to put an end to the illegal activities that had taken over the industry, further backed away from taking a strong stance by providing for the expiration of the decree after only a three year period. Specifically, the decree enjoined the consenting defendants as follows: (1) block booking was limited to no more than five pictures; (2) blind bidding was prohibited; (3) the use of unreasonable clearances was prohibited; (4) forced rentals were abolished; (5) limits were placed on the rights of distributors to refuse to license motion pictures to exhibitors; and (6) the defendants were prohibited from engaging in a “general program of theater acquisition.” The decree also created an arbitration board that was designed to resolve disputes arising between independent theater owners and the Paramount defendants. This decree, like the ones before it, was unsuccessful in bringing about change in the industry because the government did not demand the separation of production and distribution from exhibition. The arbitration board proved to be unsuccessful, and other regulations were unhelpful. At the expiration of the decree’s three year life, affiliated circuits still controlled exhibition, and independent production had gained no advances.

Determined to free up trade and create competition by eliminating the monopolistic strangle hold that the Paramount defendants still maintained, the Justice Department, late in the summer of 1944, reactivated the Paramount case and asked the District Court for the Southern District of New York to impose all of the remedies of the

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52. Id. However, the government reserved the right to reinstate the case at the expiration of the three year period. Id. at 298.
53. Blind bidding is the practice whereby a motion picture distributor requires exhibitors to bid on the licensing or rental of a motion picture without first having an opportunity to view the film. See Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 433 (S.D. Ohio 1980), aff’d in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982).
54. See Paramount, 1940-1943 Trade Cas. (CCH) ¶ 56,072, at 289-94.
55. Id.
56. See CONANT, supra note 7, at 97.
amended complaint with specific emphasis placed on forcing the divestiture of the theaters by the defendants. By that point in time, the Paramount defendants had gained control over 17.35% of the nation's theaters. This seemingly small percentage of ownership masked the reality that the defendants controlled 90% of the most significant theaters in the major markets around the country. This control of prime exhibition coupled with the fact that at the same time the defendants distributed 75% of all pictures in this country, is demonstrative evidence that the Paramount defendants had fully attained their long-term goal to completely control the distribution market for first run motion pictures in the United States.

It was under these conditions that the court reacted. Although the district court did not find that the major defendants had monopolized production in the industry, the did find that the distribution system then used by the defendants was restraining trade and was resulting in numerous violations of the Sherman Act. Pursuant to its decision, the court went on to issue a decree in December 1946. The decree prohibited many of the complained of activities such as: the use of excessive zones and clearances, forced block booking, fixing admission prices, expansion in theater ownership, and joint theater ownership by the defendants or between any defendant and an independent theater owner. However, the remedy of divorcing motion picture exhibition from production and distribution, as requested by the government, was found to be unnecessary. As an alternative remedy for correcting the illegal distribution system then in

57. See United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946); see also, STANLEY, supra note 6, at 134.
59. See CONANT, supra note 7, at 82.
60. Id.
61. See Paramount, 70 F. Supp. at 70-71 (findings 146-51). By filling 90% of the best theaters with 75% of the movies that they exhibited, the studios had blocked access to independent producers and distributors and had effectively eliminated competition for audience dollars from non-affiliated theaters.
62. In actuality, the case was originally tried before a three judge expediting court. See United States v. Loew's, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,553 at 76,951 (S.D.N.Y. 1980); see also infra note 67.
place, the court mandated that a system of competitive bidding in each run be instituted, which would be open to all theaters.\(^6^6\)

On appeal to the Supreme Court,\(^6^7\) most of the lower court rulings relating to the illegality of trade practices carried on by the defendants were affirmed.\(^6^8\) As for the remedy to be applied, the Supreme Court reversed the district court's mandate of instituting a competitive bidding procedure. The Court found that this was not a workable solution,\(^6^9\) and that such a system "involves the judiciary so deeply in the daily operation of this nation-wide business and promises such dubious benefits that it should not be undertaken."\(^7^0\) The Court seemed to be more concerned with vertical integration, and instead of the bidding system, it ordered that on remand the district court begin anew in considering whether or not the remedy of theater divestiture was a more appropriate remedy.\(^7^1\)

On remand from the Supreme Court, and before any further hearings in the case, RKO and Paramount consented to decrees divorcing their theater circuits and divesting certain theaters from the circuits.\(^7^2\) By voluntarily signing decrees before a final finding in the case, both defendants were able to obtain more favorable terms in their decrees than were the remaining major defendants.\(^7^3\) As for the remaining six defendants, the final decision as to their fate was filed

\(^{66}\) Id.

\(^{67}\) Appeal to the Supreme Court was direct from the district court because the case was brought under § 2 of the Expediting Act of February 11, 1903, 32 U.S. Stat. 823. See United States v. Paramount Pictures, 334 U.S. 131, 140 n.1 (1948). The Expediting Act was enacted in order to allow the Attorney General to seek expeditious treatment for cases of general public importance, that were brought under the Sherman Act. HANS B. THORELII, THE FEDERAL ANTITRUST POLICY: ORGANIZATION OF AN AMERICAN TRADITION 537 (1954).

\(^{68}\) Paramount, 334 U.S. 131.

\(^{69}\) See STANLEY, supra note 6, at 135.

\(^{70}\) Paramount, 334 U.S. at 162.

\(^{71}\) Paramount, 334 U.S. at 166-75. The Court did not accept the government's contention that vertical integration was illegal per se. The Court set forth a two part test for determining whether vertical integration was illegal under the Sherman Act. This test turned on "(1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent." Id. at 174-75.

\(^{72}\) United States v. Paramount Pictures, 1948-1949 Trade Cas. (CCH) ¶ 62,377 (S.D.N.Y. 1949) (Paramount Consent Decree); United States v. Paramount Pictures, 1948-1949 Trade Cas. (CCH) ¶ 62,335 (S.D.N.Y. 1948) (RKO Consent Decree). It should be noted that within all of the decrees that were issued, the court used the term "divorcement" to refer to the required separation by the defendants of exhibition from production and distribution. The court used the term "divestment" to refer to the selling off of theaters by the circuits.

\(^{73}\) After the divorcement of their exhibition businesses, neither company was required to obtain the permission of the court before reentering the motion picture exhibition business. See RKO and Paramount consent decrees, supra note 72.
on July 25, 1949.\textsuperscript{74}

The district court held, as a matter of law, that the defendants had conspired to and had restrained trade in the distribution and exhibition of motion pictures. The court concluded that vertical integrations were "a definite means of carrying out the restraints and conspiracies" that were found to be illegal and in restraint of trade.\textsuperscript{75} As a remedy, the court found that the divestiture of exhibition from production-distribution was necessary in order to free up trade.\textsuperscript{76} On the basis of its decision, the district court issued a final decree against the three major defendants that had not yet signed decrees, and against the three minor defendants.\textsuperscript{77} The decree, as to the exhibitor defendants, was later supplemented with new decrees outlining the details of their divorcement and theater divestiture.\textsuperscript{78}

The final result to arise from the government’s long-pursued case was that all of the named defendants were forced to end their illegal conduct and were required to begin licensing motion pictures on a picture-by-picture basis, solely upon the merits and without discrimination in favor of affiliated theaters, circuit theaters, or others.\textsuperscript{79} Furthermore, and equally as important, the decrees provided the government with their requested remedy of the divestiture of specific theaters as well as the divorcement of theater circuits by the major defendants.\textsuperscript{80} This mandate forced the defendants to divorce theater ownership from their control by creating independent "theater" and "picture" companies that would be separately owned and which were strictly prohibited from attempting to influence one another’s conduct.\textsuperscript{81} The new picture companies that were created could only en-

\textsuperscript{75} Paramount, 85 F. Supp. at 893.
\textsuperscript{76} Id. at 896.
\textsuperscript{79} See, e.g., Loew’s, 1950 Trade Cas. (CCH) ¶ 62,573, 63,681-82 (S.D.N.Y. 1950).
\textsuperscript{80} See STANLEY, supra note 6, at 135.
\textsuperscript{81} See, e.g., Loew’s, 1950-1951 Trade Cas. (CCH) ¶ 62,765, at 64,273 (Warner Consent Judgement). As a result of the divorcement requirement, Paramount split into Paramount Pictures Corporation and United Paramount Theaters, and RKO separated into RKO Pictures Corporation and RKO Theaters Corporation. M-G-M sold its theaters to Loew’s, Inc. Twentieth Century-Fox sold its theaters to National Theaters, Inc. Warner Brothers’s theaters were
After the exhibition business, and the new theater companies that were created could only enter the distribution business after petitioning the court, and "upon showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures." Furthermore, the new theater companies could only acquire additional theaters in the limited situations outlined in the decrees, or with the court's consent after showing that such acquisition would not restrain competition.

Fourteen years after the original proceedings had begun, the government had finally succeeded in loosening the grip that the studios had long held over the entire industry. By eliminating the domination of vertically integrated studios, the hold over motion picture distribution was sufficiently weakened to give independent producers access to screens and a chance to prosper in the industry. The number of independent producers skyrocketed from 70 in 1946 to almost 170 in 1957. As early as 1953, the Justice Department found that the decrees had helped start to bring about arms length dealing in the industry. "After Paramount, competitive bidding and competitive negotiations became the predominant method of film licensing." Independent theaters were also given a chance to compete equally for the right to exhibit first run movies.

II. DEREGULATION UNDER REAGAN

Although in the ensuing years suits were brought alleging viola-

acquired by the Stanley Warner Corporation. See Grant, supra note 21, at 361.
83. Id. at 64,266.
84. The independence of these producers is debatable, as they still needed the studios to aid in the financing and distribution of their films. See STANLEY, supra note 6, at 144.
85. See CONANT, supra note 7, at 113.
86. See id. at 110 ("In spite of the slow progress of divorcement and the continued family interrelationships, the facts seem to support a finding that divorcement has been effective. The production-distribution firms deal at arm's length with their former circuits. This was the conclusion of the Justice Department in 1953.")).
88. Although the independent exhibitors had the opportunity to compete, many were hurt by divorcement and divestiture. Studios no longer distributed as many films and competition for the highest quality motion pictures increased with competitive bidding. As a result, many individual theaters were put out of business. See SUZANNE M. DONAHUE, AMERICAN FILM DISTRIBUTION: THE CHANGING MARKETPLACE 35 (1987); Grant, supra note 21, at 361; Whitney, supra note 22, at 174.
tions of the Sherman Act by both distributors and exhibitors, it was not until Ronald Reagan took over as President of the United States in 1980 that the studios were once again allowed to become vertically integrated and swallow up the exhibition market in the United States. As President Reagan moved his belongings into his new residence on Pennsylvania Avenue, this country was about to enter what has been called one of the greatest periods of deregulation and "nonenforcement" of the antitrust laws since the 1930s. Reagan brought with him the desire to bring about vast legislative reform by instituting a traditional laissez-faire attitude that was designed to "reduce the government’s role in business." As Reagan had the opportunity to shape the Justice Department by appointing new Assistant Attorneys General, it became apparent that the Administration’s policy of promoting free competition was one of "narrowing rather than expanding the scope of antitrust laws." Reagan’s first Assistant Attorney General, William Baxter, has been described as having as one of his agendas, the “trivialization of the dominant antitrust thinking.” It is claimed that he pictures this dominant thinking as “wrongheaded, fuzzy, unworkable, protectionist, and perverse.”

89. See infra notes 206-18 and accompanying text (relating to block booking and split agreements).
90. Eleanor M. Fox & Lawrence A. Sullivan, Antitrust—Retrospective and Prospective: Where are We Coming From? Where are We Going?, 62 N.Y.U. L. REV. 936, 941-42 (1987). This earlier period of nonenforcement was demonstrated by the government’s lack of prosecution of the Paramount defendants in the 1930s. See supra section I.
91. See 60 Minutes With Douglas Ginsburg, Assistant Attorney General, Antitrust Division, 55 ANTITRUST L.J. 255, 260 (1986) [hereinafter Ginsburg] (when asked what his personal priorities were as Assistant Attorney General, he replied, “legislative reform, legislative reform, legislative reform, legislative reform”). This desire to bring about change should not be seen as unusual. Every administration has used litigation to implement their policies. See Thomas J. Campbell, The Antitrust Record of the First Reagan Administration, 64 TEX. L. REV. 353, 354 (1985).
92. See Fox & Sullivan, supra note 90, at 944-45.
93. Campbell, supra note 91, at 353.
94. Baxter served as Assistant Attorney General for the Antitrust Division from 1981 to 1984. As an arm of the executive branch of the government, the enforcement policies of the Department of Justice “reflect closely the current views of the administration in power on antitrust policing.” See JERROLD G. VAN CISE, THE FEDERAL ANTITRUST LAWS 43 (1975).
95. Fox & Sullivan, supra note 90, at 945.
96. Id. Most commentators will agree that antitrust enforcement has become obfuscated; see also generally Nolan E. Clark, Antitrust Comes Full Circle: The Return to the Cartelization Standard, 38 VAND. L. REV. 1125, 1125 (1985) (noting that “for decades, Sherman Act doctrines have been murky and confused”); William L. Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. CHI. L. REV. 221, 222 (1956) (stating that “[i]t should not
Under Reagan, the long adhered to traditional concerns that helped Congress shape this nation’s first antitrust law, the Sherman Act, were cast aside in favor of an alternative school of thought. No longer was the main emphasis placed on the fear that

be surprising ... that although the Sherman Act was passed by a virtually unanimous vote, and although its language is disarmingly clear, the administration and courts charged with enforcing it have experienced too much difficulty in settling its meaning”

97. There is a significant debate about the legislative history of the Sherman Act, what Congress’s purpose was in passing it, and how it should now be applied. This Note does not attempt to present a detailed description of the differing opinions; it only relates the approach to antitrust taken by the Reagan Administration.

The “traditional view” refers simply to the feeling that all forms of competitive restraints that hurt small businesses or consumers deserve some legislative and judicial scrutiny on a fact sensitive basis. See John J. Flynn, The “Is” and “Ought” of Vertical Restraints after Monsanto Co. v. Spray-Rite Service Corp., 71 CORNELL L. REV. 1095 (1986).

In the words of two commentators:

[A]ntitrust traditionally had two central concerns. The first was political—distrust of bigness and of fewness of competitors as well as a policy preference for diversity and opportunity for the unestablished. The second was socioeconomic, especially as seen from the vantage point of the small businessperson and the consumer. Antitrust set fair rules for the competitive game. What mattered was getting a fair shot as an entrepreneur, and having choice and receiving a fair deal as a consumer. Fox & Sullivan, supra note 90, at 944.

The Reagan Administration’s view runs afoul of these traditional concerns and is described infra, note 99. Other commentators argue that because antitrust laws were passed to eliminate trusts, that purpose should be the only goal of enforcement today. See Clark, supra note 96. Lastly, there is also support from some commentators for a total repeal of all antitrust laws. See DOMINICK T. ARMENTANO, ANTITRUST POLICY, THE CASE FOR REPEAL x-xi (1986).

98. In the words of one author:

Traditional antitrust policy has collapsed like a house of cards. In just 10 years—an extremely short time in matters of such importance—the antitrust regulatory authorities have gone from an enthusiastic enforcement of traditional antitrust policy in the mid-1970s to a substantial rejection of much of the conventional approach in the mid-1980s.

ARMENTANO, supra note 97, at ix.


The Administration’s conservative view is known by many names; it has been termed “neoclassical,” “economic efficiency” and of course “Chicago School.” See LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 376 n.1 (1977); Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1, 13 (1984); Flynn, supra note 97, at 1095 & 1132.

The basic tenets of this theory is to apply rigid economic models, as opposed to making fact sensitive determinations, when analyzing merger activity. See Flynn, supra note 97, at 1125-42. But see Frank H. Easterbrook, Workable Antitrust Policy, 84 MICH. L. REV. 1696 (1986) (arguing that the Chicago School does not blindly follow economic models). The end result of this approach is to favor most forms of collaborative conduct. See infra notes 121-27 and accompanying text. Judge Posner summed up the results of this school of
big businesses were fencing out competitors from access to markets, and big business leaders were depriving the little man of a fair chance to participate in the governance of business.100

The Reagan Administration’s neoclassical approach to antitrust law believed in a perfect market and favored applying strict models of economic efficiency that left no room for the realities of day to day occurrences.101 This view favored most forms of collaboration because it felt that they aided efficiency,102 apparently ignoring potential harms that might befall consumers.103 While this view of antitrust law still favored attacking the most severe anti-competitive practices,104 it proposed the adoption of a softened stance when analyzing most types of merger activity.105

The Administration used many tools106 to accomplish its re-
shaping of historic antitrust restrictions. One tool that was used to promulgate change was the issuance of guidelines\textsuperscript{107} that were designed to give practicing attorneys a guide to the Administration's policies when pursuing possible merger activity, and forewarn them as to when the Department was likely to challenge a merger.\textsuperscript{108}

While the basic tenets of these guidelines still seemed to support traditional concerns about consumer welfare,\textsuperscript{109} other concerns were abandoned. Horizontal restraints,\textsuperscript{110} in their purest form, were still looked at as being per se illegal;\textsuperscript{111} however, vertical restraints,\textsuperscript{112} once thought to reduce competition and foster illegal monopolistic structures,\textsuperscript{113} were now often thought to aid competition and help the economic environment.\textsuperscript{114} Even more astonishing, this conservative approach to antitrust thinking adopted the view that the regulation of vertical restraints would actually harm consumers.\textsuperscript{115}

These guidelines were not met with open arms by all of those in to new levels. Id.; see also ROBERT A. CARP & RONALD STEDHAM, THE FEDERAL COURTS 111 (2d ed. 1991).

107. Of all of the guidelines issued by the Administration, three are most pertinent to this Note: (1) U.S. Dep't of Justice 1982 Merger Guidelines, 47 Fed. Reg. 28,493 (June 30, 1982); (2) U.S. Dep't of Justice 1984 Merger Guidelines, 49 Fed. Reg. 26,827 (June 29, 1984); and (3) U.S. Dep't of Justice Vertical Restraint Guidelines, 50 Fed. Reg. 6263 (Feb. 14, 1985).


109. See Fox & Sullivan, supra note 90, at 953; Ginsburg, supra note 91, at 270.

110. Horizontal restraints exist where competitors conspire with each other to set prices, restrain trade through combined control, and generally eliminate competition from outside companies. See SULLIVAN, supra note 99, at 150-329.

111. See Campbell, supra note 91, at 352; Flynn, supra note 97, at 1101; Pitovsky, supra note 99, at 321; see also ARMENTANO, supra note 97, at 4 ("Antitrust in the 1980s is still . . . very much concerned with price-fixing and market division agreements between competitors (horizontal agreements), and neither the antitrust authorities nor the courts have relaxed their position that such arrangements are normally illegal per se."); Kovacic, supra note 99, at 63 (noting that "the Reagan Antitrust Division mounted an unprecedented program to detect and prosecute horizontal price fixing").

112. "Vertical restraints are arrangements between firms operating at different levels of the manufacturing or distribution chain (for example, between a manufacturer and a wholesaler or a wholesaler and a retailer) that restrict the conditions under which firms may purchase, sell, or resell." Department of Justice Vertical Restraint Guidelines, 50 Fed. Reg. 6263, 6264 (1985). See Sullivan, supra note 99, at 376.

113. See Fruehauf Corp. v. Federal Trade Comm., 603 F.2d 345, 353 (2d Cir. 1979); see also supra section I.

114. See Clark, supra note 96, at 1167; Kovacic, supra note 99, at 65 (noting that, "[t]o conservative antitrust scholars, vertical restraints almost invariably serve desirable efficiency ends").

115. See Campbell, supra note 91, at 369.
the legal community. The biggest opponent of the vertical restraint guidelines was possibly Congress itself, which did not believe that the courts should view them as persuasive. Feeling that the guidelines were “inconsistent with the congressional purpose in adopting antitrust laws,” and that they were not an accurate representation of the law, Congress asked the Justice Department to withdraw them. The Administration respectfully declined.

Another tool that the Administration used to infuse its reformulated and toned down interpretation of antitrust law into the nation was “enforcement discretion,” as so eloquently termed by Professor Campbell. Gone was the fear that large scale mergers might substantially lessen competition; large conglomerates were now thought to bolster both economic efficiency and competition. As a result, the Administration’s softened stance on anti-competitive practices influenced all types of large scale mergers and corporate restructuring. For example, the 3001 mergers in 1986, which broke a thirteen-year record were easily surpassed by the 3487 mergers in 1988. Of the majority of challenges that were brought against

116. See, e.g., NAAG Adopts Alternate Guidelines to Govern Vertical Restraints of Trade, ANTITRUST & TRADE REG. REP. (BNA) No. 1243, at 978 (Dec. 5, 1985) (finding that the Department of Justice’s guidelines are an inaccurate reflection of law); Lawrence A. Sullivan, The Justice Department Guidelines on Mergers and Vertical Restraints: A Critique, 16 ANTITRUST L. & ECON. REV. 11, 18 (1984) (“In all of these respects the guidelines are inconsistent with existing law and are also demonstrably unsound as a matter of policy.”).
117. See Flynn, supra note 97, at 1147.
118. See HOUSE JUDICIARY COMMITTEE, VERTICAL RESTRAINT GUIDELINES RESOLUTION, H.R. 399, 99th Cong., 1st Sess. (1985); Ginsburg, supra note 91, at 267; see also infra notes 139-40 and accompanying text.
119. See Ginsburg, supra note 91, at 267.
120. See Campbell, supra note 91, at 361-64.
121. According to then Assistant Attorney General Douglas Ginsburg, the Administration “opposed federal proposals further to restructure or restrict merger and acquisition activity as unnecessary bits of legislation that would intrude into the area of state corporation law. It is our view that mergers perform beneficial functions in the economy and, in the absence of competition problems, should not be inhibited by law.” Ginsburg, supra note 91, at 256.
122. See ARMENTANO, supra note 97, at 1 (stating that, “[c]onglomerate and vertical integration mergers—which rarely harbor any direct threat to restrict market output or reduce consumer welfare—are now of only limited concern to the antitrust authorities”); ROBERT H. BORK, THE ANTITRUST PARADOX 406 (1978); see also Malcom R. Pfunder, Developments in Merger Law and Enforcement 1989-90, 59 ANTITRUST L.J. 319, 324 (1990).
123. Leslie Wayne, Buyouts Altering Face of Corporate America, N.Y. TIMES, Nov. 23, 1985, at 1, col. 1.
124. See Number of Acquisitions in 1986 Shatters Grimm’s 13 Year Record, 52 ANTITRUST & TRADE REG. REP. (BNA) No. 1302, at 269 (Feb. 12, 1987).
125. See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES—1990 534 (1990). The full impact of this figure can be realized when it is com-
merger activity, almost all of the cases were initiated by private parties, and not by the Justice Department. For example, between 1981 and 1985, the Department of Justice challenged only twenty-eight mergers and throughout the entire Reagan Administration, the federal agencies initiated no cases challenging conglomerate or vertical transactions.

While the Justice Department was not involved in preventing mergers, they did intervene on the side of mergers. This intervention came in the form of the filing of amici curiae briefs with the Supreme Court and appellate courts. This approach to reshaping law is not unusual; when an appellate court grants the Department's request to intervene, it is acting in a similar vein as does the Supreme Court when they request the views of the Justice Department to aid them in deciding cases based on antitrust issues. Most commentators agree that if an administration wants to narrow the scope of a law, intervention in private litigation is a route that they must take. This aggressive program of intervention was met by Congress with as much hostility as were the Justice Department's merger and vertical restraint guidelines. The most nefarious example of this can be seen in the case of Monsanto Co. v. Spray-Rite


126. See Flynn, supra note 97, at 1102.

127. See Fox & Sullivan, supra note 90, at 948; Kovacic, supra note 99, at 66; see also Robert Pitofsky, New Definitions of Relevant Market and the Assault on Antitrust, 90 COLUM. L. REV. 1805, 1809 (1990) (noting that "[a]lthough there were roughly six times as many mergers of substantial size in 1987 compared to 1979, there was roughly one-third as much government enforcement"). But see Rule & Meyer, supra note 101, at 256-57 (arguing that the Reagan Administration challenged a substantially fewer percentage of mergers because changing economic conditions and increased clarity within merger guidelines resulted in the filing of fewer anticompetitive mergers).

128. See Ginsburg, supra note 91, at 264. The administration had a policy of only intervening as amici at the appellate level because material issues of fact were settled by that stage in the litigation. Id.

129. The Supreme Court routinely seeks the opinions of those agencies responsible for enforcing different laws. See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965) (suggesting that the Court pays great deference to those charged with enforcement of the law).

130. See Fox & Sullivan, supra note 90, at 354.

131. See Campbell, supra note 91, at 354; Fox & Sullivan, supra note 90, at 951.

132. As a corollary, if the administration wants to expand the law, "it can have this influence by bringing its own cases." Campbell, supra note 91, at 354. But see, e.g., Flynn, supra note 97, at 1095 (commenting that the filing of amici briefs is an improper route for the administration to follow).

133. See Fox & Sullivan, supra note 90, at 951.

134. See supra notes 116-19 and accompanying text.
In Monsanto, the Justice Department filed an amicus brief with the Supreme Court, unsuccessfully urging that the Court overturn the long-established procedure of applying a per se rule of illegality to agreements to maintain resale prices, and replace it with the softened rule of reason test. Congress was so angered by the filing, which went against its recently affirmed view on the subject, that they placed a gag order on the Justice Department appropriations bill. The order prohibited the Department from spending any money on attempting to overturn the per se prohibition on resale price maintenance, and asked the Attorney General to withdraw the vertical restraint guidelines which sought to avoid the per se rule.

Along with this reformulated interpretation of traditional doctrine,

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136. The Supreme Court rejected the Justice Department’s argument in an eight to zero decision. Justice White took no part in the decision of the case. Monsanto 465 U.S. at 753.
137. In the context of an antitrust inquiry, per se illegality has been defined as “certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1957).
140. Id.; see also Congress Takes Affirmative Steps to Attack Vertical Restraint Guidelines, 49 ANTITRUST & TRADE REG. REP. (BNA) No. 1244, at 1019-20 (Dec. 12, 1985). In addition, nineteen Senators and Representatives filed a brief as amicus curiae in the Monsanto case urging the Court to permit Congress to direct national antitrust policy and not allow it to be set by executive decision. See Brief for the Undersigned Senators and Representatives as amicus curiae, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (No. 82-914).

It should be noted that this softened stance against retail price maintenance puts in doubt the Paramount decrees broad prohibitions on the fixing of admission prices. If studios had wished to engage in such practices, it would appear that they might not have met any resistance from the Justice Department.
the Administration introduced a new vocabulary that was designed to perpetuate its ideals. Many of the long standing and commonly understood terms were replaced with new terms and new definitions that reflected the Administration's new policies. Professors Fox and Sullivan explore one of the most glorifying examples, the replacement of "public good" with "consumer welfare." While "public good" was thought to relate solely to the consumer, and was reflected in decreased cost and increased choice, "consumer welfare" was looked at as the sum of both producer and consumer welfare. Thus, if as a result of certain practices, producers benefited to a greater extent than consumers were harmed, "consumer welfare" was increased. So, while the shell of past antitrust laws still existed, the substance of its past application and resulting impact had all but vanished.

This laissez-faire attitude and new application of antitrust doctrine was used by the studios to reshape the motion picture industry. Under the Reagan Administration's policies, the Paramount consent decrees were allowed to sit idle and unenforced. With Reagan in the White House, movie studios could once again "reassemble[e] the vertical integration surrendered in 1948."

The complete resurgence of vertical integration followed a cautious path that culminated in an explosion of purchasing in 1985.
The first attempt at reentry by a major defendant was initiated in 1980 by Loew's Theaters, Inc. ("LTI"). LTI petitioned Judge Palmieri for total relief from its consent decree. LTI wanted permission to enter the motion picture distribution industry. The court did not vacate the original decree, but it did grant LTI limited permission to enter the production and distribution business. This order was subject to a new decree prohibiting it from showing its own pictures, and binding it to the same conduct restrictions in the original decrees. This was the first substantive modification allowing reintegration to one of the original decrees. Although it did no-

quality motion pictures available for exhibition, National General Corporation, subject to the Twentieth Century-Fox decree, was granted temporary permission to enter the production and distribution business on June 24, 1963. This grant was further extended on two later occasions. See United States v. Loew's Inc., 1969 Trade Cas. (CCH) ¶ 72,767 (S.D.N.Y. 1969).

LTI was the successor to the New Theater Company, which was formed when the original Loew's defendant to the Paramount case had to divorce its theater operations from its production and distribution operations.

Judge Palmieri had presided over the decrees since they were handed down by the court. Judge Palmieri had this continuing authority over the defendants because of jurisdictional clauses in the decrees. See, e.g., United States v. Loew's Inc., 1952-53 Trade Cas. (CCH) ¶ 67,228 (S.D.N.Y. 1952) (Loew's Consent Decree, Section III(7)(b)). Furthermore, it is well established that "[a] court that enters an initial antitrust consent decree has the inherent power to modify that decree." John D. Anderson, Note, Modifications of Antitrust Consent Decrees: Over a Double Barrel, 84 Mich. L. Rev. 134 (1985).

Loew's, 1952-53 Trade Cas. (CCH) ¶ 67,228 (S.D.N.Y. 1952) (Loew's Consent Decree).

United States v. Loew's Inc., 1980-1981 Trade Cas. (CCH) ¶ 63,662 (S.D.N.Y. 1980). The court granted the requested relief in the hopes that "[w]ith the entry of Loew's into production and distribution, some addition to the limited number of top box office pictures can be expected." Id. at 77,553.

On July 25, 1974, the decrees had been modified to allow the divorced theater circuits to acquire theaters newly created by or for the defendants without a court finding that they would not result in a restraint of competition. See United States v. Paramount Pictures, Inc., 1974-2 Trade Cas. (CCH) ¶ 75,378 (S.D.N.Y. 1974).

This modification was desired because of a clause in the original decrees that mandated that the defendants petition the court before they acquired any beneficial interest in a theater. This permission would only be granted upon a showing that the acquisition would not unduly restrain competition. See, e.g., United States v. Loew's Inc., 1952-53 Trade Cas. (CCH) ¶ 67,228, at 63,328 (S.D.N.Y. 1952) (Loew's Consent Judgement, Section III(7)(b)).

In the years following Paramount, hundreds of applications to acquire theaters were filed with the court. See generally United States v. Paramount Pictures, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,553 (S.D.N.Y. 1980) (reviewing the history of the courts role in the Paramount case).

Also, in 1979, the Mann Theater Corporation of California ("Mann") petitioned the court for permission to acquire theaters in various domestic markets. Mann had acquired the theater assets of National General Theaters Inc., the theater circuit that had been divorced from Twentieth Century-Fox. The court granted Mann's request for a modification of the Fox decree on February 14, 1980. The modification allowed Mann to acquire theaters on a
ing to diminish the effects of the decrees, it signaled the beginning of the end for the restrictions that had been placed on the motion picture industry forty years prior.

The LTI decision was followed one year later by the purchase of forty-eight percent of the Walter Reade theater chain by Columbia Pictures. Technically this was not a "reentry," because Columbia had never owned theaters in the past. Thus, Columbia had never been barred from the exhibition business. Nevertheless, like other distribution companies, Columbia avoided the exhibition business out of fear of instigating a new round of legal battles with the Justice Department. They had patiently waited for the ideal climate before entering the exhibition business, and the Reagan Administration provided it.

These two initial transactions were followed by two years of cautious observance by the studios. What the studios did not know was that during this period, Assistant Attorney General William Baxter had begun a departmental review of almost all antitrust consent decrees that were over ten years old. The Department was reviewing all decrees that were "either out of date, anticompetitive, or based on theories out of favor with the Reagan Administration." According to Jeffrey I. Zukerman, special assistant to William Baxter, the review would affect most decrees restricting vertical conduct by the defendants; this included the Paramount decrees. After review by the Justice Department, a decision had been reached by the end of 1981 that under the Administration's new pro-merger thinking, the decrees had "outlived their usefulness." The Department on its own volition decided that the safeguards that had been instigated at the suggestion of the Supreme Court were no longer needed.
By 1983, the dam was beginning to crack. CBS, Inc. ("CBS") and Columbia Pictures, together with Home Box Office ("HBO") sought Justice Department approval for a joint venture that would create a new motion picture studio, TriStar Pictures. Approval was sought because of the antitrust questions that arose from the marriage of producer Columbia with exhibitors CBS and HBO. Although such unions were one of the main concerns in the earlier case, the Justice Department investigated the venture and approved the merger. The Department went so far as to find that the creation of this new company would effectuate an increase rather than a decrease in competition within the industry.

The TriStar deal was followed a year later by the Justice Department's providing the still-cautious studios with the green light that they had been waiting for. The Department took the initiative and offered to support the studios if they sued to get back into the theater business. In a press release dated February 4, 1985, the Department announced that they would no longer enforce the Paramount decrees because of changed circumstances in the industry. "Although no studios took up that offer, they undoubtedly saw the new position as a clear signal that the Justice Department would not try to block theater acquisitions." With this support from the Justice Department, all that the studios needed was a successful court challenge seeking complete relief from one of the original restrictive decrees.

This challenge came in 1986 when the newly formed TriStar Pictures purchased Loew's (now LTI) and petitioned the court for total relief from the original and subsequent Loew's decrees. The

164. The legality of the deal was further put into doubt by the financing that HBO had proposed. They offered to help finance the films that TriStar produced in exchange for exclusive pay television rights to the pictures. Exclusive engagement arrangements had been specifically banned by the original decrees. See supra note 79.
165. See Hasson, supra note 163.
166. Yarrow, supra note 155, at 3.
168. Id.
169. Although the Justice Department could issue opinions on the subject, the final decision still rested in the hands of the district court. See supra note 151.
170. TriStar, as a new company, was not bound by the restraints promulgated by the original decrees.
Reagan Justice Department fully supported the merger of these two companies, heeding the cries from the independent theater owners that the "loss of the decrees could jeopardize their continued existence and would also hurt movie-goers." Assistant Attorney General J. Paul McGrath sent a letter to Judge Palmieri suggesting that "it may be appropriate for the court and the parties to consider whether a termination date" should be added to the decrees. Furthermore, the Justice Department stated that it believed that "competition in distribution or exhibition would not be unreasonably restrained, even if TriStar and Loew's dealt exclusively with one another." Succumbing to the pressure of the Justice Department, Judge Palmieri granted this request and vacated the decree.

As a result of the approval of the Loew's and TriStar deal, a "madcap rush to vertical reintegration" began. For example, in August of 1986, Warner Bros. Inc., one of the original Paramount defendants, petitioned the court for total relief from their decree so that they could reenter the exhibition business with the purchase of interests in several theater chains. Although the court at first only granted temporary relief, the appellate court did eventually grant Warner Bros. total relief from the original decree. This left them able to reenter the exhibition business without any of the original safeguards left in place.

(Loew’s Consent Decree).

172. See Tagliabue, supra note 158, at 346.
173. Werner, supra note 161, at 1.
174. Al Delugach, Justice Won't Oppose Theater Ban on Studios; Antitrust Chief Says Industry Isn't Interested in Seeking Change in Court, L.A. TIMES, Feb. 7, 1985, at IV1.
175. See Tagliabue, supra note 158, at 346. This is an amazing statement in light of the strong stance that was taken against exclusivity contracts in the original case.
176. Order of Judge Palmieri, June 18, 1987 (as reported in Tagliabue, supra note 158, at 347).
180. United States v. Loew’s Inc., 705 F. Supp. 878 (S.D.N.Y. 1988). The court allowed Warner to proceed with the purchases but continued to restrict their conduct as a distributor and ordered that they do business with the newly acquired theaters on an arms length basis. Id. at 885. In denying Warner’s petition for total relief, Judge Palmieri found that the motion picture industry is a "concentrated industry in which there has been a recent trend toward vertical integration which appears significant." Id. Judge Palmieri also expressed his fears that there was "a climate of non-compliance with the heart of the consent judgements—that films be licensed theater by theater, solely on the merits and without discrimination." Id.
181. Loew's, 882 F.2d 29 (2d Cir. 1989).
Between 1985 and 1988, movie companies spent more than one billion dollars in the purchasing of independent movie theaters.\textsuperscript{182} The exhibition industry had not seen such a rush to purchase theaters since a similar craze in the 1930s.\textsuperscript{183} Spurred by hopes of bolstering the economy and convinced that large scale vertical mergers were more helpful than harmful, the Reagan Administration’s new policies succeeded in returning the structure of the entire motion picture industry back to the state that it had been in before circuit divorcement and theater divestiture in the 1930s. As the motion picture industry was still a concentrated club that was once again becoming vertically integrated, the natural question to arise was whether the evils that were stamped out by the original decrees would now return in their absence.

III. THE CURRENT STATE OF THE INDUSTRY

It was not long before the victims of the motion picture industry’s monopolistic practices, whose protection the original decrees were supposed to ensure, found themselves struggling to survive. As was the case fifty years earlier, while theater acquisitions by the studios grew, so did market domination by the circuits.\textsuperscript{184} The power that these circuits obtained placed a tight squeeze on independent theater owners,\textsuperscript{185} causing the number of non-affiliated\textsuperscript{186} circuits and theaters to decline dramatically. According to the latest statistics, of the more than 24,000 movie screens nationally, affiliated exhibitors control about eleven percent of the screens.\textsuperscript{187} Of the top ten theater circuits in the nation, five, including the two largest, are

\begin{itemize}
\item \textsuperscript{182} See Michael Stremfel, Movie Studios Direct More than $1 Billion into Theater Chains, L.A. BUS. J., Sep. 19, 1988, at 1. During this period, four of the major studios Matsushita (parent company of Universal), Paramount, Sony, and Warner Brothers made significant entries into the exhibition business; see also STANDARD & POOR’S, Industry Surveys—Leisure Time Basic Analysis 24 (Mar. 12, 1992).
\item \textsuperscript{183} See Tagliabue, supra note 158, at 342-43.
\item \textsuperscript{184} Id. at 343; see also DONAHUE, supra note 88, at 107.
\item \textsuperscript{185} See Daniel M. Kimmel, Al Says Nix to Switch in Flix, BOSTON BUS. J., Feb. 1, 1988, at 1.
\item \textsuperscript{186} “An affiliated exhibitor is a firm or corporation engaged in the exhibition of motion pictures which is owned, operated or controlled, directly or indirectly, by a producer or distributor of motion picture films.” United States v. Balaban, 26 F. Supp. 491, 495 (N.D. Ill. 1939).
\item \textsuperscript{187} See STANDARD & POOR’S, supra note 182, at 24. At the time the Paramount case was brought, the major defendants controlled 17.3% of the nation’s most lucrative theaters. See supra note 58 and accompanying text.
\end{itemize}
affiliated with one of the major distributors. On Long Island, for example, since Ronald Reagan took over the Presidency in 1980, the number of independently owned and operated theaters has dropped from 114 to only 20 today.

For the independent exhibitors and producers, one of the most terrifying aspects of this resurgence was the reasoning that the major studios extolled for wanting to reenter the exhibition business. Comments by analysts and the studios alike seemed to reflect a desire to bring about similar controls as had existed in the industry in the 1930s. For example, Christopher Pearce, the chief operating officer of Cannon Pictures, was quoted as saying, "If you make films, it is rather smart to have a place to show them." This statement is in clear opposition to the clauses in the consent decrees that mandated that motion pictures be distributed theater by theater and without discrimination. Furthermore, by owning screens, the studios could delay video releases until they drained all possible exhibition profits, and theater ownership would guarantee that a below-average film would get a "decent screen even when the box office [was] marginal." Although these philosophies raise issues and questions that are similar to those that eventually brought about the original decrees, the Justice Department did not react. Even when Warner Brothers extolled what could be considered blatant anti-competitive attitudes while seeking to have their original decree terminated, and in the

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188. As of March of 1992, the largest circuit was United Artists and the second largest was Cineplex Odeon, owned by Matsushita, the parent company of distributor Universal. At that time, the sixth largest circuit, Cinerama, was owned by Panamount and Warner Brothers. Seventh on the list was Loew's, owned by Columbia's parent, Sony, and tenth was Famous Players, owned by Paramount. See STANDARD & POOR'S, supra note 182, at 24.


190. Geraldine Fabrikant, Cannon to Buy Chain of Theaters, N.Y. TIMES, May 8, 1986, at D4, col. 6. It should be noted that the desire to have guaranteed access to screens to exhibit their films was a predominant reason that the studios began their theater purchasing campaign earlier in the century. See supra section I.

191. See supra note 79 and accompanying text.


193. See Gilbert, supra note 177. This practice is reminiscent of the banned practice of block booking which had provided access to screens for undesirable films.

194. See Kimmel, supra note 185.

195. See supra note 78 and accompanying text. Warner argued that they needed to be able to own theaters to effectively compete with the other distributors who were not bound by decrees and who were reentering the exhibition business. United States v. Loew's Inc. 705 F. Supp. 878, 884-85 (S.D.N.Y. 1988).
face of opposition by the National Association of Theater Owners, the Justice Department continued to support their petition to reenter the exhibition business.

With the studios firmly entrenching themselves in the motion picture exhibition business, they were quickly able to effectuate a remarkable decline in independent theater ownership by reusing, in different forms, many of the trade practices that had been declared illegal in the 1930s. For example, although divestiture, and the mandate that motion pictures be distributed theater-by-theater solely on the merits and without discrimination, had been enacted to help ensure that independent exhibitors would regain some bargaining power against the circuits; the reintegration, as supported by the Reagan Administration, virtually removed these safeguards altogether. As affiliated and nonaffiliated circuits continued to grow in size and with the deep pockets of these large circuits against them, independent theaters were eliminated from the competition to obtain first run motion pictures. While there is no evidence of the use of collusive or discriminatory behavior by distributors or affiliated circuits, the market power of the large affiliates that had worried the Paramount court has been allowed to resurface.

Although the court found that Warner had legitimate concerns and business reasons for wanting to reenter the exhibition business, this is a less than compelling argument. What is puzzling about this argument is that the distributors were not supposed to be able to gain a competitive advantage through theater ownership. Without such advantage, how could Warner Brothers be disadvantaged?

196. United States v. Loew's Inc., 882 F.2d 29, 32 n.3 (2d Cir. 1989).
197. See id. at 30.
199. See CONANT, supra note 7, at 74.
200. See DONAHUE, supra note 88, at 108; Harris, supra note 192.
201. In the past, circuits used their bargaining power to destroy their competition by obtaining exclusive privileges from distributors which left non-circuit theaters without enough product to fill their screens. These practices were employed in markets in which circuits owned theaters and even in those in which they did not. See United States v. Griffith, 334 U.S. 100 (1948).
202. In determining that a system of competitive bidding involves the judiciary too deeply in the day to day operations of the industry, the court recognized that:

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

Independent exhibitors have also been injured by the practice of authorizing subsequent repeat runs of a picture in the same theater that had the first run. This practice enabled a circuit theater to obtain for itself all of the exhibition value of a movie. With the circuits building many new multi-screen theaters, and revamping many old single screen theaters into such giants, they were permitted to show a motion picture in subsequent runs on smaller screens in the same theater. Once again, the market power of the circuits left independent exhibitors without any quality films to show on their screens.

In an attempt at rectifying the imbalance of bargaining power that distributors have maintained over exhibitors in the licensing of motion pictures, twenty-four states have at some time passed motion picture licensing laws. These statutes are predominantly concerned with the practice of blind bidding, and uniformly regulate or ban the practice. Most of the statutes also regulate the bidding proce-

203. See CONANT, supra note 7, at 83-88; DONAHUE supra note 88, at 107.
204. See Harris, supra note 192.
205. See Werner, supra note 161.
206. Motion picture licensing usually occurs under a competitive bidding, competitive or noncompetitive negotiation, or track system. With competitive bidding, distributors send exhibitors solicitation letters informing the exhibitors of the release of new films. These letters contain a minimum amount of information about the film, possibly the stars and a brief plot synopsis, and suggested terms for the licensing of the film. If the distributor is unhappy with the bids that they receive, they will either solicit new bids or negotiate directly with the exhibitors. Lastly, the track system is sometimes used when there is an established relationship between an exhibitor and a distributor. See United States v. Capitol Serv., Inc., 756 F. Supp. 502, 503-04 (7th Cir. 1985).
dure for licensing motion pictures, and prohibit the use of advances and guarantees. Quite obviously, motion picture distributors have not been happy with these statutes and have brought many court cases challenging their constitutionality under the Commerce Clause, Supremacy Clause, and the First Amendment. Despite these challenges, courts have upheld the validity of these laws. Unfortunately, these laws do nothing to protect the independent and non-circuit theater owner from the bargaining power of the affiliated and circuit exhibitors.

Exhibitors themselves have also attempted to obtain some bargaining strength against the distributors with the use of "split agreements." Split agreements are the practice whereby exhibitors in a given market split the rights to negotiate for the rental of upcoming films.

Split agreements ensure that each split member has an initial right to bid or opportunity to negotiate for certain films without competition from other split members. Because other split members agree not to submit bids for films that have not been designated to them, initially the split designee faces competition only from exhibitors who are not members of the split.

As with state film licensing laws, distributors desiring to maintain their bargaining strength have challenged the legality of such agreements under the Sherman Act. Although in many cases courts had been unwilling to impede their use, in most cases,

208. Advances are funds paid prior to the exhibition of a picture as security for the performance of the license agreement or to be applied to payments under such an agreement. See Grant, supra note 21, at 368.

209. A guarantee is a minimum dollar amount which the exhibitor guarantees a distributor will receive for granting the license to exhibit a particular film. See Grant, supra note 21, at 368.


211. For a detailed analysis of the constitutional arguments for and against these statutes, see Mary Elizabeth Kilgannon, Note, Motion Picture Licensing Acts: An Analysis of the Constitutionality of their Provisions, 51 FORDHAM L. REV. 293 (1982).

212. See supra note 210.


214. See id. at 160-61, 166-67.

courts found them to be illegal restraints of trade.16 Either way, split agreements do nothing to balance bargaining power in favor of small independent theaters because these exhibitors are excluded from the agreements217 and are left in direct competition with the larger circuits.218

The Reagan Administration's new outlook on antitrust law has also affected independent producers. The illegal practices of the Paramount defendants were, in part, designed to keep independent producers from having access to screens upon which to exhibit their films.219 They were able accomplish this by controlling the distribution arm of the industry and engaging in practices such as block booking. So even if producers could get the financing to make a motion picture, they could not get the picture shown in theaters without the aid of the studios. As predicted,220 this situation has resurfaced today. The "distribution arm of the motion picture industry has become increasingly concentrated in several major companies."221

By the end of the 1980s, the major studios took in "more then 90 cents of every dollar earned from the distribution of movies."222 This figure has risen since then. In 1991, independents produced roughly 275 movies and distributed 286 movies, with the major studios producing 133 movies and distributing 147 movies.223

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216. See United States v. Capital Serv., Inc., 568 F. Supp. 134 (E.D. Wis. 1983) (criticizing the Greenbrier decision and holding that these agreements are a per se violation of antitrust law); see also DONAHUE, supra note 88, at 126.
217. The court in Capitol Serv., 568 F. Supp. at 142, found that the defendants had formed the split agreements "for the purpose of eliminating competition among themselves."
219. See supra section I.
220. See Arnold, supra note 147.
221. Kilgannon, supra note 211, at 293 (emphasis added).
223. These statistics were computed from charts printed in VARIETY, Dec. 23, 1991 at
these figures seem to indicate that the independent producers have been able to grab a large share of the market, in reality, the movies produced by the seven major studios took in 91% of the total domestic box office receipts. So, while independent producers have not been prevented from making films, the control over distribution has given the major studios control over almost all of the revenues that American films generate at the box office.

CONCLUSION

It took only two terms in the White House for President Reagan to bring about the return of the anti-competitive aura of the 1930s to the motion picture industry. Eliminated are the safeguards that were once designed to open up a closed industry and protect its small independent players. The effect that these reforms are having on consumers and the industry can already be seen and experienced. For example, even though exhibition profits are continually rising, this is solely attributable to increased ticket prices, not increased audiences. From 1975 to 1991, admissions decreased an average of 0.3% per year while box office receipts increased an average of 5.3% per year. At a time when distributors and exhibitors are continually losing audiences to pay cable and home video, it would seem prudent to ensure the production of higher quality films and provide incentives to audiences with lower priced admissions. Unfortunately, as prices have been going up, and box office receipts are accounting for less and less of the studio revenue, product has been declining in quality.

12-14.

224. See STANDARD & POOR'S, supra note 181, at 21.

225. The distribution industry remained concentrated after the Paramount case but the move back into exhibition once again helped those in control secure their power. See generally Whitney, supra note 22, at 190-91 (explaining how the majors didn't lose significant power after the Paramount case).


227. See DONAHUE, supra note 88, at 158-69; see also Alex B. Block, Garth Drabinsky's Pleasure Domes, FORBES, June 2, 1986, at 90, 92; supra note 2.

228. See GOLDMAN SACHS, supra note 226, at 7. One reason for this decline is the increased competition for consumer entertainment dollars that has resulted from "an unprecedented rise in the number of outlets for public entertainment." Boadwin, supra note 2, at 1211.

229. See GOLDMAN SACHS, supra note 226, at 9; see also United States v. Loew's Inc., 1980-1981 Trade Cas. (CCH) ¶ 63,662 (1980) (granting LTI's petition to reenter the production and distribution business in the hopes of increasing the amount of quality first run
As studios use their vast revenues to reenter the exhibition business, consumers should be getting newer and better theaters designed to enhance their viewing experience and drive them to the movies. Instead what we have are more profitable theaters. Any theater goer can readily attest to the smaller screens and larger prices that have come with the large multiplex cinemas that have replaced the “Mom and Pop” independent theaters. Also, with the major studios in complete control of what we see, we can anticipate more sequels of moderately entertaining motion pictures that usually steal audience dollars and provide little of the entertainment of the original film. If the studios wish to recapture lost revenue, there should be more emphasis placed on producing higher quality films that would entice audiences to come to theaters and would eliminate the need for constantly increasing admission prices and large multi-screen theaters to enhance profits.

The fate of independent production, distribution, and exhibition appears to be sealed by the devouring of ninety percent of the total box office income by the major studios. As for the future, the outlook can be summed up by the words of Frank Mancuso, then Chairman of Paramount Pictures: “[T]he studios want increased control over not just theaters but pay TV, home video, and broadcasting as well.”230 Hopefully, as control over the entire entertainment media becomes more concentrated, attention will once again be focused on the consumer, for it is the consumer that must support the industry.

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