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# Monopolies in the Motion Picture Industry

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# NOTES

## MONOPOLIES IN THE MOTION PICTURE INDUSTRY

### INTRODUCTION

The free enterprise system, which is the basis and foundation of our American economy, survives and is strengthened by the ingenuity and the initiative of the individual. As long as the individual is allowed to remain free and unrestrained in his quest for economic security, the economy itself will prosper and flourish. The economic history of this country has witnessed a steady growth and trend toward concentration and combination in the field of business. Though this trend has produced a more productive society, for out of it came our mass production, our efficiency, and even our factory system, yet we see so vividly from our history, that unless this trend is guided then it will destroy itself and the very purpose and reason for its creation. The Federal Government has played the principal role in the guidance of this trend through legislation with perhaps the key words being "a free and competitive society".

This concentration and combination in business, more commonly called monopoly, is a vast and perplexing problem affecting every scope of our economic system. This note is an attempt to deal with merely one phase of that problem, namely, monopolies in the motion picture industry.

### WHAT IS A MONOPOLY

"The courts have found great difficulty in formulating an authoritative definition of the term 'monopoly'. Originally the term necessarily implied a grant from the sovereign power. In time, however, the term acquired a much broader significance, and it is no longer confined to a grant of privileges, but is understood to include a condition produced by the acts of individuals; and its dominant thought now is the suppression of competition of the unification of interest or management, or it may be through agreement and concert of action."[1] The courts, in more specific instances, have stated that a combination effectively excluding or attempting to exclude outsiders from a business altogether is a "monopoly" and is unlawful;[2] but

1. 58 C. J. S. 954.
2. Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. § 2 (1946); American Tobacco Co. v. U. S., 147 F. 2d 93 (6th Cir. 1945), *certiorari denied*, 324 U. S. 836 (1945); Liggett & Myers Tobacco Co. v. U. S., 324 U. S. 836 (1945), and R. J. Reynolds Tobacco Co. v. U. S., 325 U. S. 856 (1945), *rehearing denied*, 324 U. S. 891 (1945); *Aff'd.* 328 U. S. 781 (1945).

a restraint of trade involving the elimination of a competitor is to be deemed reasonable or unreasonable on the basis of matters affecting the trade itself and not on the relative cost of doing business of the persons engaged in competition.[3] The material consideration in ascertaining the existence of a monopoly is not whether the prices are raised or that competition is actually excluded, but whether the power exists to raise prices or to exclude competition when it is desired to do so.[4] The courts further recognize that monopolistic power is usually displayed by size and vertical integration[5] and take these basic signs into consideration. Although a "conspiracy to monopolize",[6] within the inhibition of the Sherman Anti-Trust Act, is a conspiracy to control the industry in which the defendant is engaged, by means which will prevent others from engaging in fair competition with him,[7] it should be remembered that purpose is never an excuse in cases of alleged conspiracy in restraint of trade, but it is the intent of the accused or the necessary result of his conduct that is important.[8] The purpose of the Sherman Anti-Trust Act is not solely to suppress combinations which restrain competition[9] and a prohibition against infliction of a particular type of public injury, but is also a limitation of rights which may be pushed to evil consequences and therefore restrained.[10]

## HISTORY OF MONOPOLY IN THE MOTION PICTURE INDUSTRY

The application of the Anti-Trust Acts to the motion picture industry has been long continued and erratic. This uncertainty as to the position of the industry within the framework of the Acts has been most noticeable during the past 12 years. In 1938, the Federal

3. Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. § 1 *et seq.* (1946); American Federation of Tobacco Growers v. Neal, 183 Fed. 2d 869 (4th Cir. 1950).

4. Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. § 1-7 (1946); U. S. v. Aluminum Co. of America, 91 F. Supp. 333 (D. C. N. Y. 1950).

5. *Ibid.* (Vertical integration, which is simply a particular of size, is a relevant consideration in ascertaining monopoly power under the Sherman Act. Vertical integration in an industry, without more, does not violate the Sherman Act, and the extent of permissible integration must be governed, as other factors in Sherman Act violations, by other circumstances of individual cases.)

6. U. S. v. Waltham Watch Co., 47 F. Supp. 524 (D. C. N. Y. 1943). A "conspiracy in restraint of trade" differs from a "contract in restraint of trade" in that a "conspiracy" although constituted by an agreement is the result of the agreement rather than the agreement itself.

7. U. S. v. National Retail Lumber Dealers Ass'n., 40 F. Supp. 488 (D. C. Colo. 1941).

8. U. S v. Gold, 115 F. 2d 236 (2nd Cir. 1940).

9. Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. §§ 31-7 (1946); Parker v. Brown, 317 U. S. 341 (1943).

10. Sherman Anti-Trust Act, 26 STAT. 209 (1890) § 1, *as amended,* 15 U. S. C. § 1 (1946); Ethyl Gasoline Corp. v. U. S., 309 U. S. 436 (1940).

Government brought a suit against the major producer-distributors, the main purpose of which was to divest the defendants of their exhibition houses. In 1940, the Government acquiesced in a consent decree under which the industry was given three years in which to govern itself.[11] Currently, the Government is once again attempting to divest the major motion picture companies of their exhibition interests.[12] Through the early years of monopolistic control, a definite and settled pattern developed. The production, distribution, and exhibition of motion pictures was dominated by eight companies, five of which either owned or were affiliated with circuits of exhibition houses. As vertical integration progressed, there was combination at the exhibitor level into the circuits of theatres not controlled by these majors.[13] Although the great majority of the theatres remained independent, the vertical integration and horizontal combination, reinforced by unique trade practices, resulted in a steady deterioration of the position of the independent exhibitor. There finally emerged three distinct forms of monopolistic control in the motion picture industry: *the first* being the combination set up by the distributors and producers, i. e., those stemming from the motion picture industry itself; *the second* being the local combinations created by the exhibitors in cities and sometimes extending to larger areas; and *the third* classification being a combination of the first two.

In the early 1920's, legislation aimed to discourage this concentration in the industry was enacted; but, although a continual stream of state and federal anti-trust suits by private parties[14] and by the Federal Government[15] suggested the extent to which an anti-competitive pattern had been established in the industry, the suits did not challenge the basic structure of the industry. These suits were directed against specific trade abuses, but were only partially successful, and did not attack the integration of production and exhibition which was the keystone of the industry's structure.[16] The Govern-

11. C. C. H. Trade Reg. Serv. (8th ed., 1940) § 25,558.
12. U. S. v. Paramount Pictures, Civil Action No. 87-273 (D. C. N. Y. 1938).
13. U. S. v. Crescent Amusement Co., 323 U. S. 173 (1945); U. S. v. Schine Chain Theatres, C. C. H. Trade Reg. Serv. (9th ed., 1945) § 57,413 (D. C. N. Y., 1945).
14. Love v. Kozy Theatre Co., 193 Ky. 336, 236 S. W. 243 (1921). Specific performance of lease refused on ground that directors of local circuit were using plaintiff's theatre to monopolize exhibitions. Peekskill Theatre, Inc. v. Advance Theatrical Co. of N. Y., 206 App. Div. 138, 200 N. Y. Supp. 726 (1923). Injunction granted against exhibitors restraining them from coercing distributors into boycotting the plaintiff.
15. U. S. v. Fox Theatres Corp., C. C. H. Trade Reg. Serv. (Supp. Vol. III, (1931) §§ 3125, 3127.
16. U. S. v. Motion Picture Patents Co., 225 Fed. 800 (D. C. Pa. 1915), *app. dismissed*, 247 U. S. 524 (1918). This was the only suit in which the

ment, realizing that it must attack the roots of the problem, returned to the position it had taken in 1938, i. e., that there must be a divestiture of exhibition houses from the producer-distributor owners.

## WHAT CONSTITUTES A MONOPOLY IN THE MOTION PICTURE INDUSTRY

Monopolies are defined by the courts and authorities in general and vague terms, but to determine exactly what is and what is not a monopoly, one must resort to the particular circumstances of each individual case.

An analysis of monopolies in each of the three classifications previously mentioned clearly reveals some of the problems and situations confronting the courts. The first of these classifications is that of a combination by the distributors and producers of motion pictures. Generally, the business involving the distribution of motion picture films and the transportation and delivery of such films across state lines, is interstate commerce and subject to the federal anti-trust statutes.[17] Combinations and contracts tending substantially to create monopoly and restrict competition in the motion picture industry are in violation of those anti-trust statutes;[18] but where a combination or agreement is lacking, the fact that the business method practiced by a motion picture film distributor tends to exclude other independent producers, does not establish a violation of the statutes.[19] The courts have unanimously held that where interstate distributors of motion picture films agree among themselves to impose certain restrictions on "subsequent run exhibitors", these distributors are guilty of conspiring in the unlawful restraint of interstate commerce and such "conspiracy" will be enjoined. It is further held that where a distributor knows that such concerted action is contemplated and gives his adherence to the scheme and participates therein, he is equally guilty of unlawfully conspiring to restrain interstate commerce, since an actual agreement for imposition of the restrictions is not an essential prerequisite.[20]

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Government secured a drastic alteration of the structure of the industry. Following the dissolution of the patent monopoly, the copyright became the basis of the restrictions placed upon the right to exhibit films.

17. U. S. v. Crescent Amusement Co., 323 U. S. 173 (1944); *rehearing denied*, 323 U. S. 818 (1945); Binderup v. Pathe Exchange, 263 U. S. 291 (1923); White Bear Theatre Corporation v. State Theatre Corporation, 129 F. 2d 600 (8th Cir. 1942); U. S. v. Schine Chain Theatres, 31 F. Supp. 270 (D. C. N. Y. 1940).

18. U. S. v. Schine Chain Theatres, *supra* note, 17.

19. Federal Trade Commission v. Paramount Famous Lasky Corp., 57 F. 2d 152 (2nd Cir. 1932).

20. Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. § 1 (1946). Interstate Circuit v. U. S., 306 U. S. 208 (1939).

Although the courts may seem to enforce the anti-trust statutes arbitrarily at times, they have not interfered with the distributor's right to select his customers and to sell to them on such terms as he sees fit. An exhibitor does not have the absolute right to demand of a distributor the privilege to exhibit his films;[21] but any combination of the major distributors of motion picture films to impose common restrictions on the exhibition of such films is a violation of the federal anti-trust laws.[22]

The second classification is the restraint of trade induced by combinations of exhibitors. Although motion picture exhibitors may organize and combine for the reasonable promotion of their economic activities without violating the federal anti-trust statutes, as in the case of a co-operative of exhibitors for the purpose of purchasing films, yet the courts hold that the activities of such an organization are illegal where it uses its economic power to prevent distributors from doing business with nonmembers except on restrictive terms or where its activities are designed to restrict competition and create a monopoly.[23]

The courts have more specifically held that an agreement by a combination of exhibitors not to deal with a certain film distributor until better terms are offered, or to urge the public not to patronize theatres doing business with such distributors, is a violation of the anti-trust statute.[24] Furthermore, a combination of exhibitors to drive their competitors out of business and establish a monopoly by their combined purchasing power to compel distributors to restrict their dealings with competitors, is also a violation.[25] Even an operating agreement between individually owned theatres, normally in competition with each other, to operate as a unit and to divide profits in accordance with a prearranged formula is considered to be a monopoly.[26] However, a theatre circuit may so utilize its efforts as to illegally stifle competition or monopolize theatre business in different locations, but since motive is an essential element, any one of

21. William Goldman Theatres v. Loew's Inc., 150 F. 2d 738 (3rd Cir. 1945); Westway Theatre v. Twentieth Century-Fox Film Corp., 113 F. 2d 932 (4th Cir. 1940); Mid-West Theatres Co. v. Co-operative Theatres of Mich., 43 F. Supp. 216 (D. C. Mich. 1941).
22. Interstate Circuit v. U. S., 306 U. S. 208 (1939).
23. U. S. v. First Nat. Pictures Inc., 282 U. S. 44 (1930).
24. Paramount Pictures v. United Motion Picture Theatre Owners of Eastern Penn., Southern N. J. & Del., 93 F. 2d 714 (3rd Cir. 1938).
25. Sherman Anti-Trust Act, 26 STAT. 209 (1890); §§ 1, 2, 15 U. S. C. §§ 1, 2, (1946); U. S. v. Crescent Amusement Co., 323 U. S. 173 (1944), *rehearing denied* 323 U. S. 818 (1945).
26. U. S. v. Paramount Pictures, 306 U. S. 208 (1939).

such efforts, disassociated from any other, would not violate the Sherman Act.[27]

The third and last classification is a combination of the distributors and the exhibitors of the film industry for mutual benefit. Such a combination for the purpose of fixing prices for admission to an exhibition of a motion picture is a violation of the federal statute *per se,* as in the supplying of films by a distributor to exhibitors under an agreement whereby minimum admission prices are fixed by the distributor.[28] However, the courts seem to feel that a mere agreement for the purchase of "first run" motion pictures and reasonable clearances does not violate the Sherman Act, since the charge of a "conspiracy" contemplates a combination of two or more persons by some concerted action to accomplish an unlawful purpose, and "monopolization" contemplates acts to monopolize or control trade or commerce between states to exclusion and disadvantage of others.[29] Therefore, the practice of giving clearance or protection in licensing the exhibition of a film, i. e., contracting that the film will not be released for exhibition to a competing theatre until a specified number of days after its exhibition by the licensee, is a reasonable restraint of trade and is not considered a violation of the statute *per se,*[30] provided the clearance provisions resulted from negotiations made separately between individual exhibitors and distributors in free and open competition with other exhibitors and distributors. However, where the major distributors of the motion picture industry act in concert in the formation and application of a uniform pattern of clearance for the theatres to which they license their films, the anti-trust act is violated.[31]

Consequently, the courts have ruled that distributors have the legal right to contract for the exhibition of their films by exhibitors, provided it does not exclude their right to contract with other exhibitors, and such a contract, which is the result of a common understanding, is illegal.[32]

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27. Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2 (1946); U. S. v. Schine Chain Theatres, 63 F. Supp. 229 (D. C. N. Y. 1946), *appeal dismissed* 329 U. S. 686 (1946), and 329 U. S. 686 (1946), *vacated on rehearing* 329 U. S. 817 (1946), *affirmed in part and reversed in part* 334 U. S. 110 (1948), *petition denied* 334 U. S. 831 (1948).

28. U. S. v. Paramount Pictures, 66 F. Supp. 323 (D. C. N. Y. 1939); Interstate Circuit v. U. S., 306 U. S. 208 (1939).

29. See note 27, *supra.*

30. Gary Theatre Co. v. Columbia Pictures Corp., 120 F. 2d 891 (7th Cir. 1941); U. S. v. Paramount Pictures, 66 F. Supp. 323 (D. C. N. Y. 1939); *reversed in part on other grounds* 306 U. S. 20 (1939); Mid-West Theatres Co. v. Co-operative Theatres of Mich., 43 F. Supp. 216 (D. C. Mich. 1941).

31. See note 28, *supra.*

32. U. S. v. Interstate Circuit, 20 F. Supp. 686 (D. C. Tex. 1937). *Set aside* Interstate Circuit v. U. S., 304 U. S. 55 (1937).

Thus in analyzing the three circumstances in which monopolies may arise in the motion picture industry, it seems apparent from the cases that Congress intended, by the anti-trust acts, to prevent all combinations and conspiracies, whether composed of employees, employers, producers, users, or consumers, from unreasonably restraining free flow of interstate commerce.[33] Good motives and intentions or a person's desire to have his own or another person's business prosper are no defense to actions brought for the violation of the anti-trust laws,[34] for they are not the criteria of liability in anti-trust cases,[35] since the interest of the public in the preservation of competition is the primary consideration.[36]

## EVIDENCE

Where the anti-trust statutes are violated, either civil or criminal proceedings may be instituted against the defendant for such violations. In civil cases the general rules of evidence are applicable as to presumptions, burden of proof, admissibility and the weight and sufficiency of evidence, in actions to recover damages for injuries resulting from unlawful combinations in restraint of trade or creating or tending to create a monoply, or from violations of anti-trust laws. The courts generally hold that the "jury are required to base their verdict on a preponderance of all the competent evidence",[37] and that the plaintiff has the burden of proving all the facts essential to the establishment of his cause of action. It has been stated by one court that in determining applicability of the Sherman Act in cases of partial or local control, the illegal purpose may be proved only by what has been done or by direct evidence of purpose of combination, and not by what might have been done.[38] Where the plaintiff's proof supports an inference of concerted action, the burden rests on the defendants to go forward with the evidence to rebut such inference.[39] Thus, the plaintiff must show acts, contracts, or combinations unlawful under the statutes;[40] and in addition that some actual damages,[41] susceptible of expression in figures,[42] have accrued

33. See note 24, *supra.*
34. See note 32, *supra.*
35. Leader Theatre Corp. v. Randforce Amusement Corp., 186 Misc. 280, 58 N. Y. S. 2d 304 (1945).
36. See note 23, *supra.*
37. Bigelow v. R. K. O. Radio Pictures, 327 U. S. 251 (1946), *rehearing denied* 327 U. S. 817 (1946).
38. William Goldman Theatres v. Loew's, Inc., 54 F. Supp. 1011, (D. C. Pa. 1944), *reversed* 150 F. 2d 738 (3rd Cir. 1945).
39. *Ibid.*
40. Momand v. Universal Film Exch., 72 F. Supp. 469 (D. C. Mass. 1947).
41. Lewis v. Archbell, 199 N. C. 205, 154 S. E. 11 (1930).
42. Package Closure Corp. v. Sealright Co., 4 F. R. D. 114 (D. C. N. Y. 1943).

to his business or property; and that such damages were proximately caused by the alleged violations.[43] In the absence of proof as to the amount of damages suffered, such damages being the proximate result of the defendant's acts pursuant to an illegal system of film release, plaintiffs, motion picture exhibitors, are not entitled to recover treble damages under the Sherman and Clayton Acts.[44] It has been further held that damages — such as loss of profit in new business venture, or loss of money invested in the enterprise, including sums owed for operational expenses and damages by reason of loss of leases and rights thereunder — cannot be proved by evidence of the operational records of the previous owner, but that may become a question for the jury.[45] In an action based on discriminatory operation of a film release system, a comparison of the exhibitor's receipts before and after the unlawful system impinging on his business affords sufficient basis for the jury's computation of damages, where the wrongful system prevents exhibitors from making any further precise proof of the amount of damages.[46]

In criminal prosecutions for the violation of the anti-trust statutes the rules generally applicable in such actions apply as to the presumptions, burden of proof, and the interpretations of and inferences to be drawn from the evidence, and the weight and sufficiency of such evidence must be proved, as in all criminal suits, beyond a reasonable doubt.

## PLEADING

In actions in the state courts, the complaint must allege facts sufficient to constitute a cause of action under the statute invoked. Thus it is not sufficient merely to allege the existence of the monopoly, or merely to repeat the words of the statute, or to recite mere conclusions of the pleader, but the plaintiff must allege facts showing the agreement, plan or scheme which the defendants have adopted, the several acts performed by them, the unlawfulness of their conduct, and the resulting injury to himself or his business.[47]

Actions in the federal courts are governed by the Federal Rules

43. Quittner v. Motion Picture Producers & Distributors of America, 50 F. 2d 266 (D. C. N. Y. 1931).

44. Bigelow v. R. K. O. Radio Pictures, 150 F. 2d 877 (7th Cir. 1945), *reversed on other grounds, 327* U. S. 251 (1946), *rehearing denied 327* U. S. 817 (1946); William Goldman Theatres v. Loew's Inc., 69 F. Supp. 103 (D. C. Pa. 1945).

45. See note 37, *supra.*

46. Quemos Theatre Co v. Warner Bros. Pictures, 35 F. Supp. 949 (D. C. N. J. 1940).

47. Foster v. Shubert Holding Co., 316 Mass. 470, 55 N. E. 2d 772 (1944).

of Civil Procedure adopted in 1948. Rule No. 8(a) states that "a pleading which sets forth a claim for relief, whether an original claim, . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled". These rules are the subject of a great deal of controversy, but the interpretation generally given them is similar to that given to actions brought in the state courts. It has been held by some courts that a motion for a more definite statement as to names of theatres and exhibitors involved would be allowed, but that a motion for a bill of particulars as to acts constituting conspiracy and monoply would be denied, where conduct charged as constituting such acts was sufficiently set forth in the complaint to enable defendants to answer and prepare for trial.[48] Other courts have held that the plaintiff was required clearly to inform the defendants of wrongful acts with which they were charged, with sufficient definiteness to enable the defendants to determine any admissions or denials that should be incorporated in a pleading, if an answer should be interposed, or to proceed by motion in the event the defendants should seek to challenge the sufficiency of allegations leveled at it. This interpretation is correct from the stand point of fairness to the parties concerned. While the courts may not be in agreement as to the interpretation of the previously mentioned section of the Rules of Civil Procedure, they do seem to agree on the question of the sufficiency of a complaint, in that the Sherman Anti-Trust Act and the Clayton Act are independent enactments and violations of either constitute a separate offense which should be pleaded by separate paragraphs so that each defendant would be clearly informed of the statute or statutes which it is claimed to have violated.[49]

## Damages

The damages provided for under the federal anti-trust laws are both punitive and compensatory. The amount of compensatory damages is not fixed by statute, but is unliquidated, and is determined by

48. Rules of Civil Procedure for District Courts, rule 12(e), 28 U. S. C., following section 723c; U. S. v. Schine Chain Theatres, 1 F. R. D. 205 (D. C. N. Y. 1940).

49. Hennepin Theatre Corp. v. Paramount Pictures, 1 F. R. D. 621 (D. C. Minn. 1941).

the pecuniary loss to the plaintiff's business or property[50] resulting proximately from the conspiracy or combination.[51] Only actual damages which can be liquidated and not those purely speculative, remote, uncertain, or conjectural, are recoverable as compensatory damages. Punitive damages cannot be recovered unless a case for compensatory damages is first made, and once these have been determined, the plaintiff, under the section providing for treble damages, shall automatically be entitled to three times such amount, neither the jury nor the court having any discretion in the matter. The verdict should represent actual damages sustained, and the amount of the verdict must be trebled so that two-thirds of the judgment will be a penalty;[52] but, if no specific damages were shown by an established combination, at least nominal damages would accrue to the plaintiff as well as injunctive relief sought.[53] An injunction may be properly issued only to prevent a continuance or recurrence of the unlawful practices and may not be issued as a penalty or punishment for a past violation of the Sherman Anti-Trust Act.[54]

## CONCLUSION

We thus see from this discussion that there exists a conflict between the objectives of the anti-trust laws and the pattern established in the motion picture industry over the past years. These anti-trust laws, which the federal and state governments have passed, are for the purpose of guiding our economy so that there will be a maximum benefit for a maximum number of people, rather than an economy of "the survival of the fittest". Although uncertainty and confusion still may be found in the Government's approach, it appears, at last, that the Department of Justice may accept as its standard the words of Mr. Justice Douglas in the *Crescent* case: "It is not for us . . . to pick and choose between competing business and economic theories in applying . . . (the Sherman Act). Congress has made that choice. It has declared that the rule of trade and commerce shall be competition, not combination".[55]

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50. See note 38, *supra.*
51. See note 40, *supra.*
52. See note 37, *supra.*
53. United Exhibitors v. Twentieth Century Fox Film Distribution Corp., 31 F. Supp. 316 (D. C. Pa. 1940).
54. U. S. v. Bausch & Lomb Optical Co., 3 F. R. D. 331 (D. C. N. Y. 1943).
55. U. S. v. Crescent Amusement Co., 323 U. S. 173, 187 (1945).