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COMMENTS

THE CONSENT DECREE IN THE MOVING PICTURE INDUSTRY

WILLIAM F. WHITMAN†

Introduction

Motion pictures being the most popular form of entertainment in the United States today, the public knows a great deal about its favorite actors, actresses and pictures. However, not only the public but lawyers and judges as well, except those having intimate contact with the motion picture industry, have little understanding of the trade practices and problems of the industry. These trade practices grew up with the rapid rise of the industry from the days of the "penny arcade" to its present economic and social importance. The motion picture business is unique in many of its essentials and it has not been possible to find much guidance from other lines of business.

It must be recognized that however these trade practices grew up there have been continuing complaints against them. Only an exhaustive and impartial inquiry can determine to what extent the complaints have been justified and to what extent they are unavoidably inherent in the nature of business. The number of disputes between the exhibitors and distributors have increased over the years resulting in a tremendous number of anti trust suits. In May, 1938 the writer summarized and commented on the anti trust cases affecting the distribution of motion pictures in an article in the *Fordham Law Review*.¹

Attempts have been made from time to time within the industry to eliminate disputes and evolve a satisfactory method of self regulation. In 1928, after a number of years of discussions and conferences between distributors and exhibitors, a standard form of contract was adopted. Among other things, the contract provided for the compulsory arbitration of disputes and the furnishing of security by an exhibitor to each distributor in the event of his failure to arbitrate disputes or to abide by the award of arbitrators and gave each distributor the option to cancel the contract upon the failure of the exhibitor to furnish security. A board of arbitration was established in 32 cities throughout the United States. In *Paramount Famous Lasky Corporation v. U. S.*² the Supreme Court held that the agreement of the distributors not to contract with exhibitors except upon a standard form requiring compulsory joint action on the part of distributors was in restraint of trade.

Considerable progress has been made since that date by compromise and conciliation. However, the problems in the motion picture industry which might appear at first blush to offer a quick and easy solution, present upon more thorough investigation, a wide variety of complexing difficulties. The Depart-

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1. Whitman, *Anti-Trust Cases Affecting the Distribution of Motion Pictures* (1938) 7 *FORDHAM L. REV.* 189.

2. 282 U. S. 30 (1930), *aff'g* 34 F. (2d) 984 (S. D. N. Y. 1929).

ment of Justice conducted an investigation of the motion picture industry over a period of two or three years and on July 20, 1938, the Government brought an action in equity, No. 87-273, under the anti trust laws in the District Court for the Southern District of New York against the eight major companies in the motion picture industry and certain of their subsidiaries and affiliates and their directors and officers. The purpose of this suit was to test out the legality of the various trade practices in the industry. Among other things, the Government asked for a divorcement of exhibition from the production and distribution of motion pictures. After approximately two years of preparation and when the trial of the case was about to commence, the Department of Justice and a majority of the defendants decided to endeavor to work out a consent decree. Approximately five and a half months later, on November 20, 1940, the court approved a consent decree signed by five³ of the eight large companies in the industry. The five companies signing the decree were producers and distributors having theatre circuits. The three⁴ producers and distributors without theatre circuits did not sign the decree. The Government has announced that it will continue the suit as to those parties who have not signed the decree.

Uniqueness of Decree

The decree not only enjoins the doing of certain acts but also directs the consenting defendants to do certain affirmative acts set forth therein. In some respects it sets up a code of conduct for the motion picture industry. The decree differs from any which has been entered into under the anti trust laws in the method of enforcement of its provisions. Instead of merely prohibiting certain acts and leaving enforcement to the ordinary process of contempt proceedings instituted by the Government, the decree provides for a forum in which independent exhibitors, who are not parties to the decree, may have certain complaints promptly heard and disposed of without any action by the Government or any court proceedings.

The forum consists of arbitration tribunals which will be set up in thirty-one districts throughout the United States. The arbitrators are appointed not by the court but by the American Arbitration Association which will administer the arbitration proceedings. The arbitrators must have no connection of any kind with the motion picture industry. Appeals from the decision of the arbitrators may be taken to an Appeal Board consisting of three members of known impartiality and distinction appointed by the court. Consenting defendant must arbitrate disputes under the decree if an exhibitor requests arbitration. On the other hand, there is no compulsion on an exhibitor to arbitrate. The decree takes away no right of the exhibitor to bring suit in court under the anti trust laws if he desires to do so.

3. Paramount Pictures, Inc.; Loew's Incorporated; Warner Bros. Pictures, Inc.; Twentieth Century-Fox Film Corporation; Radio-Keith-Orpheum Corporation and their principal subsidiaries and affiliated companies.

4. Columbia Pictures Corporation; Universal Pictures Company, Inc. and United Artists Corporation (which is a distributor only).

There can be no contempt proceedings under any provision of the decree which provides for arbitration unless the consenting defendant shall refuse to arbitrate a dispute under such provision of the decree or shall fail to abide by the award of the arbitrator or the Appeal Board.

The approach of the Government and the consenting defendants to the consent decree was an endeavor to meet a solution of alleged evils and alleged abuses in the motion picture industry without resorting to the divorcement of exhibition from production and distribution. The Government agrees not to seek divorcement or dissolution of theatre circuits of the consenting defendants for a period of three years after the entry of the decree.

Trade Shows and Blocks of Not More Than Five

The decree makes no fundamental change in the production or the exhibition of motion pictures. The fundamental change made by the decree in the business of distribution of motion pictures is to provide for an entirely new method of selling⁵ feature motion pictures. This new method of selling motion pictures provides for two things: (1) a trade showing within the exchange district prior to the sale or offer of sale; and (2) a sale of not more than five pictures in a block.

The present method of distributing motion pictures is for an exhibitor to enter into a contract with a distributor for the pictures released by such distributor for an entire motion picture season, usually commencing September 1st and continuing for a year. Such contracts cover any number up to all the pictures to be released by such distributor during such year. The contracts were usually negotiated before the start of a motion picture season and before the pictures were actually produced. The exhibitor did not know the quality of the motion pictures to be released under his contract but relied on the reputation and past performance of the producer and his knowledge of certain stars, stories and directors supplied by the distributor in a prospectus of the new season's production program.

The practice of requiring an exhibitor to contract for a group of pictures to be released by a distributor during a specified period, usually a year, in order to secure some of such pictures is known as "block booking". Inasmuch as the exhibitor does not know what the completed pictures will be like when he enters into such contract, it is sometimes said that he is engaged in "blind buying".

The Federal Trade Commission investigated these practices over a period of years and ordered Paramount to cease and desist from conspiring to monopolize distribution and exhibition by block booking and by acquiring theatres.

5. Technically, motion pictures are not sold but the distributor grants to the exhibitor a non-exclusive license under copyright to exhibit the same in one or more theatres for a limited period. However, for the sake of simplicity, such a license is sometimes referred to as a sale.

In *Federal Trade Commission v. Paramount Famous Lasky Corp.*⁶ the Circuit Court held that block booking was not an unfair method of competition.

Blind buying and block booking have been criticized in the past by certain exhibitor associations and by certain Parent Teachers Associations and by certain other public groups. The Neely Bill which was passed by the Senate but which did not become law was designed to eliminate the abuses in block booking and blind buying.

Starting with the next motion picture season, September 1, 1941, a consenting defendant is prohibited from licensing or offering to license a feature motion picture until it has been trade shown in the exchange district in which the public exhibition is to be held. The trade showing must be preceded by a notice published in a trade publication having general circulation among exhibitors in the exchange district. An exhibitor is thus given an opportunity to see a feature picture before he buys it.

The practice of seasonal block booking or contracting for a distributor's output of pictures for a year in advance has been changed by the consent decree effective with the start of the next selling season. The decree provides that feature pictures shall be sold in blocks of not more than five, all of which, of course, must be trade shown. It further provides that the sale of one block of features may not be conditioned upon the sale of another block of features. It was recognized that to do away with block booking entirely and to provide for the sale of single feature pictures only would so increase the cost of distribution as to be prohibitive and the sale of blocks of not more than five was a compromise. The particular pictures in a block of five may be changed from time to time and pictures from one block may be included in another block. There is no restriction on the number of blocks of five which may be sold at one time as long as the sale of one block is not conditioned on the sale of another block.

The Department of Justice is hopeful that this new method of distribution will react to the benefit of the public in allowing the exhibitor to choose pictures which are most suitable for his particular community. It is also hopeful that it will react to the benefit of the exhibitor by providing a greater amount of competition among the distributors for the exhibitors playing time and offering the exhibitors greater opportunity in the choice of pictures throughout the year. The Department also hopes that it will encourage the production of motion pictures by more independent producers. It recognizes that this method of selling is new and untried and that whether it will work effectively can only be determined by a fair trial which is provided for in the decree.⁷

This new method of distribution of motion pictures provides for the substitution of a retail method in place of a wholesale method. Instead of one

6. 57 F. (2d) 152 (C. C. A. 2d, 1932).

7. The attitude of the Department of Justice is set forth by James V. Hayes, Esq., Special Assistant to the Attorney-General, in an argument before Hon. Henry W. Goddard, D. J., in favor of the decree on November 14, 1940.

contract for the sale of approximately fifty pictures, ten or more different contracts for the sale of not more than five pictures each will be substituted. There appears to be no question but that this changed method of selling pictures will result in substantially increased costs which, in the first instance, will fall on the distributor. Whether the distributor or the exhibitor will eventually bear this increased cost remains to be seen.

The five consenting defendants will be the only distributors in the motion picture industry which will be bound to follow this method of selling commencing September 1, 1941. The three non-consenting defendant distributors and other distributors will be free to continue to do business on a season block booking basis. The consenting defendants are willing to try the new method of selling for a period of one year. The decree provides that if by June 1, 1942, the Government does not secure a decree against the three non-consenting defendants providing for this, or a similar method of sale and trade showing, the consenting defendants will be relieved from the provisions of the decree relating to trade showings and blocks of not more than five.

If Congress should pass legislation covering these subjects the provisions of the consent decree will be superseded by such legislation but the decree will continue as to other matters covered thereby.

If after September 1, 1943, distributors of motion pictures have licensed twenty-five per cent or more of the features released for exhibition in the United States otherwise than in accordance with the provisions relating to trade showings and sales in blocks of not more than five, or if more than twelve and one-half per cent of the revenue from distribution of pictures is received by companies which are not bound by this method of sale, the consenting defendants shall be relieved from such provisions. In addition, there is the further general provision that if after September 1, 1942, a consenting defendant can show to the satisfaction of the court that it has been damaged and adversely affected as a result of following this method of sale in competition with companies which do not follow it, then too it may be relieved from the operations of these provisions of the decree.

Other Trade Practices

Offensive pictures: Under the consent decree the exhibitor has the right to cancel a picture which is generally offensive in the locality served by such theatre on moral, religious or racial grounds. The question as to whether or not a picture is offensive on such grounds is subject to arbitration.

Forcing short subjects: Certain complaints were made that a distributor would insist that an exhibitor contract for short subjects, newsreels or western or foreign pictures as a condition for the licensing of feature pictures. The consent decree prohibits such alleged practice.

License by exchange districts: One provision of the consent decree requires that no license for feature pictures to be exhibited in theatres located in one exchange district shall include theatres located in another exchange district nor

be conditioned upon the licensing of pictures in another exchange district. This provision is intended to cut down the purchasing power of large chains of theatres.

Refusal to license: Certain exhibitors claimed that they were unable to get motion pictures at all on any run, no matter how late they were willing to exhibit the pictures. The consent decree attempts to give an exhibitor the right to exhibit pictures of a distributor on some run to be designated by the distributor, provided the exhibitor is responsible and reliable, unless the granting of a run on any terms to such exhibitor would have the effect of reducing the distributor's total film revenue in the competitive area in which the exhibitor's theatre is located.

Clearance: The greatest value from the exhibition of a picture is secured as a result of the first exhibition of such picture in a particular territory. A well established practice in the industry has been for the first exhibitor to insist, and the distributor to agree, that a picture licensed to a particular exhibitor in a particular territory would not be licensed to another exhibitor for exhibition in the same territory until a certain number of days after the end of the run of the first exhibitor in such territory. This is known as clearance or protection. The locality or territory in which an exhibitor is given clearance is known as a zone. As an exhibitor would insist upon the same clearance from all distributors with whom it did business, it followed, as a matter of course, that clearance became more or less uniform in a particular zone and continued from year to year with little change. The value of a picture for a later exhibition in the same territory depends to a great extent on how soon the picture may be shown for a second or third time in the same territory.

In other words, the value of a subsequent run of a picture depends to a large extent on the amount of clearance. The consent decree recognizes that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. Controversies arising on the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable are subject to arbitration under the consent decree. The arbitrator is required to take into consideration a number of factors in determining whether or not the clearance is unreasonable. However, the arbitrator must disregard the fact that one of the theatres involved is affiliated with a distributor or a circuit of theatres. If he finds that it is unreasonable, the arbitrator can then fix the maximum clearance which can be allowed in a particular area after the expiration of existing contracts. If conditions in the area change, any person affected by the award may seek a redetermination of the maximum clearance.

Booking prints: In a particular city there may be twenty theatres which are entitled to a second run of a picture of a particular distributor. However, there may be only six prints of such picture in the exchange. Obviously all twenty theatres cannot secure a print at the same time. An exchange manager may try to keep everyone happy by rotating the preference in securing prints. Under the consent decree it is recognized that distributors must be permitted some discretion in this matter but the decree also provides in substance, that

a distributor will not discriminate against an exhibitor in order to give his competitor a prior advantage.

Arbitrary refusal to sell pictures on run requested by an exhibitor: This provision of the decree is an attempt to meet complaints that a chain of theatres is favored as against a small independent exhibitor in the distribution of motion pictures on the same run. For the purposes of this provision, an independent exhibitor is defined as one who is wholly independent of any circuit of more than five theatres. This provision is limited to theatres in existence at the date of the decree or theatres which replace them. If an independent claims that a distributor defendant has arbitrarily refused to license its features for exhibition in his theatre and has licensed such features to a circuit theatre (consisting of fifteen or more theatres) he may bring his claim to arbitration. However, no award shall be made in any such arbitration against a defendant distributor unless the exhibitor can satisfy the requirements set forth in the decree. If the arbitrator finds that there was such favoritism shown to a circuit theatre he may order that after the expiration of existing contracts, all contracts with the independent theatre and circuit theatre shall be made with such theatres alone without consideration being given to any other theatres which might be owned by the circuit or the independent theatre owner. It seeks to restore competition on the merits to the two competing theatres in the particular locality.

If a final award is made in favor of a complaining exhibitor and is not complied with by the distributor, a further arbitration proceeding may be instituted by the exhibitor on the ground that such award has not been complied with in good faith by the distributor and if the arbitrator shall find that the distributor has not complied in good faith with the original award, the arbitrator may award compensatory damages to the exhibitor for any loss which he may suffer.

Acquisition of Theatres

Each of the consenting defendants has agreed that during a period of three years from the date of the entry of the decree, it will not enter on a general program of expanding its theatre holdings although it may acquire theatres to protect its existing investment or its competitive position or for ordinary purposes of business. In addition, each of the consenting defendants will report to the Department of Justice monthly any changes in its theatre position during such three year period. As has been mentioned before, during this three year period, the Government has agreed not to seek the divorcement of exhibition from production and distribution nor the dissolution of theatre circuits.

Agreements Excluded From the Decree

A long term franchise for the exhibition of motion pictures is any agreement which covers more than one motion picture season. Such franchises which were in existence on June 6, 1940, the date on which the parties decided to endeavor to arrive at the consent decree, are not within the terms of the consent decree

with the exception that certain of such franchises are included as far as the clearance provisions of the decree are concerned. Any long term franchises made after June 6, 1940 however, come within the decree unless the franchise is between a consenting defendant distributor and its own theatre circuit.

All dealings by a consenting distributor defendant with its own theatre circuit and any theatres in which it has an interest are exempt from the operations of the decree. Such distributor may license any or all of its motion pictures without trade showings and in blocks of more than five to its own theatre circuit on any terms which it can arrange. However, dealings between one consenting defendant distributor and the theatre circuit of a different consenting defendant distributor are not exempt from the decree except as to long term franchises made prior to June 6, 1940.

Function of the Department of Justice and the Court

The Department of Justice proposes to keep a constant check on the operation of the decree for the purpose of securing compliance with its various provisions. It has access to the records of the arbitrators and to those of the consenting defendants for this purpose.

Contempt provisions may be brought for violations of the provisions relating to trade showings and sales in blocks of not more than five without any arbitration proceedings. Practically all of the other provisions of the decree provide for arbitration. As has been pointed out previously, there can be no contempt for violation of the provisions which specifically provide for arbitration unless a consenting defendant refuses to arbitrate or refuses to abide by the award of the arbitrator or the Appeal Board.

The court reserves jurisdiction of the case for various purposes including those of enabling the parties to the decree to apply for further relief or a modification of the decree.

Arbitration

The administration of the arbitration system by the American Arbitration Association has been briefly described in an earlier part of this comment. The rules of arbitration are to guide the local arbitrators and the Appeal Board. Without going into detail regarding the rules of arbitration, it may be pointed out that all parties who believe they would be interested in the outcome of any arbitration may intervene in such arbitration. The rules are designed to afford an efficient and impartial method of settling disputes without sacrificing any substantial rights.

The method of arbitration of disputes which is set up in the consent decree and in the rules of arbitration and appeals which were filed with the consent decree will also be used in the arbitration of any disputes under any decree which may be entered in Chicago as an amendment to the existing consent decree of April 6, 1932, against Balaban and Katz Corporation and others. This method of arbitration will also be used in the arbitration of any disputes

under any supplemental decree which may be entered in Los Angeles modifying the existing consent decree of August 21, 1930, against West Coast Theatres, Incorporated, and others.

It is estimated that the cost of the arbitration system for the first year will not exceed \$490,000 and the cost for each subsequent year will not exceed \$465,000. The expenses of the arbitration system will be borne by the consenting distributor defendants in proportion to their gross receipts from motion pictures in the United States.

Summary

The petition in the equity suit against the major companies in the motion picture industry covered practically every phase of production, distribution and exhibition and sought to test the legality of the method in which the business in such three fields has been conducted for a number of years. It grew out of an increasing number of complaints from independent exhibitors. It is safe to assume that the representatives of the Department of Justice after intensive investigation, acquired an intimate contact with the industry and realize that there are many perplexing problems for which there are no precedents in other lines of business and which do not offer an easy or simple solution. The consent decree is a compromise and represents an honest endeavor on the part of the Government and the consenting defendants to find a solution to some of these problems and to eliminate or settle disputes within the industry. Both parties realize that the decree is not perfect. Both parties realize that time and events may demonstrate that there is need for modification.

The consenting defendants are willing to give at least a year's trial to a new method of distribution of pictures which eliminates blind buying and limits block booking to blocks of not more than five. They will make an honest endeavor in good faith to make it work. Many independent exhibitors voiced their disapproval of the consent decree in its final form but they in turn appear willing to give it a trial.

Whether or not this new method of distribution will be successful it is difficult to say. The consent decree indicates that some progress can be made to the solution of difficult problems if the parties interested mutually desire to find a solution. Even if the new method of distribution of motion pictures does not work after a fair trial, the consent decree may be a milestone on the road toward self-regulation within the motion picture industry. It has brought clearly before the industry the realization that the problems of the independent exhibitor, the problems of the circuit exhibitor and the problems of the producer and distributor vitally affect each other and must have a solution whether that solution be arrived at by legislation, court action or self-regulation. If all parties have a genuine desire to arrive at a solution of such problems, self-regulation appears to offer the best method to accomplish the greatest good for the industry.