



**Comments  
of the Independent Cinema Alliance  
to the Department of Justice, Antitrust Division  
concerning the Paramount Consent Decrees**

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## I. The Independent Cinema Alliance

The [Independent Cinema Alliance](#) (“ICA”) is a non-profit corporation that promotes the preservation and prosperity of independent cinemas<sup>1</sup> as an essential part of a healthy motion picture industry. Independents are essential because:

- independents serve small-town and rural markets that would typically not have a cinema but for the dedication of independents to their communities;
- hundreds of thousands of Americans who love big-screen entertainment would never see motion pictures on the big screen if independents disappeared, because the big circuits would never go into such small markets;
- independents are frequently industry innovators because they *must* innovate to find ways to survive in an industry dominated by big players;
- independents often depart (necessarily) from the Big Exhibition paradigm of featuring only the biggest Hollywood fare, and thus diversify the motion picture entertainment available to patrons (*e.g.*, art films, niche films such as Hispanic and faith-based films, and films by independent producers generally);
- independents frequently become integral components of their communities and provide services and contributions that connect the big screen to special community watersheds (film festivals, community fundraising, children’s matinees, showings of classic movies, special pricing for veterans/first-responders/active military, sponsoring local events on the big screen);
- the average ticket price for independents is significantly lower than the average ticket price for big circuits, and independents generally operate at lower margins than circuits command; and
- even in urban markets, where a few independents survive, they are the only remaining check against big circuit monopoly power, and frequently innovate in pro-consumer ways to compete (*e.g.*, family entertainment centers).

In sum, motion picture consumers benefit enormously because, compared to big circuits, independents vitally contribute more diverse content, in more diverse places, more inexpensively, and in more diverse and creative ways. But they achieve these pro-competition and pro-consumer benefits increasingly in competitively hostile and cost-crippling circumstances. The big players in the motion picture industry are doing fine. For independents it is a labor of love, and they are being forced out of business in growing numbers.

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<sup>1</sup> For purposes of eligible membership in the ICA, “independent” means:

- not publicly owned or owned in whole or in part by a motion picture distributor, motion picture studio or other content supplier, including a supplier of electronic content;
- market share of domestic theatrical revenue does not exceed 2%;
- not owned in whole or in part by a national or regional circuit having a domestic theatrical revenue share of more than 2%; and
- consolidated screen count does not exceed 500 screens.

As an advocacy group on behalf of independent cinemas, the ICA is uniquely positioned to urge preserving the Paramount Consent Decrees, which foremost seek to protect independent cinemas. The Paramount Consent Decrees happened because the Department of Justice seven decades ago valiantly stepped into an industry rife with antitrust abuse and on behalf of independents and their patrons. *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 162 (1948) (“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 freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built.”).

The ICA currently represents 236 independent cinema companies with 2,672 screens.

## II. Independents in the Motion Picture Industry

### A. The Business of Big Stories

We deal in durable stories, stories with the status of national treasures, even stories with broad therapeutic influence,<sup>2</sup> and stories that can take many millions of dollars to produce by teams of hundreds. But we never know in advance whether people will credit any particular story.

The history of the motion picture industry is a tale of urgency to control the wild unpredictability of the product. Every instance of the “product” (the motion picture) is all its own, and no truly

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<sup>2</sup> Vikas Shah, *The Role of Film in Society* (June 19, 2011) (<https://thoughteconomics.com/the-role-of-film-in-society/>):

Contemporary research has also revealed more profound aspects to film’s impact on society. In a 2005 paper by S C Noah Uhrig (University of Essex, UK) entitled, “‘Cinema is Good for You: The Effects of Cinema Attendance on Self-Reported Anxiety or Depression and ‘Happiness’” the author describes how, “The narrative and representational aspects of film make it a wholly unique form of art. Moreover, the collective experience of film as art renders it a wholly distinct leisure activity. The unique properties of attending the cinema can have decisively positive effects on mental health. Cinema attendance can have independent and robust effects on mental wellbeing because visual stimulation can queue a range of emotions and the collective experience of these emotions through the cinema provides a safe environment in which to experience roles and emotions we might not otherwise be free to experience. The collective nature of the narrative and visual stimulation makes the experience enjoyable and controlled, thereby offering benefits beyond mere visual stimulation. Moreover, the cinema is unique in that it is a highly accessible social art form, the participation in which generally cuts across economic lines. At the same time, attending the cinema allows for the exercise of personal preferences and the human need for distinction. In a nutshell, cinema attendance can be both a personally expressive experience, good fun, and therapeutic at the same time. In a rather groundbreaking study, Konlaan, Bygren and Johansson found that frequent cinema attendees have particularly low mortality risks – those who never attended the cinema had mortality rates nearly 4 times higher than those who visit the cinema at least occasionally (Konlaan, Bygren, and Johansson 2000). Their finding holds even when other forms of social engagement are controlled, suggesting that social engagement specifically in an artistic milieu is important for human survival.”

reliable formula has ever been devised to predict its demand with meaningful certainty.<sup>3</sup> And thus has the last century (roughly the age of Hollywood) been alternating determinations by big production, big distribution, and big exhibition to control the chaos and assure the reliable revenue stream that is more commonplace in other industries.

The antitrust sensitivity of this industry follows inevitably. The formula for dealing with chaos is to control as much as possible: in the case of distribution, to ensure that its stories always get to the big screen on as favorable terms as possible, and in the case of exhibition, to ensure that it gets the best stories on as favorable terms as possible, ideally at the expense of any potential competitors.<sup>4</sup>

The market structure that emerges is the irresistible force (Hollywood distribution) versus the immovable object (the big circuits). From an *abstract* antitrust perspective, perhaps that looks like sufficient parity to pay no further attention. But that ignores the compelling reasons for the Paramount Consent Decrees in the first place: **independents**, the people who do the *really* hard work in markets that would never have a big screen if they went out of business. *See Paramount*, 334 U.S. at 162.

## B. Being an Independent

The cinema business is essentially comprised of two types, large national and regional exhibitors, or circuits, and **independent** exhibitors. Typically, the large national and regional circuits are publicly owned, operate in larger metropolitan markets and collectively generate most of the domestic theatrical ticket revenue. In 2017, for instance, the top 8 circuits produced over 65% of cinema revenue in the United States. AMC, Regal, and Cinemark alone accounted for 51% of revenue.

The average number of screens per large circuit location is between 12 and 16, because circuits typically open “multiplexes,” while the average number of screens per small independent

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<sup>3</sup> *But see* sequels and prequels, the ubiquitous multiplication of a “proven” formula, typically beyond the formula’s ability to deliver.

<sup>4</sup> *See* M. Conant, *Antitrust in the Motion Picture Industry: Economic and Legal Analysis* (Univ. of Cal. Press 1960) at p.1 (“The final product is not homogeneous, but is constantly changing, and market uncertainty is greater than in most industries. Consumer reaction to any particular film is unpredictable. The search for security—for protection against market uncertainty—gave the greatest impetus to combination and concerted market control in the industry. Major producers purchased leading theaters in order to be assured that their pictures would be exhibited in them—a necessity if they were to earn revenues adequate even to cover the production costs of first-class films. Some large theater chains, in order to be assured of adequate supplies of films, acquired production companies. From these initial vertical combinations, it was only a short step to nation-wide horizontal combines that could exclude the pictures of independent producers from large theaters, and, by withholding their own pictures from independent exhibitors, force them to sell out to major theater circuits. Monopoly and combination in the motion picture industry can thus be said to rest on the foundation of market uncertainty.”); M. Anderson, *State Regulation of Motion Picture Distributors*, 3 Pace L.R. 107, 107 n.2 (1982) (“Motion pictures are high risk, high profit enterprises, in part, because of the difficulty in predicting public acceptance and box office revenues. Distributors attempt to share the financial risk with exhibitors by obtaining as favorable terms as possible.”).

location is significantly fewer. The smaller population base in markets served by independents typically cannot support the considerable costs of expansion.

Because the smaller independent exhibitors typically serve markets the large circuits disregard, they are usually the only source of big-screen entertainment in their communities and serve a very important economic, social and cultural function. Put another way, if these independent exhibitors shuttered, tens of thousands of Americans would never again watch stories on the big screen (unless they were willing to drive 50 or more miles).

To build a modern cinema costs from \$500,000 to \$750,000 per auditorium. The bar of public expectations has been raised to expect this level of construction and amenities.

Since the 1960s the rule of thumb has been that it takes 10,000 people to profitably support one screen. A town of 20,000 could support 2 screens, and pay a full-time manager a decent salary, service the mortgage and provide a reasonable return on investment. A town of 2,500 could support a mom and pop operation with no or few paid employees, and maybe mom or pop having a day job. But these are numbers specifically for independents. No big circuit would ever locate in these towns because the numbers do not fit their model.

Independents in small towns and rural areas are there for the love of the business. The people in these markets enjoy the big screen because someone loves the business enough to stay open notwithstanding. And they love it enough to wear multiple hats.

Unlike other businesses which sell basically the same products year after year, each movie is a new product that appeals to a different audience segment and presents a new marketing challenge. Motion picture contracts must be tirelessly negotiated and renegotiated. New marketing plans for each motion picture must be managed every week. The way cinemas are constructed and maintained is governed by strict fire and life safety codes, Americans with Disabilities Act regulations and insurance requirements. HIVI (hearing impaired, visually impaired) equipment must be regularly maintained to ensure proper service to patrons with disabilities and comply with DOJ regulations. Precise time schedules must be worked out to meet contract requirements, ease congestion and optimize use of the facilities. Buildings and furnishings host high traffic counts and must be cleaned, maintained and repaired daily. Seat maintenance and repair is a major issue especially with the newer, more complex rockers and recliners. Regular HVAC maintenance includes air filters, grease traps in grill hoods, and popcorn and lobby vents. Water filter maintenance includes water lines to mix drink dispensers and ice makers. Technical equipment must be maintained in perfect order – and digital cinema equipment is so much more difficult and expensive to maintain than the old film projectors used to be. Staffs must be hired and trained, including “how to” instruction and customer service training, periodic fire drills, fire extinguisher training, emergency procedures for power outages, tornado warnings, etc., and state-mandated chemical training for use of cleansers and other chemicals used at the cinema, and state-mandated food and alcohol testing and certifications. Perishable concession supplies must be ordered, inventoried, stored and sold while still fresh. Security must be maintained handling large amounts of cash and large crowds. Each individual guest must be welcomed, sold tickets and concessions, seated and cleaned up after in a calm, gracious manner. Local events must be managed. Federal, state and local legislatures frequently

want a piece of the cinema business, in the form of admission taxes or beverage taxes, and so lobbying is required.

The typical independent cinema owner is “in charge,” frequently “hands on,” of all of the foregoing. As noted, it is a labor of love.

Finally, independents in small towns tend to be active in their communities, serving on various volunteer boards, local chambers of commerce, school boards, local colleges and hospitals, and municipal government positions (one independent served several terms as mayor of Paradise, California).

### C. Booking the Movie

Motion pictures are copyrighted creations, and the copyright owners enjoy the standard ownership rights with respect to their creations. Thus, exhibitors do not typically *purchase* content, but instead purchase a *license* to show it. The license terms and conditions are contained in the complex **master license agreements** (MLA) imposed upon exhibitors by distributors, coupled with particular booking requirements for individual motion pictures (and sometimes picture rental is negotiated or renegotiated or “settled” after the picture has finished its run) (collectively, “the **booking contract**”). Most of the prohibitions contained in the Paramount Consent Decrees concerned the booking contract.

Motion pictures typically start on Fridays. It matters to play a major motion picture “**on the break.**” It means playing the picture when it first comes out, when its popularity is greatest and national advertising is most intense, when the most people will buy tickets to see it. Small-town cinemas could once wait to play motion pictures later when the rental percentage was lowered. But with the steady shrinking of the theatrical window (the period when a motion picture can be viewed exclusively at the cinema), and pictures released on video and other platforms ever more swiftly, playing off the break is increasingly unsustainable.

The price of the license may be either “flat” or “percentage.” Flat terms are rare, and typically apply only on older motion pictures which have already gone to other formats. A common flat fee would be \$250 to \$350 for a one- or two-day engagement. All other motion pictures are licensed on a percentage of “gross” ticket sales after deduction of local and state sales taxes. Percentage arrangements range from 35% to as outrageously high as 70% payable to distributors. Even at a 50/50 split, independents are lucky to break even and must rely on concession sales (or other revenue streams) to profit and stay in business.

Variations on the percentage arrangement include the “90/10 deal,” in which a pre-set “house allowance” (the house expense or “nut”) is deducted, and 90% of the remaining gross is paid to the distributor. Of course, a high-grossing, prestigious cinema in a big city may negotiate a house allowance that is more than the actual cost of running the theatre for the week, while the house allowance in other cinemas will fall short of the actual expenses.

A distributor may demand an **advance** or a **guarantee** before opening the picture. An advance is applied to the film rental that the picture earns. If the picture does not earn the amount of the



advance, the overpayment is applied to future films. It is very hard to get a distributor to make a cash refund of an unearned advance. A guarantee is a nonrefundable payment and will not be refunded even if the picture does not earn the guarantee. At the end of the engagement, the theatre will owe any percentage film rental over the guarantee. Guarantees are illegal in some states.<sup>5</sup>

Independents routinely engage in discount programs in order to survive in markets with lower population bases, to account for certain viewing realities (*e.g.*, matinees), and to serve certain deserving demographics (*e.g.*, children, senior citizen, military and first-responder discounts). Distributors generally accept differential pricing for adults and children, and discounts for matinees (showtimes before 6 p.m.), but may or may not accept any other differential ticket pricing. **Per capita** requirements by distributors effectively eliminate ticket pricing flexibility independents would otherwise enjoy.

Discount theatres are a variation. Most distributors have a discount or “sub-run” release date after the national break, when ticket prices are understood to be lower.

Somewhere in the “booking contract” will typically be a “**holdover**” provision, meaning that if the motion picture grosses above a certain dollar amount on its opening weekend, it must “hold” another week (that is, play another week, whether or not the exhibitor planned to continue featuring that motion picture). Of course, if the picture is performing well, both the distributor and the exhibitor will benefit from continuing its run.

Too frequently, however, these “holdover” provisions are becoming “**minimum runs**,” where distributors dictate multi-week runs whether or not the motion picture is performing well. Two-week minimums have become common and the bigger distributors demand three-week minimums, or more.<sup>6</sup>

For the average big circuit with a multiplex, a “minimum run” might be vaguely irritating. (One of fifteen screens must be devoted to a poorly performing picture at a loss.) For independents, it can be ruinous. An independent with a two-screen or four-screen location simply cannot afford to commit one of those screens to a poorly-performing “holdover” *and* lose the opportunity to play a fresh and better-performing picture. Coupled with per capita requirements, that scenario is

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<sup>5</sup> See generally Martin G. Anderson, “State Regulation of Motion Picture Distributors,” 3 PACE L. REV. 107 (1982), available at: <http://digitalcommons.pace.edu/plr/vol3/iss1/6>.

<sup>6</sup> See, *e.g.*, Erich Schwartzel, “Disney Lays Down the Law for Theaters on ‘Star Wars: The Last Jedi,’” *The Wall Street Journal* (Nov. 1, 2017), <https://www.wsj.com/articles/disney-lays-down-the-law-for-theaters-on-star-wars-the-last-jedi-1509528603> (“Few operators can afford to turn away a Disney windfall. But some independent theaters have decided against screening ‘Last Jedi’ when it is released, saying the company’s disproportionate share of ticket sales and four-week hold make little economic sense—especially in small towns ... ‘There’s a finite number of moviegoers in my market, and I can service all of them in a couple of weeks,’ said Lee Akin, who operates a single-screen theater in Elkader, Iowa (population: 1,213).”).

literally a net negative. The independent is losing money by playing that distributor's punitive "minimum run" unless the four people who come to the movie in week 3 buy 165 popcorn tubs among them.

For very small towns, even the standard "two-week minimum" means they cannot play the picture on the break and must wait until they can play the picture for one week only off the break. Yet there is no rational reason, especially in the **digital age**, why they should be forced to play the picture off the break, other than an arbitrary and anti-competitive **minimum run**.

The minimum runs demanded by studios mean that independents are constantly required to pick and choose among distributors because (lacking "multiplexes") they cannot accommodate all distributors' minimum run requirements. If five distributors are demanding minimum runs on their pictures, independents must pass on some product, or play it, if at all, off the break, which then strains their relationship with distributors.

### **III. The Department of Justice Project Concerning Legacy Consent Decrees and the Reasons for Preserving the Paramount Consent Decrees**

Unlike most previous occasions when the Department of Justice parachuted into the motion picture industry to inquire about the continuing efficacy of the Paramount Consent Decrees,<sup>7</sup> the Department this time made no secret of its negative disposition:

The Department of Justice's Antitrust Division today announced an initiative to terminate outdated antitrust judgments.

"Today, we are taking a first step toward freeing American businesses, taxpayers, and consumers from the burden of judgments that no longer protect competition," said Makan Delrahim, Assistant Attorney General for the Justice Department's Antitrust Division. "We will pursue the termination of outdated judgments around the country that presently do little more than clog court dockets, create unnecessary uncertainty for businesses or, in some cases, may actually elicit anticompetitive market conditions."

From the early days of the Sherman Act until the late 1970s, the Division often entered into final judgments that did not include an express termination date. In 1979, the Division adopted the general practice of including sunset provisions that automatically terminate judgments, usually 10 years from entry. However, nearly 1300 "legacy" judgments remain on the books of the Antitrust Division, and nearly all of them likely remain open on the dockets of courts around the country.

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The original consent decrees are reported as follows: *United States v. Paramount Pictures, Inc.*, 1948-49 Trade Cas. (CCH) ¶ 62,335 (S.D.N.Y. Nov. 8, 1948) (**RKO**); *United States v. Paramount Pictures, Inc.*, 1948-49 Trade Cas. (CCH) ¶ 62,377 (S.D.N.Y. Mar. 3, 1949) (**Paramount**); *United States v. Loew's Inc.*, 1950-51 Trade Cas. (CCH) ¶ 62,573 (S.D.N.Y. Feb. 8, 1950) (**Columbia, Universal and UA**); *United States v. Loew's Inc.*, 1950-51 Trade Cas. (CCH) ¶ 162,861 (S.D.N.Y. June 7, 1952) (**Fox**); *United States v. Loew's Inc.*, 1950-51 Trade Cas. (CCH) ¶ 62,765 (S.D.N.Y. Jan. 4, 1951) (**Warner**); *United States v. Loew's Inc.*, 1952 Trade Cas. (CCH) ¶ 67,228 (S.D.N.Y. Feb. 7, 1952) (**Loew's**).



The vast majority of these judgments no longer protect competition because of changes in industry conditions, changes in economics, changes in law, or for other reasons.<sup>8</sup>

The ICA readily acknowledges that consent decrees, especially in the absence of truth-finding adjudications, can be taken too far as heavy-handed government regulation.<sup>9</sup> We respectfully contend, however, that the Paramount Consent Decrees present a special and compelling case, in an antitrust-sensitive industry, for retention. We urge the Department not to take the disruptive and dangerous step of dissolving the Decrees and potentially unleashing a wave of anticompetitive conduct at an already very volatile moment in the history of our industry. And make no mistake: the primary victims of dissolving the Decrees would be independents, and the tens of thousands of Americans who consume motion pictures at their local independent cinema.

### A. The Heart of the Paramount Consent Decrees

For independents, and for the district court that fashioned the Paramount Consent Decrees, “the heart of the consent judgment was the licensing injunction, prohibiting the defendants ‘from licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken **theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.**”<sup>10</sup>

That declaration was a magnificent antitrust achievement. It synthesized better probably than any other single statement in cinema history the essential principle of free and fair competition in the exhibition industry. It deserves to be preserved.

Interestingly, the *original* “theatre by theatre” language of the Decree presupposed a competitive bidding requirement, which the Supreme Court ultimately rejected.<sup>11</sup> The language was thus

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<sup>8</sup> <https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

<sup>9</sup> See *Washington Post*, “Sessions wants a review of consent decrees, which have been used for decades to force reforms” (Apr. 4, 2017) [https://www.washingtonpost.com/news/post-nation/wp/2017/04/04/sessions-wants-a-review-of-consent-decrees-which-have-been-used-for-decades-to-force-reforms/?utm\\_term=.7901b3076f77](https://www.washingtonpost.com/news/post-nation/wp/2017/04/04/sessions-wants-a-review-of-consent-decrees-which-have-been-used-for-decades-to-force-reforms/?utm_term=.7901b3076f77) (Attorney General Jeff “Sessions has been a longtime critic of the pacts. The attorney general — a former federal prosecutor and U.S. senator — once called consent decrees ‘one of the most dangerous, and rarely discussed exercises of raw power’ and ‘an end run around the democratic process.’”).

<sup>10</sup> *United States v. Loew’s Inc.*, 705 F. Supp. 878, 881 (S.D.N.Y. 1988) (emphasis added) (*quoting* Warner Consent Judgment § III(8), 1950-51 CCH Trade Cas. ¶ 62,765, at 64,266; Loew’s Consent Judgment § II(8), 1952-53 CCH Trade Cas. ¶ 67,228, at 67,327; Fox Consent Judgment § II(8), 1950-51 CCH Trade Cas. ¶ 62,861, at 64,546; Columbia, Universal and UA Consent Judgment § II(8), 1950-51 CCH Trade Cas. ¶ 62,573, at 63,678; Paramount Consent Judgment § II(8), 1948-49 CCH Trade Cas. ¶ 62,377, at 63,011).

<sup>11</sup> See *Paramount*, 334 U.S. at 155-56 (“the findings on franchises are clouded by the statement of the District Court in the opinion that franchises ‘necessarily contravene the plan of licensing each picture, **theatre by theatre**, to the highest bidder.’ As will be seen hereafter, we eliminate from the decree the provision for competitive bidding. But for its inclusion of competitive bidding the District Court might well have treated the problem of franchises differently.”).

modestly adjusted on remand to become a perfect non-discrimination declaration at the heart of the consent decrees. As to that perfect declaration, the Supreme Court opinion contains scattered bits and pieces of it throughout its opinion<sup>12</sup> – but nowhere is the declaration so succinct and perfectly encapsulated as in the Decrees themselves.

Most of the specific prohibitions of the Paramount Consent Decrees follow naturally from this essential proposition: if distributors truly license each motion picture “theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others,” then practices such as circuit dealing, block booking and overbroad clearances would be impossible. Moreover, licensing with such meticulous fairness would blunt the anticompetitive effect of any vertical integration.

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<sup>12</sup> See *id.* at 154-55 (“The formula deals and master agreements are unlawful restraints of trade in two respects. In the first place, they eliminate the possibility of bidding for films **theatre by theatre**. In that way, they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations.”); *id.* at 155-56, *supra* note 10; *id.* at 156-57 (“Block-booking prevents competitors from bidding for single features **on their individual merits**. The District Court held it illegal for that reason and for the reason that it ‘adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first.’”); *id.* at 159-60 (“(6) **Discrimination**. The District Court found that defendants had discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions. These included suspension of the terms of a contract if a circuit theatre remained closed for more than eight weeks with reinstatement without liability on reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers and extended runs; granting road show privileges; allowing overage and underage; granting unlimited playing time; excluding foreign pictures and those of independent producers; and granting rights to question the classification of features for rental purposes. The District Court found that the competitive advantages of these provisions were so great that their inclusion in contracts with the larger circuits and their exclusion from contracts with the small independents constituted an **unreasonable discrimination** against the latter. Each discriminatory contract constituted a conspiracy between licensor and licensee. Hence the District Court deemed it unnecessary to decide whether the defendants had conspired among themselves to make these discriminations. No provision of the decree specifically enjoins these discriminatory practices because they were thought to be impossible under the system of competitive bidding adopted by the District Court. These findings are amply supported by the evidence. We concur in the conclusion that these discriminatory practices are included among the restraints of trade which the Sherman Act condemns.”); and see *id.* at 160-61 (“It will be for the District Court on remand of these cases to provide effective relief against their continuance, as our elimination of the provision for competitive bidding leaves this phase of the cases unguarded.”). And the result on remand was this perfect statement of fair competition: that no distributor may license “any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.”

For independent cinemas, the “theatre by theatre” mandate is a lifeline, the continuing reason for their existence in the teeth of increasingly consolidated and powerful distribution *and* exhibition industries. To dissolve the Decrees at this moment in cinema history would declare open season on the most vulnerable players in the market and imperil access to the Big Screen for so many Americans in small towns and rural areas.

## **B. The Reasons to Preserve the Paramount Consent Decrees**

The Paramount Consent Decrees are a special case. They deserve to be preserved, and their termination now would send exactly the wrong signal in an industry with steadfastly more structural conditions and incentives for anticompetitive abuse.

**First**, these are not decrees negotiated without any adjudication of guilt. *See United States v. Loews's Inc.*, 705 F. Supp. 878, 881 (S.D.N.Y. 1988) (“Because this case was actually litigated, the judgments are not consent decrees in the traditional sense. Only the details of relief were negotiated and entered by consent, findings of guilt having been entered and upheld.”). Indeed, the Paramount Consent Decrees were *abundantly* litigated, at the district court, on immediate appeal to the United States Supreme Court, and then further on remand.<sup>13</sup>

Moreover, the Supreme Court remand did not undo the key factual findings by the district court. The Supreme Court affirmed the findings, and indeed remarked not once, but *twice* on the defendants’ proclivity for unlawful conduct.<sup>14</sup> The Supreme Court “affirmed in part and reversed in part” only because the Court quibbled with one *remedy* of mandatory competitive bidding, *not* any findings of fault. It therefore cannot be said that the Consent Decrees rested in any sense upon findings that had been undone, questioned or reversed on appeal.<sup>15</sup>

**Second**, the Paramount Consent Decrees pose none of the problems and perpetuate none of the mischiefs associated with overzealous employment of consent decrees.<sup>16</sup> The Paramount Consent

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<sup>13</sup> *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323 (S.D.N.Y. 1946), *affd in part and rev'd in part*, 334 U.S. 131 (1948), *on remand*, 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 984 (1950).

<sup>14</sup> *See Paramount*, 334 U.S. at 147 (noting studio defendants’ “proclivity to unlawful conduct”); *id.* at 148 (noting that distributors had “shown such a marked proclivity for unlawful conduct”).

<sup>15</sup> *See Don George, Inc. v. Paramount Pictures*, 111 F. Supp. 458, 467 (W.D. La. 1951) (“Under the circumstances of the remand, it will not do to say that the Supreme Court granted the defendants a new trial as the defendants contend, since it must be borne in mind that the judgment was affirmed in part, that is, as to many findings of fact and conclusions of law with reference to violations of the antitrust laws by the defendants and reversed in part but the reversal was made largely to enable the district court to solve the problem of divestiture. It appears that in order to give third parties, such as plaintiffs herein, the benefit of pleading the consent decrees for use as prima-facie evidence a careful distinction was made in the consent decrees between issues which had been closed by the decision of the Supreme Court and issues such as the problem of divestiture which were left open for determination by the District Court on remand.”).

<sup>16</sup> *See generally* Andrew Grossman, Former Visiting Fellow, American Heritage Foundation, *Use and Abuse of Consent Decrees in Federal Rulemaking*, Testimony before the Subcommittee on the Courts, Commercial and Administrative Law, Committee on the Judiciary, United States

Decrees are not an example of an agency seeking to short-circuit traditional rulemaking procedures, or two parties colluding to effect “regulation” by consent decree, or one administration seeking to limit the policy discretion of a future administration, or an arrogation of excessive judicial power and excessive judicial involvement in on-going policy matters. Indeed, the Supreme Court disagreed with the district court as to the remedy of mandatory competitive bidding precisely because the Court believed such a remedy would excessively entangle the judiciary in on-going industry activity. The Department of Justice played by the rules, filed and fully litigated one of the most significant antitrust lawsuits in the 20<sup>th</sup> century, obtained detailed findings, and negotiated appropriate remedies in the form now known as the Paramount Consent Decrees. The passage of decades has not dimmed their relevance.

Indeed, the ICA submits respectfully that not a single mischief can be cited from perpetuation of the Paramount Consent Decrees. It is certainly true that antitrust law has evolved since the 1940s. For example, vertical arrangements are viewed more benignly now than they were in the 1940s. But that is not to say that the Paramount Consent Decrees are perpetuating “bad law.” The salutary effect of the Paramount Consent Decrees is not their recitation of modern antitrust principles, but their expression of certain timeless guides for fair conduct in an industry inclined to misbehave.

While not dispositive, it is at least relevant that the Department of Justice has parachuted into the motion picture industry several times to conduct precisely this inquiry – and each and every time, the Department concluded that no disturbance of the status quo was necessary or appropriate.

**Third**, if general antitrust laws were adequate, these particular decrees would not have been necessary, which remains true today. *See United States v. Loews's Inc.*, 705 F. Supp. 878, 884 (S.D.N.Y. 1988) (“These consent judgments were fashioned after years of litigation in which this industry was shown to have a proclivity for anti-competitive behavior. If the specter of criminal prosecution and civil litigation were a sufficient prophylactic for antitrust violations, the consent judgments in this and many other cases would never have been necessary.”).

Moreover, the primary beneficiaries of the Paramount Consent Decrees – independent cinemas and their patrons – generally cannot afford to invoke “general antitrust laws” in any event. Especially given the trajectory of antitrust law (away from the *per se* category and toward the “rule of reason,” with its notoriously dense factual exploration), and the tendency of antitrust litigation to be complex, protracted and expensive, very few independents could ever afford to launch an antitrust lawsuit.

**Fourth**, the Paramount Consent Decrees have become a part of movie industry jurisprudence. Comparable to case law from another jurisdiction, the Decrees are persuasive authority; they are not “binding” on all industry players, but they usefully instruct. Industry players, including small exhibitors, who have never heard of the Sherman Act or the Clayton Act *have* heard of the “Paramount Consent Decrees.” When an errant distributor pushes the envelope (and to be sure we still hear many reports of such conduct) and hints at conditioning access to a blockbuster on taking some stinkers, the invocation of the “Paramount Consent Decrees” can be very effective.

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House of Representatives (February 3, 2012), available at <https://www.heritage.org/testimony/use-and-abuse-consent-decrees-federal-rulemaking>.

In this sense, despite the absence of “statutory” status, the Paramount Consent Decrees have exercised a measurable “**civilizing influence**” on an antitrust-inclined industry. The Decrees have become part of the essential fabric of the industry, and dissolving them would accomplish no salutary purpose, but *would* strip vulnerable independents of a valuable negotiating tool.

It is of course true that the Decrees are not strictly applicable across the industry. We cannot ignore the fact, for example, that the current industry behemoth, Disney, was not even one of the original Paramount defendants. But “bound” or not, all industry players take *instruction* from the Paramount Consent Decrees. And why wouldn’t they? The Paramount Consent Decrees constitute a highly particularized adjudication and application of “general” antitrust laws to our very idiosyncratic industry.

For example, “general antitrust law” says broadly that tying arrangements are illegal, subject of course to numerous exceptions and countless factual gradations and distinctions. But thanks to the Paramount Consent Decrees, we have a much more specific and therefore useful application of that “general” antitrust principle to our industry: “block booking” specifically is unlawful. That specificity lends a very useful clarity to behavior in our industry.

It is true that dissolution of the Paramount Consent Decrees would still leave the Supreme Court’s *United States v. Paramount Pictures* opinion itself as precedent. But the Supreme Court opinion is not what has become an integral part of this industry’s self-understanding. It is the fact of those Decrees, the fact of those specifically-embodied remedies, that continue to guide and constrain so many industry players today. Moreover, as noted, the eloquent heart of the Paramount Consent Decrees – the theatre-by-theatre without discrimination mandate – is contained only most succinctly in the Decrees themselves. *See supra*, section III.A at pp. 9-11.

Interestingly, that eloquent heart of the Paramount Consent Decrees has truly become an industry mantra, and it is invoked widely by both distributors and exhibitors. For example, in recent Cobb Theatres antitrust litigation against AMC, concerning clearances, AMC defended itself in part by insisting that “AMC has always licensed films at these theatres on a film-by-film, theatre-by-theatre basis.”<sup>17</sup> Nothing about “general antitrust laws” would have suggested that specific

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<sup>17</sup> See *The Hollywood Reporter*, “Cobb Theatres Argues Jury Should Decide Antitrust Case Against AMC” (Nov. 7, 2016), available at <https://www.hollywoodreporter.com/thr-esq/cobb-theatres-argues-jury-should-decide-antitrust-case-amc-944852>: (“AMC tells the judge in a summary judgment motion that ‘uncontroverted evidence disproves’ the allegation that it coerced distributors into granting it exclusive licenses. Specifically, AMC says in its court papers that the distributors ‘unequivocally testified that AMC never threatened or attempted to coerce them into doing anything. To the contrary, both the distributor witnesses and AMC’s witnesses have sworn that AMC has always licensed films at these theatres on a film-by-film, theatre-by-theatre basis.’”); see also *Deadline Hollywood*, “Distributors & Exhibitors Hold Line On Clearances Despite Fox’s Position Change” (Mar. 31, 2016) (“Added Sony’s distribution honcho Rory Bruer: ‘We will make decisions theater by theater, picture by picture and we aren’t looking to change that. It’s our intention to continue to distribute our pictures on what’s right for each film.’”). Available at <https://deadline.com/2016/03/20th-century-fox-exhibition-clearances-circuit-dealing-1201729061/>. Again, significantly, nothing in “general antitrust laws” obliged Mr. Bruer to frame



phrasing. Nor, of course, was AMC a defendant in the original *Paramount* litigation. For AMC (and its distributor witnesses) to frame AMC's defense that way underscores the continuing salutary and civilizing influence of the Paramount Consent Decrees.

**Fifth**, while decades have passed, modern conditions in the motion picture industry, if anything, reinforce the continuing relevance of the Paramount Consent Decrees. On both the distribution and the exhibition sides of the business, the drive toward consolidation continues unabated. All of that consolidated power will almost certainly squirt out as anticompetitive conduct, because they can, and almost certainly the losers will be independent cinemas.

The motion picture industry is much less vertically integrated than it was when the Department of Justice instigated the Paramount litigation. But the primary beneficiaries of the Decrees – independent cinemas and their patrons – do not need protection specifically from “vertical integration.” They need protection from anticompetitive abuse by *all* players with market power and a natural tendency to exploit it. That means the shrinking distribution oligopoly *and* the shrinking exhibition oligopoly *and* the looming streaming oligopoly.

Interestingly, the era following the Paramount Consent Decrees roughly coincided with the broad advent of television, perhaps the single greatest competitive threat to cinemas in their history. Cinemas survived, but the motion picture industry was changed forever. Fewer people went to cinemas and studios pivoted to fewer and more expensive motion pictures. Thus, independent exhibitors “found themselves bidding for a smaller supply of films in a more competitive market.”<sup>18</sup> But for the Paramount Consent Decrees, independents, and the small-town cinema experience generally, likely would have been crushed out of existence, and a generation of Americans would have missed the big screen.

Conditions are ripe for the big squeeze. Streaming services with massive market power are the new, potentially scarier, “television.” If they purchase cinemas, and throw around their ample weight, independent cinemas confront the predations of Big Distribution, Big Exhibition, *and* Big Streaming. On the other hand, if the Paramount Consent Decrees continue to be respected, the entry of behemoths like Amazon into the exhibition business would more likely be on terms that deterred Amazon from abusing its market power either to favor its own cinemas with its content or to punish fairly competing exhibitors with terms such as overbroad clearances.<sup>19</sup>

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his company's conduct that way. That is the continuing salutary legacy of the Paramount Consent Decrees.

<sup>18</sup> Michael Conant, *The Paramount Decrees Reconsidered*, 44 LAW & CONTEMP. PROBS. 79, 107 (1981).

<sup>19</sup> See Open Markets newsletter, “Lights, Camera, Monopoly: DOJ Could Revive the Studio System” (Aug. 24, 2018), available at <https://openmarketsinstitute.org/newsletters/corner-newsletter-august-23-2018-paramount-consent-decrees-matter-tech-giants-threaten-banking-overlooked-dissent-ftc/>:

A DOJ decision to end the Paramount Decrees would allow major studios to buy up theater chains and impose the same anticompetitive practices on filmmakers and consumers barred 70 years ago. More troubling is that this would come at a time of increased concentration in the studio, movie theater, and online distribution markets. Disney's recent



Moreover, the great promise of **digital cinema** – that distribution of motion pictures can be accomplished easily and at a tiny fraction of the cost (there being no \$1,500 cumbersome celluloid print involved),<sup>20</sup> and that widely-released motion pictures can therefore more easily and more widely get into the hands of independents in small markets – is reaching a delicate stage, and the results so far are decidedly mixed.

Despite the relative ease of digital distribution, independent cinemas curiously continue to experience vexatious obstacles to accessing major motion pictures. Much too frequently, our members are hearing vague excuses like “you’re not a part of our marketing plan.” What “marketing plan” seeks a *lower* gross for a major motion picture’s opening weekend?<sup>21</sup>

Some of the reluctance to widen the availability of major motion pictures can possibly be attributed to “virtual print fees,” the arrangements whereby distributors pay exhibitors a certain sum upon booking a motion picture to subsidize purchase of digital equipment and pass on some of the savings reaped by distributors.<sup>22</sup> But here is the strangeness, and the reason why it is a delicate stage in our industry’s history. The era of virtual print fees is coming to a close. Many

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purchase of 20th Century Fox means that four corporations now control 75 percent of the movie production business. In theaters, three firms now control 60 percent of the domestic market. Online, two companies dominate the streaming market, where 30 percent of consumers report using Amazon Prime Video and 50 percent report using Netflix as of 2017.

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In announcing the plan to review the Paramount consent decrees, Assistant Attorney General for Antitrust Makan Delrahim said that ‘much has changed in the motion picture industry since’ the Paramount Decrees. That’s true. In many key respects, the film industry is more concentrated now than it was in 1948.

<sup>20</sup> H. Alexander and R. Blakely, “The Triumph of Digital Will Be the Death of Many Movies,” *The New Republic* (Sep. 12, 2014) <https://newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film> (“Yet the real opportunity to axe costs digitally comes long after the final scene is shot. To produce and ship a 35mm print to an American cinema costs about \$1,500. Multiply that by, say, 5,000 prints for a big movie and it comes to \$7.5 million. Digital formats can do the same job for 90 percent less.”).

<sup>21</sup> Even in the pre-*Paramount* period, it was recognized that “multiple first runs” (as opposed to default exclusivity arrangements) increased total revenue. Michael Conant, *Antitrust in the Motion Picture Industry: Economic and Legal Analysis* at 65 & n.20 (Univ. of Cal. Press 1960). (“Some postwar deviations showed that multiple first runs (in a number of neighborhood theaters at one time) increased total revenues for the distributor.”).

<sup>22</sup> See Wikipedia, the Free Encyclopedia, “Virtual Print Fee,” at [https://en.wikipedia.org/wiki/Virtual\\_Print\\_Fee](https://en.wikipedia.org/wiki/Virtual_Print_Fee) (last visited Oct. 4, 2018):

**Virtual Print Fee** (VPF) is a subsidy paid by a film distributor towards the purchase of digital cinema projection equipment for use by a film exhibitor in the presentation of first release motion pictures. The subsidy is paid in the form of a fee per booking of a movie, intended to match the savings that occurs by not shipping a film print. The model is designed to help redistribute the savings realized by studios when using digital distribution instead of film print distribution.

independents have already concluded their virtual print fee arrangements with distributors, and yet they *still* report inexplicable motion picture availability problems.

What is happening? We cannot yet be certain, but it is a fixture of antitrust law that when players leave money on the table or otherwise act contrary to self-interest, antitrust conspiracies may be much more readily inferred.<sup>23</sup> Are overbroad clearances to blame for the difficulty independents are experiencing with film availability? Clearances are analyzed under the rule of reason, which makes proving them and their specific anticompetitive effects a dense and difficult undertaking. But it would send a terrible signal at this moment in our industry to dissolve the most eloquent expression and free and fair competition in the exhibition industry.

The great promise of digital cinema is precisely that distribution can be as wide as there are willing exhibitors, which was not possible in the finite “print” era. As we approach the end of the virtual print fee era, at an otherwise highly dynamic moment in the larger entertainment industry, we should take tremendous care not to change or abolish rules that have long constituted the most significant checks on anticompetitive impulses.

For the foregoing reasons, the ICA and its members respectfully request that the Department of Justice conclude, as it has repeatedly before, that no action concerning the Paramount Decrees is necessary or appropriate.

#### **IV. The Specific DOJ Inquiries**

The case for preserving the Paramount Consent Decrees set forth in the previous sections implicitly answers many of the DOJ’s specific inquiries. The ICA nevertheless briefly addresses them.

##### **A. Do the Paramount Decrees continue to serve important competitive purposes today? Why or why not?**

Yes. The Paramount Consent Decrees constitute a vital checklist of do’s and don’ts in the motion picture industry, particularized to this industry in a way that the “general antitrust laws” could never justly or efficiently accomplish. Even if not strictly “binding” on all current industry players, the “**civilizing influence**” and salutary instruction of the Decrees warrants their retention.

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<sup>23</sup> See *Regal Entm’t Grp. v. Iplic-Gold Class Entm’t, LLC*, 507 S.W.3d 337, 350 (Tex. App. 2016) (“The evidence that Regal and half of the major film distributors acted contrary to their self-interest is what permits a rational inference of conspiracy or coercion as opposed to permissible independent conduct.”) (citing *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978) (when conduct is inconsistent with self-interest of actors, were they acting alone, agreement may be inferred solely from action)); see also *Cobb Theatres III, LLC v. AMC Entmt. Holdings, Inc.*, 101 F.Supp.3d 1319, 1331 (N.D. Ga. 2015) (noting that most conspiracies are inferred from behavior of alleged conspirators and denying motion to dismiss restraint-of-trade claim where premium theater alleged that megaplex requested clearance, implicitly threatening economic harm if distributors did not accede, and premium theater subsequently received fewer films).

Most importantly, as noted, the heart of the Paramount Consent Decrees – the theatre-by-theatre on the merits licensing mandate – might be the single most important factor in the ability of independents cinemas to survive in today’s increasingly concentrated market.

**B. Individually, or collectively, are the decree provisions relating to (1) movie distributors owning movie theatres; (2) block booking; (3) circuit dealing; (4) resale price maintenance; and (5) overbroad clearances necessary to protect competition? Are any of these provisions ineffective in protecting competition or inefficient? Do any of these provisions inhibit competition or cause anticompetitive effects?**

As previously noted, and worthy of repetition, most of the specific prohibitions of the Paramount Consent Decrees follow naturally from the requirement that motion pictures be licensed “theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.” If that essential formula for fairness is followed, then practices such as circuit dealing, block booking and overbroad clearances would be impossible. Moreover, licensing with such meticulous fairness would blunt the anticompetitive effect of any vertical integration by any content provider, no matter how much market power. *See supra*, p.10.

**(i) Movie Distributors Owning Movie Theatres**

As noted, it is not vertical integration *per se* that threatens the livelihood of independents. It is the abuse of the market power gained either by the vertical integration itself or otherwise. If distributors truly follow the mandate to license “theatre by theatre, solely on the merits,” then by definition they cannot favor either their own “affiliated theatres” or other large “circuit theatres.”

It is a somewhat common misconception that the Paramount Consent Decrees precluded vertical integration. They did not. While substantial divestiture was ordered as part of the initial remedy, neither the Supreme Court nor the district ruled that defendants could not get back into the exhibition business. Several of the defendants were required to seek permission to do so, but the relative lack of vertical integration today is not because of the Paramount Consent Decrees. It is because the studios themselves have concluded for various reasons that the exhibition industry is too difficult or insufficiently attractive.

The ICA does not see distributor ownership of cinemas as the primary mischief to be avoided,<sup>24</sup> *provided* critically that the theatre-by-theatre licensing mandate is preserved and respected. That said, a scenario where a studio or a behemoth streaming service bought up a significant number of cinemas (or, for example, bought one of the biggest circuits) would raise significant antitrust anxieties. We believe the DOJ is well equipped to assess the impact on competition if such a possibility materializes.

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<sup>24</sup> Indeed, perhaps *some* modest vertical integration would be a net positive insofar as content providers acquired some skin in the exhibition game and learned the importance of the theatrical window and the pro-consumer and pro-competitive benefits of tiered entertainment, something that Amazon, for example, has suggested it would respect.

It warrants emphasis that the chief mischief associated with vertical integration in the motion picture industry is clearances.<sup>25</sup> If clearances are illegal, or at a minimum regulated strictly, vertical integration poses less of a threat to competition. If clearances are legal, or their regulation too lax, then vertical integration quickly becomes a big problem.

### **(ii) Block Booking**

The Supreme Court in *United States v. Paramount* described block-booking as “the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced. All the defendants, except United Artists, have engaged in the practice. Block-booking prevents competitors from bidding for single features on their individual merits.” 334 U.S. at 156-57.

Block booking has significant anticompetitive consequences for *any* exhibitor, including the biggest circuits. But it is ruinous for independents with their smaller screen counts. Somewhat akin to the effect of “minimum runs,” block booking occupies tremendously valuable screen space with under-performing content. Thus, it is one thing for a multiplex with 15 screens to devote one screen to an under-performing motion picture – to be sure a pernicious mischief that ought to be unlawful – but the effect on the independent with two screens is obviously devastating.

The prohibition of block booking in the Paramount Consent Decrees most certainly does *not* have anticompetitive effects, quite the opposite. Block booking empowers distributors to push weak content on exhibitors,<sup>26</sup> *and* the opportunity cost of devoting that screen to that weak content (especially devastating to locations with few screens) empowers distributors unfairly to keep their distributor-competitors’ content off the big screen.

### **(iii) Circuit Dealing**

The ICA notes at the outset that the exhibition market is not a zero-sum game between big circuits and small independents. Indeed, independents have often benefited from the buying power of big circuits, which has prevented studio predations that might have otherwise occurred

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<sup>25</sup> See Michael Conant, *Antitrust in the Motion Picture Industry: Economic and Legal Analysis*, at 64 (Univ. of Cal. Press 1960) (“The record showed that many theaters received first-run films only during a period when affiliated with a major circuit. When under independent ownership, either before or after circuit affiliation, the Paramount defendants even refused to bargain with the operator to license him first-run film. Examples were the Oriental Theatre in Chicago, the Roxy in Atlanta, the Fifth Avenue in Englewood, California, and the Palace in Gary, Indiana. A small theater in Janesville, Wisconsin, took first run away from larger local houses when Fox acquired control of it.”).

<sup>26</sup> See Michael Conant, *Antitrust in the Motion Picture Industry: Economic and Legal Analysis*, at 79 (Univ. of Cal. Press 1960) (“Many mediocre films would never have earned their costs of production had the distributor tried to market them singly, each on its own merits. In this way block booking enabled distributors to shift a part of the market uncertainties to the exhibitors by guaranteeing that poorly accepted pictures would be bought.”).

industrywide. Moreover, big circuits pay the lion's share of dues to trade associations such as the National Association of Theatre Owners, which ably represents the entire exhibition industry in multiple forums.

However, it is undeniable that "circuit dealing" violates the "theatre-by-theatre on the merits" licensing mandate at the heart of the Paramount Consent Decrees. *See Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal.App.4th 1366, 1375 (2011) ("The case law contains no general definition of prohibited circuit dealing, but it is generally characterized as 'the pooling of the purchasing power of an entire circuit in bidding for films,' which undermines the competitive process of bidding for film licenses 'theatre by theatre.'") (citing *Paramount*, 334 U.S. at 154). Indeed, the "theatre-by-theatre" mandate *expressly* includes in its recitation of prohibited discrimination both affiliated theatres *and* **circuit theatres**. As the Supreme Court described circuit dealing in *Paramount*:

The inclusion of theatres of a circuit into a single agreement gives no opportunity for other theatre owners to bid for the feature in their respective areas and, in the view of the District Court, is therefore an unreasonable restraint of trade. ... The formula deals and master agreements are unlawful restraints of trade in two respects. In the first place, they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations.

334 U.S. at 154-55.

In any given geographic market, if the big circuit gets the picture *on the merits*, and an independent competitor does not, the antitrust laws generally provide no recourse for the disappointed independent. But what big circuits *cannot* do is obtain circuit-wide deals that predetermine "the merits" across multiple geographic markets (and, if coupled with overbroad clearances, suppress independent access to motion pictures even outside the big circuit's geographic markets).

Given the steadily increasing consolidation in the exhibition industry, the prohibition of circuit dealing is even more vitally important today than it was in 1948. Whether the anticompetitive mischief is instigated by Big Distributors or Big Circuits matters little to the struggling independent who cannot stay in business if denied access to major motion picture content.

#### **(iv) Resale Price Maintenance**

Horizontal price fixing continues to be a *per se* violation. "Vertical price fixing" used to be a *per se* antitrust violation but is no longer. "Resale price maintenance" (a vertical arrangement) is subject to the "rule of reason," as opposed to *per se* treatment, meaning it requires a dense factual inquiry. *See General Cinema Corporation v. Buena Vista Distribution Inc.*, 681 F.2d 594 (9th Cir. 1982) (finding a distributor's per capita requirements not "vertical price fixing"). In

2007, the Supreme Court made it official that vertical resale price maintenance arrangements are subject to the “rule of reason,” and no longer *per se* violations. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007).

While distributors are not fixing a specific ticket price, their **per capita** requirements (essentially, a floor on ticket price that exhibitors will be charged regardless of the actual ticket price) certainly eliminate nearly all pricing flexibility an exhibitor might otherwise have. Independents in particular chafe at the per capita requirements because (1) as small operators, they have less buying clout and they are already operating at lower margins; (2) their average ticket prices are generally lower than the average ticket prices of big circuits; and (3) they generally need more pricing flexibility to account for local socioeconomic and other conditions.

While independents steadfastly complain about the stifling of pricing flexibility from per capita requirements, the ICA has not surveyed its members concerning details of per capita requirements. It is accordingly an open question whether per capita requirements are imposed unfairly against independents, or in a discriminatory fashion that favors big circuits, or in other anticompetitive ways. What seems clear, however, is that per capita requirements, *coupled with abuses like minimum runs*, constitute unlawful restraints of trade. Having to keep an underperforming picture on a screen beyond its opening week *and* pay excessive per capitas for the relatively few patrons who show up (and of course being unable to price the ticket downward precisely because of per capita requirements) is manifestly anticompetitive, and especially injurious to independents with their typically smaller locations.

While antitrust law has changed with respect to resale price maintenance since 1948, the Paramount Consent Decrees still constitute a salutary check on vertical price predations, especially as to more vulnerable and consumer-friendly independents.

#### (v) **Overbroad Clearances**

It is not unlawful for a distributor to “pick a winner” in a given geographic market. What the Paramount Consent Decrees add to the rule-of-reason inquiry<sup>27</sup> is, again, the requirement that the “winner” be picked “on the merits” and on a theatre-by-theatre film-by-film basis. Nobody gets to be the automatic winner. Moreover, nobody gets to “win” beyond a reasonable geographic range. The big circuit winner downtown cannot keep the picture out of the small independent’s suburban or rural cinema.

Especially pernicious is the coupling of clearances and circuit dealing, where a “blanket clearance” effectively issues in favor of a big circuit. The Paramount Consent Decrees justly deter that kind of anticompetitive conduct. And because clearances tend (with some exceptions) to operate against a distributors’ interest by reducing the number of runs and the achievable

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<sup>27</sup> *Regal Entm't Grp. v. Ipic-Gold Class Entm't, LLC*, 507 S.W.3d 337, 346-47 (Tex. App. 2016) (alleged clearance analyzed under rule of reason); *Cobb Theatres III, LLC v. AMC Entmt. Holdings, Inc.*, 101 F.Supp.3d 1319, 1332 (N.D. Ga. 2015) (alleged clearance agreement between premium theater and distributor is vertical agreement scrutinized under rule of reason); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1371 (3rd Cir. 1996) (clearances are vertical, nonprice restraints evaluated under rule of reason).



gross,<sup>28</sup> the persistence of clearances, especially in favor of the same big circuit, raises serious suspicion of an unlawful restraint.<sup>29</sup>

In *Paramount*, the Supreme Court treated clearances appropriately as likely anticompetitive and as requiring specific competitive justification by the distributor.

As we have said, the only justification for clearances in the setting of this case is in terms of the special needs of the licensee for the competitive advantages they afford. To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive effects. Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law. Cf. *United States v. Crescent Amusement Co.*, 323 U. S. 173, 323 U. S. 188.

334 U.S. at 148.

Apart from the obvious anticompetitive impact on the exhibitors who are getting excluded (and these are usually, though not always, independents), clearances operate in other ways to distort competition. For example, clearances prevent the kind of head-to-head competition that requires exhibitors to get creative in pro-consumer ways. An exhibitor consistently getting a clearance is basically getting a market pass from competition.<sup>30</sup>

Moreover, clearances can constitute significant (and hidden?) **barriers to entry**, in that an otherwise attractive market might be fatally less attractive if the exhibitor operating in that market is regularly getting (or clearly capable of getting) muscular clearances.<sup>31</sup> Thus, for example, clearances might confer the power to exclude competition even if a monopolist is not exacting a monopoly profit, and thus obscure the abuse of monopoly power.

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<sup>28</sup> See *supra*, note 21.

<sup>29</sup> See *supra*, note 23.

<sup>30</sup> A similar “consumer choice” argument was one of the reasons Fox noted when, upon the May 27, 2016 release of *X Men: Apocalypse* it famously declared it would not honor clearances. Deadline Hollywood, “Distribs & Exhibs Hold Line On Clearances Despite Fox’s Position Change” (Mar. 31, 2016) (“with the different types of movie theaters that exist today from PLFs to restaurant/multiplex combos, Fox believes the consumer should have the right to choose where they’ll see a movie. This puts some pressure on exhibition to provide a better experience than their competition down the street.”). Available at <https://deadline.com/2016/03/20th-century-fox-exhibition-clearances-circuit-dealing-1201729061/>.

<sup>31</sup> See *American Stores*, 872 F.2d at 842 (“An absence of entry barriers into a market constrains anticompetitive conduct, irrespective of the market’s degree of concentration.”). Where entry barriers are low, market share does not accurately reflect the party’s market power. *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 982-83 (2d Cir. 1984). But entry barriers that are only *apparently* low distort analysis of that market and hamper efforts at competitive redress.

Clearances almost *always* hurt smaller players. Almost. *Sometimes* a smaller player wins the lottery and gets a "clearance" *vis-a-vis* a big player.<sup>32</sup> And that's what makes clearances so insidious. They're not "structurally" anti-competitive because they can always be withheld or given to another player (although they can certainly *become* structurally anticompetitive if the same exhibitor essentially obtains a permanent and automatic clearance in plain violation of the Paramount Consent Decrees). But obviously it is typically the big circuits with the economic wherewithal to extract most clearances, especially clearances that reduce the distributor's gross.

The Paramount Consent Decrees did not eliminate clearances, but they did create a higher bar with respect to their competitive justification. As with circuit dealing, given the steadfastly increasing concentration in the exhibition industry, the importance of the Decrees' skepticism regarding clearances is even more important today than it was in 1948.

**C. What, if any, modifications to the Paramount Decrees would enhance competition and efficiency? What legal justifications would support such modifications, if any?**

The ICA respectfully submits that the status quo ought not be disturbed, and that, as the Department has done on each previous occasion when it revisited the Paramount Consent Decrees, it conclude that no change is necessary or appropriate. However, taking the question seriously, the very best "modification" of the Paramount Consent Decrees would be codifying their central principle as positive law: prohibiting distributors "from licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."

That principle, writ large, would do wonders for competition, consumers and the motion picture industry generally. If the Department of Justice instituted a rulemaking proceeding toward the end of distilling the best of the Paramount Consent Decrees, including their "theatre-by-theatre on the merits" mandate, the ICA would applaud the initiative, and likely not object if the action were coupled with efforts to vacate the Paramount Consent Decrees.

**D. What effect, if any, would the termination of the Paramount Decrees have on the distribution and exhibition of motion pictures?**

Termination of the Paramount Consent Decrees would be not only misdirected policy, but terrible timing. This is not the moment to untether big distributors (or other behemoth content providers) or even to hint that some "testing the waters" or "pushing the anticompetitive envelope" might be okay. Even the perception that the Department of Justice feels *less* solicitous toward independent cinemas would tempt too many big players (including big circuits) into the kinds of predations that are difficult to detect, and even some that are more brazen. Independents already dwell in a kind of perpetual existential angst, and the economic challenges of running a cinema continue to mount. It is difficult to navigate these waters. Independents need to see that

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<sup>32</sup> That is exactly what happened in the government's antitrust litigation against Syufy Enterprises, which doomed the government's case. *See United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990).

the Department of Justice remains committed to the principles of fairness so succinctly embodied in the Paramount Consent Decrees, *especially* the “theatre-by-theatre on the merits” mandate.

To the extent that termination of the Decrees introduced ambiguity into the state of the law (and it is a virtual certainty that some, and possibly substantial, ambiguity would be introduced), anticompetitive conduct would spike, and the earliest casualty would likely be the “theatre-by-theatre on the merits” mandate. If that mandate is compromised, we would witness the death spiral of independent cinema, with appalling consequences to the industry and to patrons of independent cinemas.

**E. Have changes to the motion picture industry since the 1940s, including but not limited to, digital production and distribution, multiplex theatres, new distribution and movie viewing platforms render any of the Consent Decree provisions unnecessary?**

To be sure, the motion picture industry is very different in 2018 than it was 70 years ago. Most obviously, nearly every consumer of motion pictures owns at least one television, and probably a mobile device as well. But the basic rules set forth in the Paramount Consent Decrees continue to serve the industry and consumers well.

**(i) Digital production and distribution**

The digital revolution *should* make wide distribution of motion pictures easier than ever, as there will never again be a “finite print” issue (and once we’re post-VPF, not even an artificially “finite” print in the form of transfer payments). This is the promise of digital: easy distribution to as many exhibitors as possible, and for a truly wide-release, there should be no impediment to such wide release. But we need the Paramount Consent Decrees to ensure that true promise of digital, else big players will introduce competitively advantageous bottlenecks that limit distribution.

Since the point of tiered entertainment is to determine as early and precisely as possible the value of a motion picture across platforms, distributors, acting in their best interest, will naturally distribute popular features as widely as possible. Failure to do so suggests some collusion or conspiracy in restraint of trade.

**(ii) Multiplex theatres**

In one sense, multiplex theatres indicate the ascendancy of exhibition, the power of choice. But that refers primarily to circuits, not independents. Independents are often 1, or 2, or 3, or 4-screen locations not because they are technologically “lagging,” but because they know exactly what their market can support.

Predatory practices like “minimum runs” are especially problematic in the world of multiplex theatres, which can easily accommodate “minimum runs” (just bump that poorly performing movie to the smallest screen for that third required week) versus independents, who typically do

not have the luxury of keeping a poorly performing movie on their one or two screens for three weeks.

The rise of multiplex theatres gives circuit theatres even more buying power, and power specifically to discriminate against independents. If circuits are encouraging minimum runs, for example, that would violate the Paramount Consent Decrees. It is easier to make the case that minimum runs are improper *with* the Paramount Consent Decrees than without them.

### **(iii) New distribution and movie viewing platforms**

Even with multiplying platforms, the “theatre-by-theatre on the merits” licensing mandate remains a relevant and persuasive principle. *See United States v. Loew’s Inc.*, 882 F.2d 29 (2d Cir. 1989) (“The continuing injunction to license features theatre-by-theatre also makes it unlikely that Warner’s interest in Cinemerica will result in foreclosure of distributors’ access to exhibitors. Moreover, the changed nature of the motion picture exhibition industry has made such foreclosure highly improbable.”).

Importantly, while platforms for movies have multiplied, the big screen remains the primary platform, and the one that typically drives the value of motion pictures in subsequent platforms. The cinema’s primacy in the sequence of various platforms preserves the relevance and the importance of the Paramount Consent Decrees. Obviously, the Paramount Consent Decrees did not become irrelevant or obsolete with the advent of television, which sent the exhibition industry generally reeling. To the contrary, given the additional competitive pressures introduced by television (as with the additional competitive pressures today from new platforms), the Paramount Consent Decrees substantially aided in ensuring that independents cinemas could navigate the rocky waters and survive to provide Big Screen entertainment to people who would likely otherwise never have such access.

### **F. Are existing antitrust laws, including, the precedent of *United States vs. Paramount*, and its progeny, sufficient or insufficient to protect competition in the motion picture industry?**

While “general antitrust laws” point *a little* of the way into clarity about proper and improper conduct in the motion picture industry, no extant statute or regulation or collection of cases comes anywhere near providing the level of particularity and clarity of application to our idiosyncratic motion picture industry as the Paramount Consent Decrees. *See discussion, supra*, at p. 12. Moreover, even if “general antitrust laws” could be refashioned over a period of time to adequately address all of the matters addressed in the Paramount Consent Decrees, the interim chaos and spur to experimental predations would doom too many independents.

As noted throughout these Comments, nothing in existing antitrust law comes close to the elegance and power of the “theatre-by-theatre on the merits mandate” in the Paramount Consent Decrees. The ICA respectfully urges the DOJ not to consider terminating the Decrees unless and until it has something of equal value and power in their stead.

Independents are robust competitors. The ICA is not promoting mere sympathy for a victim class. But they are the most vulnerable players in an industry increasingly dominated by *very* big

players. And their disappearance would have a terrible impact on the industry and on mostly rural and small-town patrons who would probably never again watch a movie on the Big Screen.

The Paramount Consent Decrees have operated for decades as a kind of civilizing influence on a dynamic industry, and as a solace for independents, who know the Department of Justice went to bat for the little guy in a big way, and won. The ICA and its members respectfully ask the Department of Justice now not to renounce its own remarkable victory.

Respectfully submitted,

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October 4, 2018