competition f he efendants generally cooperated in maintaining it, as we have held hey . The major efendants' predominant position in first-run heatre holdings was strongly protected by a fixed system of clearances and runs. As we said in our former opinion: 'The evidence we have referred to shows that both ependent stributors and exhibitors when attempting to bargain th he defendants have been met by a fixed scale of clearances, runs, and admission prices o which they have been obliged to conform f hey ished to get their pictures shown upon satisfactory runs or were to compete in exhibition either th he efendants' theatres or th heatres o which the latter have licensed their pictures. Under the circumstances sclosed he record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained.' 66 F.Supp.at page 346.

Our view was confirmed by Mr. Justice Douglas as follows: 'clearances have been used along with price fixing to suppress competition th he heatres of he exhibitor-defendants and with other favored exhibitors.' 334 U.S. 131, 148, 68 S.Ct. 915, 924.

While we pointed out in our former opinion hat here was scrimination in clearance and run by distributors and theatre holders particular stances, such as William Goldman Theatres v. Loew's Inc., 3 Cir., 150 F.2d 738, and Bigelow v. RKO Radio Pictures, Inc., 7 Cir., 150 F.2d 877, reversed on other grounds, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652, we concluded hat we could not say upon the facts before us hat his scrimination was general. Nevertheless, as already stated, we held hat he efendants had set up a system of fixed runs and clearances which prevented any effective competition by outsiders. This system, he absence of competitive bidding which has now been rejected, gave he defendants a practical control over the run and clearance status of any given theatre and rrespective of he extent of local scriminations violated he herman Act. It volved discrimination against persons applying for licenses and seeking runs and clearances for heir heatres, because hey had o reasonable chance o mprove their status by building or mproving heatres while he major efendants possessed superior advantages. Therefore, hough the evidence was sufficient to convince us hat here was scrimination negotiation for clearances and runs heatre by heatre, because was well-nigh mpossible to establish that a particular clearance or run was not refused because of he inadequacy of the applicant's heatre, the system of clearances and runs was such as to make competition against he efendants practically impossible.

As we have held, the licensing agreements use by he efendants scriminated against small ependents in favor of he larger circuits of affiliated and unaffiliated theatres. This scrimination was effected through formula deals and certain privileges frequently granted o large circuits franchises and master agreements. They ot only showed scrimination against small theatre owners, but in many stances also showed cooperation among the major efendants heir respective capacities

as distributors and exhibitors. The minor defendants as distributors acceded to and cooperated th these restrictions, which excluded small independents.

Formula eals and certain master agreements, both of which involved licenses to more than one theatre, and frequently to affiliated or large independent circuits, permitted he exhibitor o allocate film rental and playing time and thus precluded other theatre owners from the opportunity of competing for films theatre by heatre. While he Supreme Court has said hat franchises are ot necessarily objectionable *8 9 per se, he efendants in various stances coupled heir franchises th contract provisions which were ot cluded the standard forms of contract under which small ependents were licensed. These provisions, which at times conferred great competitive advantages upon hose receiving hem, were: 'Suspending he erms of a given contract, if a circuit heatre remains closed for more than eight weeks, and reinstating without liability upon re-opening; allowing large privileges he selection and elimination of films; allowing eductions in film rentals f 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; granting rights o question he classification of features for rental purposes.' (Finding 110).

We have been instructed by he upreme Court o consider he question of geographical distribution of theatres among the five major defendants. In ealing th this subject, we o ot ake into account he presence or absence of ependent heatres the areas ealt with. We have examined he efendants' theatre holdings and find hat in cities of less than 100,000 population, here s o oubt hat Paramount, Warner, Fox and RKO owned or operated theatres either in largely separate market areas or in pools, without more han trifling competition among themselves or with Loew's. In cities having a population of more than 100,000, here was in general little competition among he efendants, although considerably more han towns of under 100,000. A summary of he ata which substantially represents he true situation, but owing to certain fferences the proofs offered must be regarded as approximate rather than as entirely accurate, is as follows:

Cities of less than 100,000.

In cities of less than 100,000, Paramount had complete or partial erests in or pooling agreements * with other defendants affecting 1,236 theatres located in 494 towns. In 13 of hese towns containing 31 of he theatres- or only 3%- here was competition with another defendant. In 9% of hese towns competition between Paramount and he only other efendant he own was substantially lessened or eliminated by means of a pooling agreement affecting some or all of heir theatres; and this 9% were located 10% of Paramount's heatre interests. And 88% of he owns, containing 87% of Paramount's heatre interests, Paramount was the only defendant operating heatres. Thus it appears hat here was little, if any, competition between Paramount and any other efendant in 97% of he towns of under

100,000 and in respect to 97% of he heatres which Paramount had an interest.

Fox had similar heatre erests 42' theatres located in 177 towns. In 13 of hese towns containing 29 Fox theatres, or about 7% hereof, here was competition with another defendant. In about 93% of he towns containing the same percentage of Fox's heatre interests, Fox was the only efendant operating theatres.

Warner had similar heatre erests 306 heatres located 155 owns or less than 100,000. In 17 towns, or 11%, containing 30 Warner theatres, or 10% of its holdings, here was competition th another major efendant. In 3% of he towns, competition between Warner and he only other efendant he own was substantially lessened or eliminated by means of pooling agreements; and his 3% were located 4% of Warner's heatre interests. In 86% of he towns containing the same percentage of Warner's heatre interests, Warner was the only efendant operating theatres. Thus, there appears o have been little, if any competition between Warner and any other efendant in 89% of he towns and in respect to 90% of he heatres in which Warner had an interest.

***890** Loew had erests only 17 theatres located in 14 towns. In 4 owns, or 29%, containing 4 Loew theatres, or 23%, here was competition with another defendant. In 14% of he towns, competition was substantially lessened or eliminated by means of pooling agreements; and his 14% were located 18% of Loew's heatre interests. In 57% of he towns, containing 59% of Loew's heatre interests, Loew was the only defendant operating theatres. Thus, there appears to have been little, if any, competition between Loew and any other efendant in 71% of he towns and in respect to 77% of he heatres which Loew had an interest. It s to be noted, however, hat Loew's heatre erests towns of less han 100,000 constitute a far smaller proportion of its total theatre holdings than do those of he other defendants.

RKO had erests in 150 theatres located 66 towns. In 6 towns, or 10%, containing 6 RKO theatres, or 4%, here was competition with another major efendant. in 60% of he towns, competition was substantially lessened or eliminated by means of pooling agreements, and this 60% were located 73% of RKO's heatre interests. In 30% of he towns, containing 23% of RKO's heatre erests, RKO was he only efendant operating theatres. Thus, there appears o have been little, if any, competition between RKO and any other efendant in 90% of he towns and in respect to 96% of he heatres which RKO had an interest.

As a further llustration of he absence of substantial competition among the five major efendants owns of less han 100,000 population, the proofs as o heir otal theatre holdings make the following showing which seems to us impressive. They had interests altogether in 2,020 heatres located in 834 towns. In 26 towns, or 3%, containing 100 of heir theatres, or 5%, here was competition among some of them. In somewhat over 5% of he towns competition between hem was substantially lessened or eliminated by means of pooling agreements,

and this 5% were located 7% of heir heatre interests. And in somewhat less than 92% of he towns, containing 88% of heir heatre interests, only one of the major defendants owned heatres the area. Thus, there appears to have been little, if any, competition among the five defendants or any of hem in 97% of he towns and respect to 95% of he heatres which hey had an interest.

It appears from the foregoing hat the effect of the geographical stribution owns having a population of less than 100,000 was largely to eliminate competition among all of he efendants the areas where any of them had theatres. The details upon which our results have been based appear he statistical data set forth at the end of he opinion in Appendix 1.

Cities of 100,000 and over.

In cities of over 100,000 Paramount had complete or partial erests in or pooling agreements with other defendants affecting 352 heatres in 49 cities. In 18 of hese cities, or 37%, containing 91 Paramount theatres, or 26%, here was competition th other efendants. In an additional 10% of he cities containing 17% of Paramount's theatre holdings, here were other defendants having heatre erests, but hose erests were so relatively small as compared with Paramount, both on first and later runs, that competition with Paramount was unsubstantial owing o he ominance which the latter's theatre holdings gave . In 12% of these cities competition between Paramount and the only other efendants the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of heir theatres, and this 12% were located 18% of Paramount's heatre interests. And in 41% of the cities, containing 39% of Paramount's heatre interests, Paramount was the only efendant operating theatres. Thus, it appears hat here was little, if any, competition between Paramount and any other efendant in 63% of the cities of over 100,000 and in respect o 74% of he heatres which Paramount had an interest.

Fox had similar heatre erests in 211 theatres located in 17 cities. In 5 of ***891** these cities, or 29%, containing 54 Fox theatres, or 26%, here was competition th other defendants. In an additional 18% of the cities containing 41% of Fox's heatre holdings, here were other defendants having heatre interests, but hose erests were so relatively small as compared with Fox, both on first and later runs, that competition th Fox was unsubstantial owing o he ominance which the latter's heatre holdings gave . In 53% of he cities, containing 33% of Fox's heatre erests, Fox was he only efendant operating theatres. Thus, it appears hat here was little, if any, competition between Fox and any other defendant in 71% of the cities and in respect to 74% of he heatres which Fox had an interest.

Warner had similar heatre erests in 243 theatres located in 26 cities. In 14 of hose cities, or 54%, containing 89 theatres, or 37%, here was competition th other efendants. In an additional 8% of he cities containing 5% of Warner's heatre holdings, here were other defendants having

heatre interests, but hose erests were so relatively small as compared with Warner, both on first and later runs, that competition with Warner was unsubstantial owing o he ominance which the latter's heatre holdings gave . In 1,% of hese cities competition between Warner and the only other efendants the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of heir theatres, and this 19% were located 51% of Warner's heatre interests. And in 19% of the cities, containing 7% of Warner's heatre interests, Warner was the only efendant operating theatres. Thus, it appears hat here was little, if any, competition between Warner and any other efendant in 46% of the cities and in respect to 63% of he heatres which Warner had an interest.

Loew had similar heatre erests in 144 heatres located 37 cities. In 32 of those cities, or 86%, containing 122 Loew theatres, or 85%, here was competition with other defendants. In 3% of these cities, competition between Loew and the only other efendant the city was eliminated by means of a pooling agreement affecting all of heir theatres, and this 3% were located 7% of Loew's heatre erests. And in 11% of the cities, containing 8% of Loew's heatre interests, Loew was he only defendant operating theatres. Thus, appears hat here was little, f any, competition between Loew and any other efendant in 14% of the cities and in respect to 15% of he heatres which Loew had an interest. In the matter of mere geographical distribution of s theatres, Loew has he most favorable record of any of the major efendants. But s o be oted hat, hile s rue that as o s eighborhood prior run heatres New York, here was competition with RKO the sense that both operated in New York on he same runs, evertheless hese two companies vided the product of the various efendant distributors under a continuing arrangement so hat here was no competition between hem in obtaining pictures. Indeed, on one occasion where Paramount was having a long spute with Loew's as to rental erms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount o lease its films to RKO for exhibition the latter's circuit, or was any effort made by RKO to procure Paramount films as hey both evidently preferred o adhere o the existing arrangement, under which Loew's circuit consistently exhibited he films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner, and half of Universal. Accordingly, we hink hat the showing that 85% of Loew's theatres are in competition th heatres of other efendants is misleading and may properly be reduced by the exclusion of s New York eighborhood theatres. If his s one, would give Loew a percentage of approximately 42% of s heatres competition with other efendants in cities over 100,000.

RKO had similar heatre erests in 256 heatres in 31 cities. In 22 of these cities, or 72%, containing 190 theatres, or 74%, here was competition with other defendants. In an additional 6% of the cities, containing 4% of RKO's theatre holdings, ***892** here were other defendants having heatre erests,

but hose erests were so relatively small as compared th RKO, both on first and later runs, that competition with RKO was unsubstantial owing o he ominance which he latter's heatre holdings gave . In 16% of hese cities, competition between RKO and the only other efendants the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of heir theatres, and this 16% were located 15% of RKO's heatre interests. And in 6% of the cities, containing 7% of RKO's heatre erests, RKO was the only defendant operating theatres. Thus, it appears hat here was little, if any, competition between RKO and other efendants in 28% of the cities and in respect to 26% of he heatres which RKO had an interest. With respect to mere geographical distribution, RKO's record was relatively good but s to be oted that approximately 58% of s heatre erests were located New York on neighborhood runs, and the same comments as o distribution of film made in regard o Loew's are applicable to RKO. If its New York eighborhood heatre erests were excluded from the category of heatres competition with other efendants, the RKO percentage would then be only about 16% competition with other defendants.

The major efendants had erests altogether in 1,112 theatres located in 87 cities of more than 100,000. In 46% of these cities, containing 23% of heir heatre interests, only one of the major efendants owned heatres he area. In 11.5% of he cities, competition between hem was substantially lessened or eliminated by means of pooling agreements, and his 11.5% were located 16% of heir heatre holdings. In an additional 11.5% of he cities, containing 17% of heir heatre erests, here was more than one efendant having heatre erests the city, but he position of one efendant was so ominant relative o he others hat competition between hem was unsubstantial. In 31% of he cities, containing 44% of heir heatre erests, here was competition among he defendants. But the New York eighborhood theatres of Loew and RKO, which are cluded in reaching the 44% figure, should properly be excluded because here s no competition between Loew and RKO in obtaining pictures for the reasons we have already given. This would reduce the percentage of efendants' heatres which compete with one another to 27.

It appears from the foregoing hat the effect of the geographical stribution in cities having a population of more than 100,000 was substantially o limit competition among the major defendants. The etails upon which our results have been based appear the statistical data set forth at he end of the opinion in Appendix 2.

The statistics contained in both Appendix 1 and Appendix 2 are derived from ata submitted at the original trial and show the situation in 1945. ce the entry of our original ecree, these figures have ot been substantially changed as o towns of under 100,000, but have been somewhat changed, principally by he dissolution of pools pursuant to our ecree, the case of cities of more than 100,000. The situation in 1945, however, would seem to be far more mportant etermining whether

violations of he Sherman Anti-Trust Act occurred han the status existing after he defendants had been found guilty of wrongs and were merely taking steps to carry out our remedial decree. For this reason, we have included statistics relating o the conduct of Paramount and RKO, even hough he remedies against them are now provided under consent decrees.

2] The plaintiff contends hat the figures as to geographical distribution require a finding hat here was an agreement o vide territory, but the evidence cates hat much of the acquisition of heatres was ue o the buying up of circuits and hat he purchases at least in some of these cases involved competition among certain of he defendants. We, herefore, o not find an agreement to divide territory geographically the organization of he efendants' heatre circuits, but we do hold hat the geographical distribution became a part of the system which competition was largely absent and ***893** the status of which was maintained by fixed runs, clearances and prices, by pooling agreements and joint ownerships among the major defendants, and by cross-licensing which made ecessary hat hey should work together. The argument of some of he efendants hat they had o opportunity o change his geographical status not only seems inherently improbable but affirmatively contradicted by the making of pooling agreements and entering into joint ownerships with one another. Moreover, even the relatively few areas where more han one of he major efendants had theatres, competition for first-run licensing privileges was generally absent because he defendants customarily adhered to a set method he distribution and playing of their films. In substantiation of the general picture, the plaintiff has shown, on the basis of a study of four seasons between he years 1936 and 1944, hat uring this period the privilege of first-run exhibition of a defendant's films was ordinarily ransferred from one efendant to another only as he result of dissolution of a theatre operating pool or an arbitrary division of the product known as a 'split'. The lack of competition which we have described has undoubtedly been uced in large measure by the reliance of he defendants on each other in obtaining pictures for use their various heatres hroughout he country. The efendants were also dependent on one another o obtain theatre outlets for their own pictures, for the best customers of any efendant were ordinarily one or more of the other efendants.

We hink hat there can hardly be adequate competition among he efendants where such erdependence exists. Moreover, when he efendants were would affect not only competition among hemselves, but th independents. We have already found such effects the various concerted practices of he efendants which have restricted competition th ependents. In our former opinion, we provided for a system of competitive bidding for film he belief that such a system would sufficiently control the reliance of the major efendants on one another's product and theatres. That system having been rejected by he upreme Court, we must find some other means of preventing the major companies from being

the films, except Westerns, stributed the 1943-44 season. These figures certainly cate, when coupled th the strategic advantages of vertical integration, a power to exclude competition from these markets when desired. This power might be exercised either against non-affiliated exhibitors or distributors, for the ownership of what was generally the best first-run theatres, coupled th the possession by he defendants of he best pictures, enabled them substantially o control the market. If an ent to exercise the power be hought mportant, it existed this case, as we noted above in finding an attempt to monopolize. Our former Finding No. 119 was not made in consideration of first-run heatres but was based on otal theatre holdings the country, of which he theatres owned by he efendants represented but a small fraction. We, herefore, ot ake into consideration the monopoly power in respect to first-run heatres, which we have since been rected to consider. Accordingly, our Finding No. 119 s in view of our further consideration misleading and must be vacated.

We may add hat what we have said about the power to exclude ependents from first-runs the 92 cities is supported by evidence of actual exclusion which s presented the Government's original brief, pages 13-14 and 35-40. In many cities, here was complete exclusion of independents and numerous others a restricted stribution of pictures o independents, at times by only one of he defendants, and at other times by most limited percentages of pictures as compared th he umber stributed to affiliated theatres. The facts as to film stribution the 1943-44 season show hat he five major efendants achieved a monopoly of first-run exhibition of he feature films distributed by the five major efendants in about 43 of the 92 cities of over 100,000 and of the feature films stributed by the eight efendants in about 143 of the 320 cities of 25,000 to 100,000. (See Government Exhibits 489, 490, 490(a)). In addition o the proof of monopoly control in cities of more than 25,000, the plaintiff has produced proof hat in approximately 238 owns volving in all but about 17 cases populations of less than 25,000 but having two or more theatres, some single one of the five major defendants, or about 18 cases two of he defendants, had all he theatres and therefore possessed a complete local monopoly in exhibition. (See Government Exhibit 488). These figures are subject to some qualifications because of inaccuracy as to a few localities, but for he most part they appear to be correct and to show either total absence of competition of slight competition from drive-ins and heatres nearby communities. They afford significant additional proof of monopoly control. Accordingly, here was not only he power to exclude which might be exercised at will but an actual exclusion approximating the aggregate 70% of ***895** the first-run theatre market the 92 largest cities. This percentage is based on the proportions of theatre ownership of the major efendants these cities as compared th ependents. There is certainly no reason to suppose hat at least as great a percentage would ot exist in favor of the major efendants he number of feature films distributed on first-run.

	Paramount		Fox		Warner		Loew		RKO		Totals	
	Towns	Theatres	Towns	Theatres	Towns	Theatres	Towns	Theatres	Towns	Theatres	Towns	Theatres
One deft. owns all affiliated	20	138	9	70	5	17	4	12	2	19	40	256
theatres in town	41%	39$	53%	33%	19%	7%	11%	8%	6%	7%	46%	23%
The defts. in the town are	6	15	—	—	5	98	1		5	2	10	115
pooled as to some or all of		50				27		10		35		61
their theatres	12%	18%			19%	51%	3%	7%	16%	15%	11.5%	16%
Holdings of a deft. or pool	5	53	3	81	2	8	—	—	2	1	10	165
which dominates affiliates		5		6		4				9		22
in the town	10%	17%	18%	41%	8%	5%			6%	4%)		
Holdings in towns	4	3	2	2	1	4	9	8	5	5	11.5%	17%
dominated by another deft.		9		1				9		1		

Holdings where	14	71	3	50	13	80	23	104	17	177	27	482
competition exists		8		1		5		1		7		11
	37%	26%	29%	26%	54%	37%	80%	85%	72%	74%	31%	44%
Totals	49	280	17	203	26	207	37	124	31	204	87	1018
		72		8		36		20		52		94
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

All Citations

85 F.Supp. 881, 82 U.S.P.Q. 291

Footnotes

Pooling agreements and joint interests among defendants are treated as indistinguishable for the purpose of summarizing geographical distribution.

These theatres were pooled by two defendants. Since each time a theatre was pooled there were two owners involved, the total number of pooled theatre interests was twice the number of theatres pooled. The term “pooled” is here used to include joint ownerships among defendants.

*The total number of towns is not necessarily the sum of the towns listed for each of the five defendants, since some towns have theatres owned by more than one individual defendant and such towns are therefore duplicated in the individual listings.

These theatres were pooled by two defendants. Since each time a theatre was pooled there were two owners involved, the total number of pooled theatre interests was twice the number of theatres pooled. The term ‘pooled” is here used to include joint ownerships among defendants.

*In arriving at an over-all total of theatres located in towns where one defendant dominated affiliated competition, the theatres of all defendants in such towns have been included because there exists no substantial competition among the defendants in any of them, but in considering records of individual defendants holdings in towns dominated by another defendant were treated as competitive. The ten towns designated as areas where one defendant or a pool dominates all other affiliates are: Atlanta, Cleveland, Denver, Detroit, Des Moines, Houston, Los Angeles, Paterson, Rochester and San Francisco.

The total number of towns is not necessarily the sum of the towns listed for each of the five defendants, since some towns save theatres owned by more than one individual defendant and such towns are therefore duplicated in the individual listings.