The Paramount Decrees: Lessons for the Future

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Antitrust judgments resolving conspiracy cases occasionally include restrictions on facilitating practices—actions and arrangements that intensify interdependence by blunting incentives to compete. The imposition of such remedies is consistent with a long line of precedents. Interdependence (“conscious parallelism”), a situation in which competitors act on a mutual understanding that they would benefit from restrained competition, is not unlawful in and of itself. But evidence showing both interdependence and facilitating practices may establish the existence of an unlawful conspiracy agreement under Section 1 of the Sherman Act.\(^1\) Thus, in their essence, restrictions on facilitating practices are similar to merger remedies addressing coordinated effects.\(^4\)

In United States v. Paramount Pictures (1948), the Supreme Court concluded that vertical integration and a set of vertical practices facilitated a horizontal conspiracy in the motion picture industry.\(^5\) Accordingly, the Supreme Court ruled that the appropriate remedy should include divestitures of certain vertically integrated assets and restrictions on certain distribution practices. The Paramount consent decrees (the “Paramount Decrees” or “Decrees”) implemented this ruling and have continued to regulate the motion picture industry over the seven decades since.\(^6\)

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1 See, e.g., Cal. Dental Ass’n v. FTC, 526 U.S. 756 (1999) (reviewing an FTC order requiring a professional association to cease and desist from restricting certain types of advertising by members); United States v. Container Corp. of Am., 393 U.S. 333 (1969) (condemning information exchange that resulted in stabilization of prices); Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936) (enjoining certain practices of a trade association that homogenized business practices to make price cutting more transparent); Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (upholding a permanent injunction enjoining a trade association’s information exchange scheme); United States v. Airline Tariff Pub’lCo., Inc. No. 92-2854 (SSH), 1994 WL 502091, 1994-2 Trade Cas. (CCH) ¶ 70,687 (D.D.C. Aug. 10, 1994) (approving a consent decree enjoining information exchange).


3 See, e.g., Leegin Creative Leather Prosds, Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007) (noting that vertical agreements “may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel”); Eastern States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600, 612 (1914) (holding that information exchange is a facilitating practice that permits the inference of a conspiracy agreement); Evergreen Partnering Grp., Inc. v. Pactv Corp., 720 F.3d 33, 49–50 (1st Cir. 2013) (stating that allegations of facilitating practices are sufficient to plead a conspiracy claim); Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (“[A] horizontal price-fixing agreement may be inferred . . . when . . . interdependent conduct is accompanied by circumstantial evidence . . . such as defendants’ use of facilitating practices. . . . Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement.”); In re Flat Glass Antitrust Litig. (Ii), No. 11-658, 2012 WL 5383346, at *3 (W.D. Pa. Nov. 1, 2012) (stating that “facilitating practices, such as information exchange” may serve as plus factors); In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 418 (S.D.N.Y. 2003) (stating that facilitating practices may constitute plus factors); Holiday Wholesale Grocery Co. v. Philip Morris Inc., 231 F. Supp. 2d 1253, 1274–75 (N.D. Ga. 2002), aff’d sub nom. Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) (noting that “facilitating devices’ are not necessarily sufficient under the law to constitute a ‘plus factor’”).


On November 22, 2019, the U.S. Department of Justice’s Antitrust Division filed in the District Court for the Southern District of New York a motion to terminate the Paramount Decrees. The Division recognized that the Decrees banned practices that facilitated a horizontal conspiracy. It maintained, however, that: (1) the “Decrees successfully dismantled and ended the motion picture horizontal distributor cartel of the 1930s and 40s,” and (2) “changes in the motion picture industry, antitrust jurisprudence, and economic understandings warrant immediate termination of the [Decrees].”

The Division’s approach in this instance is, unfortunately, misguided. Its claims about the industry rest on a sloppy compilation of factual statements, and its claims about antitrust jurisprudence and modern economics reflect antipathy for behavioral remedies, as well as skepticism that vertical arrangements may be anticompetitive.

The story of the Paramount Decrees offers lessons for present debates about the future of antitrust law that could benefit contemporary assessments of remedies such as restrictions on facilitating practices and divestitures. The story could also benefit assessments of antitrust policy in periods of rapid technological change, vertical arrangements, and conspiracy inference.

**Hollywood’s Golden Age: Interdependence and “Coopetition”**

In the second quarter of the 20th century, the motion picture industry was one of the fastest growing sectors in the United States. Through technological and operational innovations, the industry turned moviegoing into America’s favorite pastime. Companies in the industry competed against each other and faced threats of entry but did not face any meaningful competition from alternative entertainment outlets, as home video technologies were not yet commercially viable. This period is known as Hollywood’s Golden Age.

Within the industry, a group of eight film distributors established themselves as industry leaders and operated as an oligopoly. These eight distributors were household names in the 1930s and 1940s: Paramount Pictures, Warner Bros., Loew’s (then the parent company of MGM), Twentieth Century-Fox, RKO, United Artists, Columbia, and Universal. Five of these distributors, known as the “majors,” integrated production and distribution and held equity in movie theaters. The other three distributors, known as the “minors,” acquired equity in theaters in the 1920s but divested these investments in the early 1930s. Two minors integrated distribution and produc-
tion and specialized in low-budget productions. One minor, United Artists, specialized in the production of high-quality films. The company was able to gain a position in the high-end segment because of the stature of its founders, superstars who resented working with the vertically integrated studios.16

Together, these eight distributors dominated the motion picture industry during Hollywood’s Golden Age. In the mid-1940s, they collected close to 95 percent of licensing that the U.S. exhibitors paid to U.S. distributors.17 The majors owned or held equity in about 17 percent of theaters in the United States, including 70 percent of the first-run theaters in the 92 largest U.S. cities.18 Seven distributors still operate today as subsidiaries of media conglomerates.19

A key characteristic of the oligopoly was the heterogeneity of the distributors and their products that undermined their ability to fix prices.20 Instead, the distributors engaged in “coopetition”:21 while competing over market shares and revenues, they also cooperated in certain areas to promote their joint interests, principally self-regulation, lobbying, and exclusion of competition from other companies.

The distributors’ cooperative ventures were often negotiated through their trade association, the Motion Picture Producers and Distributors of America (MPPDA),22 which was “the expression and fulfillment of [their] cooperative impulses.”23 In 1923, shortly after the distributors formed MPPDA, the association introduced a template exhibition agreement that standardized distribution practices.24 This model agreement produced efficiencies by reducing transaction costs associated with the booking of films and simplifying the process of dispute resolution. Nonetheless, some elements of the model agreement were anticompetitive.25 For example, in the 1920s, the agreement contained mandatory arbitration clauses that were unfavorable to independent exhibitors. Holding that these arbitration clauses violated antitrust law, the Supreme Court noted that arbitration could serve “the needs of the motion picture industry; but, when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, their action becomes illegal.”26 In another decision, the Supreme Court held that the credit rules for exhibition

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18 1947 Paramount, 70 F. Supp. at 68, 70 (Findings 126 and 148).
21 For the notion of coopetition, see Rockwell D. Hunt, Co-opetition, L.A. TIMES, Nov. 20, 1937, at 4 (“[T]he maintenance of competition does not presuppose the absence of cooperation, nor does the existence of cooperation demand the overthrow of competition.”); ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION (1996); Pierre Roy & Said Yami, Coopetition within an oligopoly: impacts of a disruptive strategy, in COOPETITION: WINNING STRATEGIES FOR THE 21ST CENTURY 185 (Said Yami et al. eds., 2010).
22 MPPDA was commonly known as the “Hays Office,” for the leadership of the association’s first president, Will Hays. See RAYMOND MOLEY, THE HAYS OFFICE (1945).
23 Id. at 37.
25 See, e.g., United States v. First Nat’l Pictures, 282 U.S. 44 (1930) (holding unlawful a provision stating that distributors would refrain from entering into licensing agreements with purchasers of theaters unless they satisfy certain conditions).
agreements that the model agreement standardized also violated antitrust law.\textsuperscript{27} In 1932, pressured by antitrust actions challenging the legality of the standard exhibition agreement, the distributors modified the agreement to be optional rather than binding.\textsuperscript{28} Their adherence to the optional agreement, however, continued to be relatively uniform.

Film scholars have struggled to characterize the complex relationships among the distributors that consisted of interdependence, mobility of executives across companies, collusive arrangements, and parallel vertical practices.\textsuperscript{29} Economist Mae Heuttig described these relationships as “a maze of intricate relationships,” in which “[n]o one aspect is intelligible except as part of the whole.”\textsuperscript{30} Economist Robert Brady observed that the industry was “governed by . . . management groups” that functioned as “a semicompulsory cartel . . . of the type that typically stops short of the more readily indictable [antitrust] offenses.”\textsuperscript{31} Together, Brady argued, the distributors operated as “a type of monopoly that is difficult to define, . . . hard to trace and appraise, and . . . varies endlessly in methods of application and degrees of effectiveness.”\textsuperscript{32} Likewise, film historian Tino Balio argued that the distributors operated as “a mature oligopoly,” in which the majors had “a sort of symbiotic relationship” with the minors that supplied “low-cost pictures.”\textsuperscript{33}

The **Paramount Decrees**

**Paramount and the Paramount Decrees** concluded an epic trustbusting campaign that sought to remove barriers to competition in the motion picture industry.\textsuperscript{34} This campaign (1) marked the reinvigoration of antitrust enforcement in the late 1930s, (2) addressed the organization of the motion picture industry during Hollywood’s Golden Age, and (3) still represents the most ambitious effort to reform markets through antitrust enforcement to date.

The Supreme Court issued the **Paramount** decision in May 1948.\textsuperscript{35} It took the government almost four years to negotiate and litigate the Decrees with all of the distributors.\textsuperscript{36} The Decrees included structural and behavioral remedies. The structural remedies required the majors to divest their interests in movie theaters and prohibited them from expanding into exhibition. The behavioral remedies sought to establish a “competitive bidding” process, which the Supreme Court interpreted to mean entering into licenses on a “theatre by theatre and picture by picture” basis.\textsuperscript{37} To this end, the Decrees forbade the distributors from setting admission prices and from engaging in “block booking” (the licensing of a bundle of films), “circuit dealing” (the licensing of films to chains rather than individual theaters), and “overbroad clearances” (exclusive licenses for

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\textsuperscript{27} United States v. First National Pictures, 282 U.S. 44 (1930).

\textsuperscript{28} See Some Angles to Uniform Contract, VARIETY, Nov. 22, 1932, at 34; Optional Standard License Agreement, VARIETY, Nov. 22, 1932, at 34; Lewis, supra note 24, at 294–98.

\textsuperscript{29} See, e.g., Conant, supra note 17; Mae D. Huettig, Economic Control of the Motion Picture Industry: A Study in Industrial Organization (1944); Daniel Bertrand et al., The Motion Picture Industry—A Pattern of Control (1941).

\textsuperscript{30} Huettig, supra note 29, at v.

\textsuperscript{31} Robert A. Brady, The Problem of Monopoly, 254 AM. POL. & SOC. SCI. 125, 125, 136 (1947).

\textsuperscript{32} Id. at 125.


\textsuperscript{34} U.S. Government’s Bill of Complaint, VARIETY, July 27, 1938, at 12.

\textsuperscript{35} 1948 Paramount, 334 U.S. 131.

\textsuperscript{36} The first decree was approved in November 1948 and the last decree was approved in February 1952. See supra note 6.

\textsuperscript{37} 1948 Paramount, 334 U.S. at 161.
Although the Decrees applied only to the Paramount defendants, their behavioral remedies have served as interpretations of antitrust law. Thus, in practice, the Decrees have regulated vertical relations in the motion picture industry over the past seven decades.

### The Division’s Rationales for Termination

The Division’s decision to terminate the Paramount Decrees was hardly surprising. Under the leadership of Assistant Attorney General Makan Delrahim, in April 2018 the Division launched an “initiative to terminate legacy antitrust judgments” that “no longer protect competition.” Legacy judgments are old decrees that remain in effect because they have no sunset provisions and, therefore, their termination requires approval by the issuing court. Over 1,300 legacy judgments had been issued from the early days of the Sherman Act to 1979, when the Division concluded that perpetual decrees were not in the public interest. Although many legacy judgments concern companies and industries that no longer exist, there are some that still govern the operation of ongoing businesses. The Paramount, ASCAP, and BMI consent decrees are probably the most well-known examples.

Announcing the decision to move to terminate the Paramount Decrees, AAG Delrahim stated that the Decrees “long ago ended the horizontal conspiracy among movie companies . . . and undid the effects of that conspiracy on the marketplace.” He further stated that the Decrees “have served their purpose, and their continued existence may actually harm American consumers by standing in the way of innovative business models for the exhibition of America’s great creative films.”

While good intentions stand behind the move to terminate the Paramount Decrees, the Division’s analysis is flawed. First, although the Division recognized that the Decrees addressed facilitating practices, it portrayed the distributors’ conspiracy as a product of an explicit agreement. Several old judicial opinions point out that Paramount’s determination that a conspiracy among the distributors had exist-

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38 The decrees banned minimum resale price maintenance, which in the 1930s and 1940s was used to undermine the appeal of inexpensive theaters. Since the 1970s, exhibition agreements typically include restrictions on minimum admission prices (“per capita requirements”) and the ban on minimum resale price maintenance is treated as a ban on interference with pricing decisions of exhibitors. See General Cinema Corp. v. Buena Vista Dist. Co., 681 F.2d 594 (9th Cir. 1982); Barak Orbach & Liran Einav, Uniform Prices for Differentiated Goods: The Case of the Movie-Theater Industry, 27 INT’L REV. L. & ECON. 129 (2007).


40 See April 25, 2018 Press Release, supra note 39; see also U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL III-149-to-150 (5th ed.).

41 The ASCAP and BMI decrees concern the licensing of public performing rights in the music industry. In June 2019, the Division opened a review of these decrees to determine whether they “should be maintained in their current form, modified, or terminated.” Press Release, U.S. Dep’t of Justice, Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019). See also Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Sign of the Times: Innovation and Competition in Music, Remarks as Prepared for the National Music Publishers Association Annual Meeting (June 13, 2018).

42 Motion to Terminate Press Release, supra note 7.

43 Id.

ed in the 1940s did not mean that this conspiracy existed thereafter. The Division misread these decisions, concluding that they held that Paramount or, at the very least, the Paramount Decrees dismantled the “cartel.” Thus, without any evaluation of past or present effects of the Decrees on interdependence in the industry, the Division argued that there is “no reason to believe” that the distributors “would or could re-establish the industry-wide horizontal conspiracy or cartel that was the basis for the original enforcement action by the United States and the resulting Decrees.”

Second, the Division mistakenly argued that consent decrees cannot ban vertical arrangements, because, today, the legality of vertical arrangements is evaluated under the rule of reason. Under this approach, consent decrees cannot ban vertical arrangements that facilitate horizontal conspiracies or horizontal arrangements that are evaluated under the rule of reason. In practice, however, antitrust consent judgments often ban arrangements that are evaluated under the rule of reason.

To be sure, there are good reasons to evaluate legacy antitrust judgments, modify some, and terminate others. The Paramount Decrees are no exception. The emergence of the digital economy and decline of brick-and-mortar retailers (such as movie theaters) demand an evaluation of whether and how the Decrees affect innovation and entry. But the Division failed to explain its assertion that termination of the Decrees would “lead to business practices and innovations that benefit consumers.”

The Reinvigoration of Antitrust Enforcement

Until 1935, antitrust enforcement meant big political promises, symbolic trustbusting campaigns, and a little enforcement stick. In January 1935, the Justice Department announced the “most far-reaching antitrust action in many years,” charging three distributors and five film executives with a conspiracy to coerce a St. Louis exhibitor to sell its theaters to one of them. The action, known in the industry as the St. Louis Trust Case, was approved by President Roosevelt and intended “to show industry and the nation at large that the anti-trust laws have survived the New Deal.”

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45 See, e.g., Theatre Enterprises, 346 U.S. at 543–44; Buckhead Theatre Co. v. Atlanta Enters., Inc., 327 F.2d 365, 369 (5th Cir. 1964).
46 Supporting Memorandum, supra note 7, at 12, 16.
47 Id. at 3.
48 Id. at 22–23.
49 See, e.g., In re Musical Instruments and Equip. Antitrust Litig., 798 F.3d 1186, 1190 (9th Cir. 2015) (describing a consent decree ordering a trade association to cease and desist from “urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information [concerning pricing practices] between or among [members of the association]”); Press Release, Fed. Trade Comm’n, FTC Enters Global Settlement to Resolve Reverse-Payment Charges Against Teva (Feb. 19, 2019) (announcing a consent decree resolving a set of reverse settlement agreements); Press Release, U.S. Dept of Justice, Justice Department Reaches Settlement with Nexstar Media Group Inc. in Ongoing Television Broadcaster Information Exchange Investigation (Dec. 13, 2018) (announcing a consent decree banning certain forms of information exchange).
50 Supporting Memorandum, supra note 7, at 22.
54 See St. Louis Probe as Test If Trust Laws Live, Motion Picture Daily, Jan 8, 1935, at 1; see also St. Louis Grand Jury Quiz Based on “Freezing” Films, Motion Picture Herald, Jan. 12, 1935, at 11.
Although the government failed to secure criminal convictions, the *St. Louis Trust Case* nonetheless marked a change in the direction of antitrust enforcement and was followed by a barrage of antitrust investigations and lawsuits. The motion picture industry was the subject of several high-profile investigations and lawsuits. In April 1938, Thurman Arnold, the “most aggressive and effective trustbuster of all time,” became the Assistant Attorney General in charge of the Antitrust Division. Shortly thereafter, the Division instituted four trustbusting actions against the distributors and large theater chains, alleging that the companies engaged in monopolistic and collusive practices in violation of the antitrust laws. The four lawsuits were litigated all the way to the Supreme Court, resulting in landmark decisions written by Justice William Douglas: *Paramount* (1948), *Griffith* (1948), *Schine Chain Theatres* (1948), and *Crescent Amusement* (1944). The *Paramount* lawsuit charged the eight distributors, their affiliated companies, and 134 individuals with a conspiracy to exclude competition. *Griffith*, *Schine*, and *Crescent* concerned powerful regional exhibitors that allegedly orchestrated conspiracies among the distributors to exclude competition from small exhibitors. The stated objective of these lawsuits was the “[r]estoration of free enterprise and open competition amongst all branches of the motion-picture industry.” To advance this goal, the government sought and secured sweeping structural and behavioral remedies.

**Technological Change and Market Power**

Antitrust law is a byproduct of the transformation of the economy at the turn of the 19th century. The Second Industrial Revolution (1870–1914) combined two threads of disruptive innovations: (1) new technologies that enabled mass production and mass distribution, and (2) institutional arrangements that enabled the formation of large companies. In many industries, the ability to operate at large scale inspired races for domination. Firms that harnessed efficiencies sought to expand quickly to establish their market positions. Important to the understanding of the *Paramount* Decrees, large-scale supply chains became a core element of the economy and necessitated vertical arrangements. In the motion picture industry, before the age of home video technologies, the supply chains consisted of three key segments: production, distribution, and exhibition.

55 *St. Louis Jury Acquits Big Film Firms of Conspiracy to Break Anti-Trust Law*, N.Y. TIMES, Nov. 12, 1935, at 1. For the perceived significance of the case, the government proceeded in a civil lawsuit, forcing the defendants to enter into consent decrees. See *Anti-Trust 'Settlement'*, VARIETY, May 6, 1936, at 7; *U.S. Anti-Trust Suit Against Three Leading Film Concerns Settled*, WALL. ST. J., May 1, 1936, at 5; *U.S. Stakes All on St. L.*, VARIETY, Nov. 27, 1935, at 5.


58 See *Third Movies Suit Is Aimed at South*, N.Y. TIMES, Aug. 11, 1939, at 2 (announcing the Division’s action against the Crescent Circuit and certain distributors); *U.S. Cracks Down on Indie*, HOLLYWOOD RPT’R, Aug. 7, 1939, at 1 (announcing the Division’s action against the Schine Circuit and certain distributors); *More U.S. Suits to Follow*, VARIETY, May 3, 1939, at 3 (announcing the Division’s action against the Griffith Circuit and certain distributors); *Justice Department Statement on Suit Against Leading Movie Interests*, N.Y. TIMES, July 21, 1938, at 6 (announcing the Division’s action against distributors).


60 *Justice Department Statement on Suit Against Leading Movie Interests*, supra note 58.
Congress passed the Sherman Act and, subsequently, the Clayton and Federal Trade Commission Acts, responding to concerns that the new business titans, then known as “trusts,” unfairly excluded competition and harmed small businesses. Much of the development of antitrust law in the 20th century surrounded beliefs that business size and vertical arrangements harmed competition. Numerous antitrust cases from the past century addressed the effects of large corporations on “independent” companies, i.e., firms that were not affiliated with big companies.

The motion picture industry was one of the many new industries that formed in the Second Industrial Revolution. In many ways, the industry epitomized social and economic tensions that industrialization created.61

The first generation of movie entrepreneurs developed and commercialized moving picture technologies.62 Inspired by the common business models of the era, these entrepreneurs treated movies as inexpensive and relatively homogeneous commodities.63 They established the “one reel” model—short films that targeted the working class and kids.64 One-reel films typically presented sights from remote places (known as “scene pictures”) and simple plots ending with a chase (known as “chaser pictures”).65 They neither featured professional stage actors nor disclosed the identity of the creative talent. One-reel films played in inexpensive facilities, such as vaudevilles and nickelodeons. Vaudevilles, also known as “variety theaters,” were inexpensive theaters that offered programs of a variety of types and styles—musicians, singers, comedians, dancers, trained animals, acrobats, lecturers, one-reel films, and so forth.66 Nickelodeons were facilities that played one-reel films, which gained their name for the common admission fee they charged.67

In the era of one-reel films, industry leaders actively suppressed efforts to introduce alternative business models, insisting that “the single reel photo-drama [was] the keystone of the motion picture industry” and that multi-reel films had no prospects.68 They were able to suppress innovation through their control over essential patents. In 1908, a group of moving picture pioneers formalized their cooperation and created a patent pool, the Motion Picture Patents Company (MPPC),

61 Orbach, Interstate Circuit, supra note 20.

62 See Terry Ramsay, A Million And One Nights: A History Of The Motion Picture (1964); Robert Grau, The Theatre of Science: A Volume of Progress and Achievement in the Motion Picture Industry (1914).

63 See, e.g., The Charm of Variety, Motion Picture World, July 31, 1909, at 151 (criticizing the “uniformity” of movies enforced by the industry); Larger Programs to Select From, Motion Picture World, May 27, 1911, at 1173 (observing that “the trend is to spread out in quantity instead of to concentrate on quality”); Facts and Comments, Motion Picture World, Aug. 5, 1911, at 270 (criticizing “the policy of the competing groups of manufacturers” that intended to kill “competition of quality”).


65 Zukor, supra note 64.


68 William N. Selig, Present Day Trend in Film Lengths, Motion Picture World, July 11, 1914, at 181. See also Carl Laemmle, Doom of Long Features Predicted, Motion Picture World, July 11, 1914, at 185.
then known as the “Motion Picture Trust.” In August 1912, the Justice Department filed a trust-busting action against MPPC, which concluded in October 1915 with a court judgment ordering the dissolution of MPPC.

The second generation of motion picture entrepreneurs introduced a new business model: feature films for shared consumption in attractive facilities. “Feature films” were multi-reel movies of superior quality and meaningful product differentiation. They were considerably longer and more sophisticated than the one-reel films. Feature films were produced on expensive sets with large creative and technical crews, used professional actors who were promoted as “movie stars,” and were heavily advertised. “Shared consumption” was the social convention that people preferred watching movies with others and moviegoing served a variety of social functions. The “attractive facilities” were designated movie theaters.

Adolph Zukor, the founder and legendary president of Paramount Pictures, was also the originator of the feature film model and its key elements. To enter the market controlled by MPPC, Zukor formed a company that integrated the production and distribution of feature films. The company’s distribution arm instituted programs of releases, initially marketed as “30 Famous Features a Year.” The concept of programs—the licensing of bundles of movies—was not new. The distribution of one-reel films was primarily accomplished through daily programs. Zukor’s scheme, however, which became known as “block booking,” was different. He required exhibitors to commit to annual programs of feature films, thereby reducing their capacity to license films from other distributors. The advantage of block booking was that it allowed production companies “to know what amount could be spent in producing a picture without gambling too much.”

Vertical integration with exhibition began and evolved as an arms race. From 1912 to 1917, Zukor’s enterprises gained control over the production and distribution of feature films in the United States. In 1917, a powerful theater chain—the First National Exhibitors’ Circuit—acquired production and distribution capacity to reduce dependence on Zukor’s enterprises. Zukor initially opposed vertical integration with exhibition, believing that it would harm competition and degrade quality. In a highly publicized essay, Zukor wrote that “[t]he evil of producing and exhibiting coali-
tions is one of the gravest perils that has ever confronted the motion picture industry.”79 Ultimately, however, Zukor’s enterprises expanded into exhibition to secure venues for their films.80 From that point and until the implementation of the Paramount Decrees, success in the industry required vertical integration of production, distribution, and exhibition, or trade relationships with firms that integrated production, distribution, and exhibition. Throughout Hollywood’s Golden Age, Paramount’s exhibition arm was the largest circuit in the United States.

By the end of the 1920s, through growth, consolidation, and integration, the eight distributors established themselves as industry leaders.

Cycles of Expansions and Contractions
Over the past century, the exhibition segment of the motion picture industry has experienced three periods of expansion and three periods of contraction. The first period of expansion was from the advent of the feature film to the Great Depression. The second expansion was from the end of the Great Depression to the commercialization of television in the late 1940s. The third expansion was from the emergence of multiplexes in the mid-1960s to the rise of the digital economy in the early 2000s.

Correspondingly, the first contraction period was during the Great Depression, from 1931 to 1933, and was mitigated by public excitement about talkies. The second contraction was from 1947 to the mid-1960, when broadcasting and cable television created competition to movies and movie theaters. The third contraction began in 2003 with the growth of streaming services and video on demand and has been moderate thus far.

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80 Douglas Gomery, The Movies Become Big Business: Publix Theatres and the Chain Store Strategy, 18 CINEMA J. 26 (1979); Zukor, Origin and Growth, supra note 64; Paramount May Control Chain of Theatres Over the Country, VARIETY, Jan. 11, 1918, at 1.
As shown in Figure 1, in 1938, when the government filed the lawsuit against the distributors, the average American watched about 34 movies per year. Movie attendance continued to grow, peaking in 1945, when the average American watched about 36 movies per year. In 1948, when the Supreme Court handed down Paramount, the average American watched about 23 movies per year. Movie attendance continued to decline until the mid-1960s. In the mid-1950s, the government reduced and subsequently eliminated admission tax that was imposed in 1932. This move contributed to a temporary increase in box-office revenues. From 1966 to 2003, movie attendance per capita fluctuated around five movies a year. The rise in box-office revenues at the turn of the 20th century is attributed to the relocation of theaters to malls that were popular in the 1990s. Since 2003, the industry has been experiencing a steady decline in attendance per capita. In 2019, the attendance per capita rate was 3.8 movies per year.

Setting aside the Great Depression, from the introduction of feature films to the mid-1940s, technological and operational innovations generated persistent growth in movie attendance and revenues. Since the mid-1940s, in the eras of home and personal video technologies, innovation has been used to preserve the viability of cinematic exhibition. Thus, contrary to dark predictions, VCRs and DVD players did not kill the motion picture industry. Rather, through innovation and heavy investments in production and exhibition, the industry was able to maintain attendance rates.

Across the boom and bust cycles, the repeated need to make big capital investments to adapt to new technologies has been particularly unfavorable to small companies. Their decline was inevitable. In the era of home video technologies, the demand for “B movies,” inexpensive pro-

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See Houses Softpedal Tax Policies, VARIETY, Apr. 7, 1954, at 7 (reporting that exhibitors increased admission prices after the federal government cut tax on tickets); Money for Movies, N.Y. TIMES, Aug. 2, 1953, at X1 (reporting that the tax relief was intended to help the industry that was adjusting to television).
ductions that used to be popular, drastically shrank. Likewise, certain forms of exhibition, such as second-run theaters, drive-ins, and adult theaters, vanished. The rapid development of streaming technologies in the 21st century has required all companies to reevaluate their reliance on cinematic exhibition. Trends in the utilization of screens illustrate this pattern. As shown in Figure 2, in the age of home video technologies, exhibitors have increased the number of screens and the revenues per screen plummeted.

The Division’s move to terminate the Paramount Decrees rests on the belief that, in our era, the Decrees no longer serve consumers and could impede technological change. This belief and its underlying premises are quite speculative.

Vertical Arrangements

Scholars associated with the Chicago School of antitrust have insisted that the vertical arrangements that the distributors employed in the 20th century were procompetitive. These assertions follow dubious reasoning: vertical arrangements are essential to the functioning of supply chains and, therefore, are unlikely to be anticompetitive. The Division’s motion to terminate the Paramount Decrees builds on this logic. But, of course, despite the many virtues of vertical arrangements, under certain and common conditions, vertical arrangements may suppress competition. The history of the motion picture industry illustrates this point.

In the 1910s and 1920s, vertical arrangements facilitated the development of the market for feature films. Subsequently, certain vertical practices served the expansion of markets. For example, systems of “runs” and “clearances” allowed the industry to use intertemporal pricing, offering first runs in upscale theaters for high prices and subsequent runs in less expensive theaters for lower prices. Likewise, circuit dealing—the licensing of multiple films to theater chains—was more efficient than the licensing on the basis of movie by movie, theater by theater. However, these practices were also used to exclude competition.

Vertical Agreements. Before the implementation of the Paramount Decrees, the distributors’ vertical restraints weakened the ability of independent companies to compete with the Distributors and their affiliated theaters. Common vertical restraints that were used to exclude competition included block booking, long clearances (stipulated periods between runs of the same picture within a particular area), high minimum admission prices for subsequent runs, and bans on double features (the offering of two movies for the price of one). Block booking depleted the exhibition capacity of exhibitors and curbed incentives to license movies from independent distributors. Long clearances and high admission prices for subsequent runs undermined the attractive-
ness of inexpensive theaters that competed with upscale theaters. Bans on double features harmed independent distributors, whose films often served as the second movie in double feature offerings.

During Hollywood’s Golden Age, arrangements between powerful exhibitors and the distributors often included exclusionary vertical restraints. In these arrangements, the distributors added to their licensing agreements a set of vertical restraints, some of which excluded competition in exhibition while others excluded competition in distribution. In effect, these arrangements were trades in exclusionary restraints. For restraints that harmed its rivals, each party “paid” with restraints that harmed the other party’s rivals. Importantly, the negotiations for these arrangements included, at least in some instances, direct or indirect horizontal coordination.

*Interstate Circuit* (1939) illustrates the architecture of trades in exclusionary restraints. Interstate Circuit was a partially owned subsidiary of Paramount that owned first and subsequent run theaters across Texas. It was managed by exhibition professionals, who were known in the industry as “partners” of Paramount. In consultation with Paramount, Interstate Circuit managers negotiated a deal under which the distributors added to their licensing agreements restrictions on minimum admission prices and bans on double features. The restrictions on admission prices benefited Interstate Circuit by forcing rivals to increase their admission prices while the bans on double features benefited the distributors by eliminating demand for features of rival distributors. To persuade the distributors to adopt restraints that harmed trade partners (small exhibitors), Interstate Circuit orchestrated a cartel among the distributors. *Crescent*, *Schine*, and *Griffith* concerned similar arrangements of trades in exclusionary restraints.

**Vertical Integration.** Discussions of the motion picture industry during Hollywood’s Golden Age typically state that the majors owned theaters, and neglect to mention that some of the vertically integrated theaters were only partially owned by the majors. Such simplified descriptions mischaracterize the industry structure. The Division’s motion to terminate the Paramount Decrees fails in this aspect as well.

The affiliation relations between the distributors and exhibitors, which the Division describes as “vertical integration,” included diverse forms of equity holdings and contractual arrangements. In the 1930s and 1940s, these affiliations divided the industry into two groups of firms: (1) the distributors and their affiliated companies, and (2) independent companies in which the distributors did not hold equity and with which the distributors did not have partnership relations. About half of the affiliated exhibitors were partially-owned subsidiaries, which were jointly-owned with third parties or by two distributors.

Simply stated, the affiliations were on a continuum stretching from small passive investments, to partial ownership without control, to partially-owned and controlled subsidiaries, to wholly-owned subsidiaries. Additionally, pooling agreements, where two or more affiliated chains entered

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88 Schine, 334 U.S. 110; Griffith, 334 U.S. 100; Crescent, 323 U.S. 173.

89 See Orbach, *Interstate Circuit*, supra note 20, at 1463–66 (describing why and how the majors moved from complete to partial vertical integration).

90 Supporting Memorandum, supra note 7, at 22–23.

91 In *Paramount*, the Supreme Court noted that the “majors … had interests in somewhat over 17 percent of the theatres in the United States—3,137 out of 18,076 [theatres].” *1948 Paramount*, 334 U.S. at 167. The Court further noted that 41% of the affiliated theaters were jointly owned by the Distributors and third parties. Another 7% of the affiliated theaters were jointly owned by two Distributors. Id. at 150, n.9.
into formal cooperation agreements, were also common. 92 Further, large independent exhibitors often had informal affiliations with one or two distributors through trading relationships, interlocking directorates, and mobility of executives across firms.

As the Division correctly observed, “vertical integration can create efficiencies that lower costs and encourage innovation that often results in better products and lower prices for consumers.” 93 Strategic theater ownership by distributors has been used to enhance efficiencies. For example, in the early 1990s, Disney acquired an iconic movie palace, renovated the theater, and has been using it as a venue for its premieres. 94 Likewise, in 2019, Netflix acquired capacity to exhibit its productions in landmark movie palaces. 95 Large scale vertical integration of exhibition, however, proved cost-ineffective. 96 The Distributors invested heavily in vertical integration with exhibition from the late 1910s to the early 1930s. Their exhibition arms, however, produced huge losses. Thus, in the early 1930s, the minors exited exhibition and the majors replaced vertical integration with diverse forms of affiliations. 97 These affiliations facilitated exclusion of competition. 98

**Interdependence and Conspiracy Inference**

Throughout the history of the feature film industry, the overwhelming majority of antitrust actions against film distributors involved alleged conspiracies to exclude competition through vertical restraints. In these cases, the government and private plaintiffs argued that powerful exhibitors used their dominant positions to persuade distributors to limit the access of small exhibitors to high-budget films, including likely blockbusters. *Theatre Enterprises*, *Schine*, *Griffith*, *Crescent*, and *Interstate Circuit* are antitrust landmarks that examined such alleged conspiracies. 99 Even today, lawsuits alleging that unlawful conspiracies explain the inability of small exhibitors to secure films because of such conspiracies are still common. 100

Alleged conspiracies to exclude small exhibitors are often consistent with competitive independent conduct. When a distributor faces a choice between an upscale theater and a lackluster theater, it would prefer to license its promising films to the upscale theater. Under such conditions, the parallel unwillingness of distributors to license their promising films to less successful theaters is not indicative of conspiracy in the meaning of Section 1 of the Sherman Act. That said, not all alleged conspiracies to exclude small exhibitors follow this pattern. Small chains of upscale theaters that compete with theaters of the national circuits typically fail to secure persistent sup-

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92 Id. at 66–68 (Findings 112–119).
93 Supporting Memorandum, supra note 7, at 22.
97 Id.
98 Id.
ply of high-budget films. The persistent inability of small exhibitors to compete with theaters of national chains should raise concerns that today’s conspiracy inference standards are inadequate. Understanding the mechanisms that have shaped business norms in the motion picture industry over the past century could provide further insight into this problem.

The fundamental lesson, which is intuitive, is that long-term interdependence and long-term trade relations considerably reduce the scope and intensity of coordination needed to form and maintain cartels. In such situations, which are prevalent in many industries, limited coordination may suffice to form and maintain concerted action.

**Competition Policy in Eras of Technological Divides**

In periods of rapid technological change, the distribution of welfare gains and losses is heavily skewed: successful entrepreneurs and their backers capture a portion of the gains and accumulate wealth, while large segments of the population experience losses arising from automation and displacement of old technologies. This pattern forms because the diffusion of access to and skills compatible with the new technologies is gradual and uneven. The resulting economic disparities created by technological divides, in turn, contribute to beliefs that companies and individuals that accumulate wealth in the process of creative destruction are responsible for the woes of those who were adversely affected in the process. In America, trustbusting impulses have emerged as byproducts of such public sentiments.

The history of the motion picture industry illustrates this phenomenon. The industry was born out of and has evolved through technological shocks that devastated businesses that specialized in older technologies and were unable to adapt to new ones.¹⁰¹ For example, the feature film model was a disruptive innovation that wiped out the one-reel film industry, placed vaudevilles on a path to extinction, and led to a drastic contraction of the “legitimate theater” industry. Tens of thousands of small businesses that operated in these industries went bankrupt. Likewise, the introduction of the talkies in 1927 evaporated the demand for silent films.¹⁰² Production companies and exhibitors that were unable to afford sound technologies went bankrupt. Musicians who played in silent movie theaters and actors with foreign accents lost their jobs overnight. In the same fashion, the emergence of the digital platforms in the 21st century required producers, distributors, and exhibitors to adjust to new realities. For exhibitors, the brick-and-mortar retailers of movies, this adjustment has been particularly challenging.¹⁰³

**Conclusion**

Today, when antitrust seems to be at an historical inflection point, the history of antitrust in the motion picture industry could inform present debates about the future of antitrust law. In the second quarter of the 20th century, eight film companies used an intricate maze of vertical and horizontal arrangements, which collectively intensified interdependence and facilitated exclusion of competition. The *Paramount* Decrees imposed restrictions on these facilitating practices. Over

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¹⁰² Color and Sound on Film, supra note 11.

the past seven decades, the Decrees have governed the distribution of movies to cinematic exhibition.

In the process of formulating the decision to terminate the Paramount Decrees, the Division solicited public comments as to whether the Decrees should be terminated or modified. The Division received 82 comments. One comment supported terminating the Decrees and 81 comments opposed terminating the Decrees.\footnote{Supporting Memorandum, supra note 7, at 28–30.} The Division’s dismissive approach to the objections was not accompanied by an adequate analysis.

There may be reasonable disagreements over the effectiveness of the Paramount Decrees. There may also be good reasons to believe that any effectiveness of the Decrees has declined over time. Such concerns deserve serious evaluation, which the Antitrust Division has failed to present. In the absence of any meaningful analysis, the concern is that ideological objections to behavioral remedies and outdated beliefs about vertical arrangements drove the Division’s decision, not evidence and analysis.

In the digital age, movie exhibition, like other forms of brick-and-mortar retailing, cannot survive in its traditional form. While the extinction of exhibition is possible, the emergence of new forms of exhibition is more likely.\footnote{Weinberg et al., supra note 103.} Thus, today, the protection of the ability of entrepreneurial exhibitors to secure films and the protection of the access of new production companies to brick-and-mortar exhibition is probably as important as it was in the late 1940s, when the commercialization of television devastated the industry.

\textbf{Postscript}

This article was written before the COVID-19 pandemic broke out. The pandemic forced consumers in the United States and around the world to stay at home, avoid trips to non-essential brick-and-mortar businesses, and increase reliance on digital technologies. On the other side of the crisis, the story of the Paramount Decrees may be an account of a 20th century business model that the pandemic wrecked. But the core elements of this story might still be valuable for the assessment of important antitrust themes: interdependence, facilitating practices, conspiracy inference, vertical relations, technological change, and remedies.