Participations
Journal of Audience & Reception Studies

Volume 16, Issue 2
November 2019

‘A Great Generic Conspiracy’: Classical Hollywood’s protection system

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Abstract:
This paper proceeds from a central assumption of ‘new cinema history,’ that any account of the place of cinema in the lives of its audiences requires an extensive understanding of the commercial history of the film industry. It focuses on the under-researched areas of distribution and exhibition in examining the circumstances under which Classical Hollywood’s products circulated to different sections of the domestic American audience. Distribution controlled exhibitors’ – and therefore audiences’ – access to films, and producers’ access to exhibition venues and audiences. It also served as the means by which revenue was allocated within Hollywood’s ‘organised industry,’ and due to that industry’s oligopolistic nature it was unsurprisingly structured to the benefit of the major companies. Within this system, “independent” cinemas operated under very different contractual circumstances from the theatres controlled by the majors, with significant implications for the kinds of material they could access and the timeliness with which they could deliver their products. Exploring the complexity of the trade practices at the commercial and legal heart of Hollywood before 1950, the paper also highlights the impact of these practices on the experience of their audiences.

Keywords: New cinema history, Classical Hollywood, distribution, exhibition, clearance, Paramount Suit, antitrust, oligopoly, Standard Exhibition Contract

> Usually … it has not been necessary for a producer-controlled circuit to prevent competing independent exhibitors from showing major films. Because the value of a picture depends in a large measure upon its novelty, the same result may be accomplished by delaying the delivery of films until their value has substantially disappeared. It is merely the difference between sudden death and slow torture. To this ingenious practice has been given the name ‘Protection.’
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> *George S Ryan, 1936*[1]

As Judith Thissen observes in her article in this issue, much of the work undertaken under the umbrella of new cinema history has been focussed on matters of exhibition, audiences and what might be termed the conditions of reception for cinema. Unsurprisingly, perhaps, much of this work has taken the form of microhistories, studies of particular audiences or exhibition situations, often over relatively short periods of time and defined by the specific local conditions under examination. These histories, along with audience studies in general, are potentially vulnerable to the criticism offered by Dana Polan, that this 'return to the empirical' may do no more than 'generate lots of examples that are not generalised to anything higher.'[2] Although Polan's critique can be countered by the proposition that the strength of cinema exhibition history lies in its aggregation of detail, in a manner exactly analogous to the proposition that the more individual films we study, the more we know about films in general, it also points to a broad methodological difficulty in the work of exploring the place of cinema in the lives of its historical audience. In his analysis of the transnational popularity of John Wayne in the 1950s, Russell Meeuf suggests that

> ethnographic or other types of studies of media consumption in local contexts ultimately can reveal only how a star functions within local or national ideological systems. Such studies cannot explain why stars … attain global popularity in the first place, why [they appeal] to so many groups of people across so many cultures, or how the representation of such stars relates to the transnational cultural, political, and economic backdrop of their production and reception.[3]

He therefore consciously chooses to avoid 'a historical analysis of Wayne's reception internationally,' and instead relies on 'a cultural-studies-inspired textual analysis to understand how the cultural tensions resulting from global capitalism and modernization are structured into the John Wayne star text and John Wayne's films.'[4] But as Simon During, whom Meeuf cites in developing his argument, observed in 1997, when analysis falls back on interpretation because of the paucity of available information about consumption and its causes, it 'runs the risk of substituting our own for other intelligences and feelings.'[5] Meeuf's analysis illustrates this interpretive problem: his argument that Wayne 'provided perhaps the most popular embodiment of the tenets and tensions of male identity within capitalism and modernity' relies on the assertion that films are 'important sites of contestation where audiences negotiate and engage with their sense of the local and their place within a globally capitalist modernity,' but a textual approach cannot demonstrate when, where and how audiences conduct those negotiations. Instead Meuff relies, like During, on the belief that 'There must be a limit to the sheer difference among various audiences' receptions. In transcending particular audiences, that limit provides the grounds upon which theorization and interpretation can begin, even if such theorization cannot assume shared cultural values and competencies.'[6]

This question is arguably specific to the examination of individual films, stars or cycles. A broader consideration of cinema as event, occasion, place or process is evidently less concerned with the individual features of the transient images on the screen. New cinema history has been centrally concerned with what Robert Allen has called the social experience of cinema; its empirical examinations have consistently documented the diversity of those experiences and the heterogeneity of audience tastes, knowledge, assumptions and responses. While new cinema history's interests are not limited to the experiences and behaviours of audiences, the perspective from the audience informs the manner of its engagement with both industrial and aesthetic histories of cinema. This perspective provides its focus on the circulation and consumption of cinema, the commercial activities of film distribution and exhibition, and the political and legal matrix that underpinned those activities.

Our concern in this article is with the operation of the Classical Hollywood system of distribution and its effect on what pictures were available which to audiences. More specifically, we are concerned with the operation of that system's mature iteration in the United States in the 1930s, although we shall also provide an account of its prior formation during the previous decade and its demise in the 1940s. Our underlying argument is that any account of the place of cinema in the lives of its audiences requires an extensive understanding of the commercial history of the film industry. If we seek to understand what historical cinema audiences saw and experienced, let alone what those experiences meant to them, then to paraphrase Harold Lasswell we need to know who sold what to whom, on what terms and with what consequences.[7] By comparison to what we know of the minutiae of films' production processes, we know hardly anything about the processes of their circulation. What we do know comes largely from those microhistories that have looked in detail at the exhibition patterns of individual cinemas over relatively short periods of time.[8] While these accounts can frequently lead us to question conventional assumptions about what played where, they, too, remain vulnerable to Polan's critique, or else to its obverse, that they provide too little material from which generalisations can safely be made.

A full consideration of our *faux*-Lasswell question would require as its basis a history of distribution, but this is a history that as yet we do not have. Distribution, the sector of the cinema system in which cinema is at its most material, is also the sector that almost no historian is interested in, despite the fact that distribution was the component of the system that made Classical Hollywood's oligopoly, and all that flowed from it, possible. At both production and exhibition, the movie was individuated, as creation and as experience. But in distribution, it became just product. As a service, distribution provided a reliable stream of products that were sold to their consumers at a constant price, regardless of the cost of manufacture of any individual film product. Distribution was the sector in which cinema was most clearly, in Supreme Court Justice McKenna's resonant phrase in the 1915 *Mutual v. Ohio* decision that rendered motion pictures subject to the laws governing interstate commerce, 'a business pure and simple originated and conducted for profit.'[9] As Catherine

Jurca has suggested, it is also the part of the cinema system in which 'the idea of film scholarship without films' is most evidently imaginable.[10]

Through what Charles Pettijohn, the General Counsel of the Motion Picture Producers and Distributors of America (MPPDA), called 'the physical task of distributing 25 to 30 thousand miles of film every day to 16,500 theatres located in 9,187 cities, towns, villages, and hamlets,' the majors' distribution system managed both 'the flow of attractions from the producing studios to the theatres and the flow of revenue from its source at the box offices to the producers and sources of supply.'[11] In the late 1930s, the eight major companies took 95 percent of all film rentals in the United States.[12] Structurally as well as procedurally, distribution connected production to exhibition as the point of intersection and communication between manufacture and retail. Distribution was uniquely central to the motion picture industry because the industry operated under the copyright laws, rather than the laws of sale and purchase. Because ownership and title of the traded product – the individual picture – did not change hands, the distributor could exercise the extensive control over the conditions of its licensed use granted by the copyright laws. Distribution controlled exhibitors' – and therefore audiences' – access to films, and producers' access to exhibition venues and audiences. It served as the means by which revenue was allocated to industry sectors, and the industry's trade practices – its typology of theatrical venues, its differentiated systems of release, its programming of films into its run-clearance system in each of its geographical zones, its deployment of percentage and fixed-price rental rates and the Standard Exhibition Contract – all existed primarily to enable the distribution of revenue within the system. Although in practice distribution responded flexibly to particular market conditions that applied to any given local exhibition situation, Hollywood's Classical oligopolists unsurprisingly ran the system to their benefit.

By the mid-1920s, there existed something that could fairly be described as a stable cinema exhibition system in the United States. That certainly did not mean that all its component parts were stable: they were affected by the booms and busts of the macro economy, with as many as 20% of theatres changing ownership annually, and within the system there was constant and not infrequently destructive competition between venues for commercial advantage. But the organisational underpinnings of the system – the operations of zoning and clearance and the hierarchy of runs, the practices of block booking and the Standard Exhibition Contract, the division of revenue among the tiers of exhibition and the custom and practice of distributor-exhibitor relations – remained broadly consistent from year to year. As Mae Huettig explained in her description of the *Economic Control of the Motion Picture Industry* in 1944, it was these practices that 'shape movie-going habits, that explain what becomes of pictures missed during the first-run, why they may suddenly turn up simultaneously at six or eight different theatres on identical double bills, and why the double bill must be suffered at all.'[13]

To understand how this system operated, we might begin by considering the number of prints that were made of an individual movie. In the 1930s, the major companies would normally strike between 200 and 250 prints of an A-movie.[14] This meant that on average,

the company's branch office in each of the key distribution centres in the United States received between six and eight copies of any movie to service its territory.[15] Prints were, therefore, a relatively scarce resource; by comparison, at the end of the pre-digital era, a studio would create more than twenty times the number of prints that were common in the 1930s to service no more than twice the number of screens. This figure cannot be explained by the cost of making prints: at an average cost of $175, expenditure on prints amounted to a mere 1.6 percent of box-office receipts.[16] The Motion Picture Division of the Department of Commerce reported that in 1938, total gross theatre receipts in the United States were $942,000,000, with 35 percent of that figure returned to distributors.[17] The major company exchanges handled an average of 400 features annually, so that a total of 80,000 prints circulated each year.[18] Each print, therefore, had an average earning capacity at the box-office of $12,500, which translated into a rental income of about $4,000 to the distributor. Ideally, each print would be used to the end of its life, which was expected to be after 200 screenings.[19] The number of prints struck of any individual movie was the result of a commercial calculation about the optimum volume required to service its expected market, which could vary between 2,500 and 10,000 contracts.[20]

The efficient circulation of so few copies of each movie through the exhibition network was achievable only because of their routing through the rigidly hierarchical structure of the distribution system of zones, runs and clearances – or to give it its other, original but less savoury, name, the protection system.[21] Although the system maintained multiple tiers or runs, movie theatres were fundamentally divided into two strata. The top stratum comprised those theatres that were provided with a selective distribution service: with access to the newest products, these exhibitors exercised considerable individual choice over the films they screened and the duration of those screenings. Theatres in the lower stratum, showing pictures that had already had their first or second release, were provided with a standard service broadly defined by the terms of the Standard Exhibition Contract used by all the major companies.[22] The distinction between the two rungs roughly corresponded to that between theatres that were part of a circuit or chain, which might or might not be affiliated to one of the major companies, and 'independent' theatres, which were owned and operated as individual small-scale retail businesses. The distinction also corresponded to a fundamental difference in the revenues and profits they generated, a difference that was more-or-less inversely proportionate to the number of each theatre type.

In circulation, films also existed in two forms, corresponding to the two strata of the exhibition system. For the top stratum, in roadshows, premieres, first-run and some second-run venues, films were exhibited and marketed as individual objects, having individual economic lives; at these theatres they were generally sold on percentage contracts and shown for variable periods depending on their audience appeal and profitability. In the lower, subsequent-run stratum, films were a service supplied in bulk to theatres with regular change policies. The Standard Exhibition Contract was explicit in declaring that it committed the distributor only to a schedule of supply and provided no guarantee that any

particular motion picture that may have been described in its advance publicity would be released as part of the program covered by the contract.[23] For two-thirds of the country's theatres, an individual movie would play for a fixed period, generally of between one and three days, long after its first appearance and as often as not on a double bill. As the *Columbia Law Review* explained in 1936,

> The problem of the subsequent, as distinguished from the first run, independent exhibitor consists not so much in his inability to obtain pictures as in his inability to obtain them when he wants them, i.e. shortly after their release, when the publicity attendant on their first showing is still fresh in the minds of the public.[24]

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> The success of Interstate Circuit and of each of the distributor defendants necessarily depends upon successful first run exhibition. The success of first run exhibition in turn depends not merely upon the quality of the picture shown, but upon the attractiveness, comfort, and seating of the theater in which it is shown … This is particularly true when the first run theater not only pays fifty times the rental on each picture but shows it on a single bill for a whole week and spends approximately $1000 a week on advertising which redounds to the benefit of the subsequent run exhibitors, who have practically no advertising costs.
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> *Interstate Circuit et al, 1939*[25]

The two key instruments of Hollywood's protection system were time and admission price. Contracts between distributor and exhibitor not only stipulated the minimum admission price at the exhibitor's theatre, but also the length of temporal protection the exhibitor was buying from subsequent-run theatres charging lower prices.[26] In operating this system, a distributor identified a geographic zone such as a large city and its surrounds, allocated each theatre in that zone a position on a hierarchy of access to their product – a run – and specified the minimum period of time – the clearance or protection – that must elapse between runs. For example, in Minneapolis in the mid-1930s, the first-run theatres in the central business district owned by Paramount and RKO had clearance periods of 28 days over the second-run Uptown theatre, 42 days over houses charging 30 cents admission, 56 days over 25 cent houses, and 70 days over 20 cent venues.[27] From the distributor's perspective, the system also offered its customers a range of choices about how much they paid to consume the product and the environment in which they consumed it. With clearance schedules geared to admission prices, the protection system used price control to differentiate between theatres and the levels of service they provided in a hierarchy of time and price. The system charged a premium price for fresh product, and presented that product to an audience able to pay for it – an imagined community similar to the 'decent

crowd' that Adrian Athique has identified in aspirant middle-class audiences in contemporary Indian multiplexes, for whom attendance at the multiplex is 'a marker of both affluence and good manners.'[28] Customers chose the theatres they attended on the basis of their convenience, character, condition, 'class of patronage' and price point, and these factors also maintained levels of social differentiation among both venues and audiences.[29] As Jeffrey Klenotic has argued, the price-based system provided a hierarchical organisation of culturally and socially safe spaces for its various audiences.[30] If movies themselves were in some sense classless objects because they could play anywhere, the social experience of consuming them was nevertheless permeated and even determined by the social – that is, the class – experiences of viewing.

The majors justified the protection system as the means by which they secured a return on the cost of production and more importantly on their capital investment in their chains of *de luxe* and first-run theatres. They also maintained that small exhibitors acknowledged that 'reasonable clearance' was justified to protect these investments in first-run theatres. As economist Simon Whitney explained, these exhibitors conceded that 'if the big theaters closed, and all patrons paid only 'neighborhood' prices, there would be insufficient revenue to induce production of expensive features of the sort that draw well at the box office.'[31] In Congressional hearings in 1936, Pettijohn defended the system by arguing that it made it possible for 'mass entertainment' to 'reach the greatest number of people' at 'a price which the people can afford to pay,' and allowed the 'humblest village in the land' to see 'the same identical pictures' as the metropolitan picture palaces:

> under the same plan of distribution these villages get, many times, pictures for which the large distributing houses have to pay thousands of dollars for first runs, delivered to them for 6, 8, 12, or 15 dollars. In other words, we are delivering a Rolls Royce at the present time cheaper than a Ford.[32]

Theatres competed with each other through both price and non-price mechanisms. Price competition, regulated through the protection system, existed between theatres, not between films. Films were, in effect, one form of non-price competition between theatres, as were the attractions and convenience of the venue and ancillary attractions such as Bank Night, giveaways and other premiums. Programming policies such as double billing enabled theatres to compete through the quantity of film entertainment offered as well as its quality. A theatre might raise its admission price to be assigned an earlier run, while lowering prices would have the opposite effect.

While small exhibitors might have considered some degree of clearance to be acceptable, exactly what constituted reasonable clearance was a matter of constant dispute. From the perspective of the most militant and litigious independent exhibitors, the protection system was a racket constructed by the distributors to preserve their oligopoly control of the industry, and after years of trying, they eventually persuaded the Federal Department of Justice to share their view. Prosecuting the government's anti-trust case

against Warner Bros., Paramount and RKO in St. Louis in 1935, Assistant Attorney-General Russell Hardy called protection 'a great generic conspiracy … a long continuing oppressive and coercive action … committed by the large companies in this industry on hundreds and hundreds of smaller and more moderate sized factors in the business, as a result of which they have been steadily and are to-day being driven from this business.'[33]

The motion picture industry's history is the history of its constant engagement with the antitrust laws. Court decisions shaped the industry from the Motion Picture Patents Company onwards, and as the 1948 Supreme Court decision in the *Paramount* case made clear, the existence of the Classical Hollywood cinema depended upon a particular interpretation of those laws. Elements of the protection system were the subject of continual litigation, mainly initiated by independent exhibitors, and the interminable arguments over these trade practices that ran through the courts, Boards of Arbitration, Congress and state legislatures, as well as the pages of the trade press, concerned themselves with the perceived inequities of the distribution system's access to product and profit. The question at issue was whether the major distributor-exhibitors, or the distributors in collaboration with unaffiliated circuits, conspired to restrain the trade of independent producers and exhibitors. Did their use of the competitive advantage they acquired through their control of distribution and first-run exhibition to exercise allocative control over the distribution of product and profit constituted a monopoly in restraint of trade? Or were they merely exercising the strategic advantages they possessed by virtue of the scale and scope of their activities? Was their uniformity of action collusion or the consequence of sound business decision-making which led them separately to similar conclusions, despite their being in intense competition with each other?[34]

While this was at one level a legal question regarding the interpretation of the Sherman and Clayton Anti-trust Acts, it was also politically highly charged. As the editors of the *Yale Law Journal* observed in 1931, 'the law relating to restraints upon trade is a branch of the law which has at all times been peculiarly susceptible to influence from current views of public policy.'[35] As a question of public policy, the issue could and should have been decided by the passage of legislation. Although bills to regulate the industry's trade practices were presented to practically every session of Congress between 1926 and 1940, all were blocked, in large part because of the lobbying efforts of the MPPDA. Because such legislation was never created at a Federal level, the question was addressed through the application of existing legislation by the courts. The answers given by the courts oscillated over a twenty-year period from 1927 to 1948, with different courts delivering conflicting verdicts in their assessment of comparable evidence, while the political conditions under which it was asked veered from the very high level of support afforded the majors under the National Industrial Recovery Act (NIRA) in 1933 to the opposite extreme of Assistant Attorney General Thurman Arnold's vigorous campaign of antitrust enforcement, which began in 1938.[36]

A detailed account of these legal oscillations, from *Binderup v Pathé Exchange* through *Paramount Famous Lasky v. US* and the *Youngclaus, Quittner*, *Perelman¸ Rembusch,* and

Robison cases, to the Department of Justice's re-engagement in *US v. Warner Bros.* (the St. Louis case) and *Interstate Circuit*, which together describe the legal journey to the *Paramount* suit, must await another occasion. The summative point to be made is that until the *Paramount* suit, all these cases addressed individual aspects or instances of the overall protection system. None of them challenged the basic, vertically-integrated structure of the industry.[37] Judgements in these cases, including some of those that reached the Supreme Court, were often ambiguous and occasionally contradictory, and when decisions unfavourable to the oligopoly were rendered, they were either ignored or circumvented through revised strategies on the part of the majors.

These legal disputes were also political because in practice, only the federal government had the resources to ask the broad legal question about the system as a whole. The issue had to be prosecuted in the public interest, and that involved determining that there was a public interest in challenging the system's control of supply and price fixing. Until 1935, the Federal government declined to recognise that such an interest existed. Franklin D. Roosevelt's first administration was if anything more favourable to the majors' concentration of economic power than the previous Republican administrations had been. George S. Ryan, a lawyer sympathetic to independent exhibitors' interests and one of the most sophisticated critics of the majors' oligopolistic controls, published a series of articles in *Harrison's Reports* in 1936 in which he argued that by mid-1933, the protection system had seemed to be dying, 'ready to slide into a nameless grave' as a result of court decisions. Then came the National Industrial Recovery Act, which provided 'an injection of adrenalin into a weakened heart' that 'not only revived the sinking patient but … accomplished a miraculous cure' by placing 'the stamp of legality upon forbidden practice' and providing the majors with 'an instrument for the oppression of independent enterprises and the perpetuation of monopoly.' [38] The Motion Picture Industry's National Recovery Administration (NRA) Code of Fair Competition was unique in being the only Code to cover all sectors of an industry, as well as being the longest of the six hundred codes written. Its authorship was dominated by representatives of the majors who, as Ryan suggested, wrote into the Code a set of sanctions for their existing and preferred distribution and contractual practices regardless of their previous legal state. Exhibitors, divided in their representation between their two trade associations, argued with each other and failed to agree on key issues. They also failed to resist the predatory demands of the distributors to enforce the Standard Exhibition Contract and block booking, including a minimum cancellation clause that many exhibitors claimed to be unworkable. Arbitration, which the Supreme Court had ruled was in breach of the Sherman Antitrust Act in 1930, was maintained through the NRA Code's Grievance Boards, and the Code aimed to implement a uniform system of zoning and clearance. It also eliminated or restricted a number of non-price competitive practices such as lotteries, prizes, 'Bank Nights' and other giveaways which were mainly used by independent exhibitors.[39]

While the NRA Code removed the industry from the scrutiny of the Department of Justice, the two years of its operation did not bring an end to civil litigation, or to the legal

confusions it generated, and NRA administrators received more complaints against the motion picture industry than any other.[40] In June 1935, the Supreme Court declared the NIRA unconstitutional. Within months, *Box Office* magazine reported that 'a great increase of law suits, either to enforce contractual provisions or to oppose unfair trade practices' was sweeping through the industry, while David Palfreyman, the head of the MPPDA's Theatre Services Department, noted that

> Since the collapse of NRA and with it the Code organization in this industry for the adjustment of commercial and trade disputes in exhibition and distribution, no program or machinery for hearing, conciliating or adjusting unfair trade practices, grievances, irritations and abuses has been established.[41]

Ironically, it was the examination of material gathered under the NRA that led the Antitrust Division of the Department of Justice to conclude not only that the film industry engaged in monopolistic trade practices such as block booking, protection and price-fixing, but also that they did so because of the vertically-integrated organisation of the five major companies. Spurred by the government's reversal of its policy towards 'the forces of organized money' in the Second New Deal, Thurman Arnold launched the *Paramount* case in 1938 with the declared intention of breaking up the majors by divorcing exhibition from production and exhibition.[42] Such an action could be considered only if there was a clear public interest at stake. Arnold identified it in the economic impact of the distributors' actions on consumers and in the powerful influence that the industry exerted 'on the manners, morals and customs of the people.' In the current system, he argued,

> The manager of the local theatre has lost his freedom of selection and his control over the details of his business. He has become a vendor of packaged goods and can no longer accommodate his product to his distinctive clientele … A community cannot even choose from the pictures which are available as its taste or need dictates. Instead the industry has avidly sought the least common denominator; and on the level of mass appeal, individual and group and locality have been forgotten.[43]

In May 1938, federal district court judge W.H. Atwell found that in the *Interstate Circuit* case the distributors' contracts had forced subsequent-run exhibitors to raise their admission prices, and that the effect of their policies had been to withhold altogether from 'low income members of the community … the best entertainment furnished by the motion picture industry.'[44] In November, Arnold's staff supplied evidence demonstrating that, unlike the behaviour of other chain retail businesses, when an affiliated circuit took over the management of a theatre, admission prices were likely to increase rather than fall.[45] Specifying the grounds for the government's pursuit of the *Paramount* suit, Arnold argued that:

> Theatre patrons in any given community are not given an opportunity to exercise choice as to the type of pictures they desire to see. Under present conditions it is impossible for community taste to find expression through a locally owned theatre, free to bargain for the type of films its patrons wish. As matters now stand each community is regimented into accepting the kind of picture which will make the most profits on a nationwide scale.[46]

The authors of the 1941 TNEC report similarly determined that aspects of the protection system resulted 'in the absolute reduction of the number of films shown' in a locality, depriving consumers of the opportunity to see them,' and concluded that 'any limitations on the ability of an exhibitor to license and show the best available productions … is to the consumer's disadvantage.'[47]

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> Control of all theaters in an area is as surely a monopoly as a local electric power or telephone company. Competition is absent simply because other facilities for the business are not available … The spread of chain exhibition organizations has accomplished a steady increase in the number of local exhibition monopolies, the effect of which as been gradually to strip the consumer of the protection formerly accorded him by competition.
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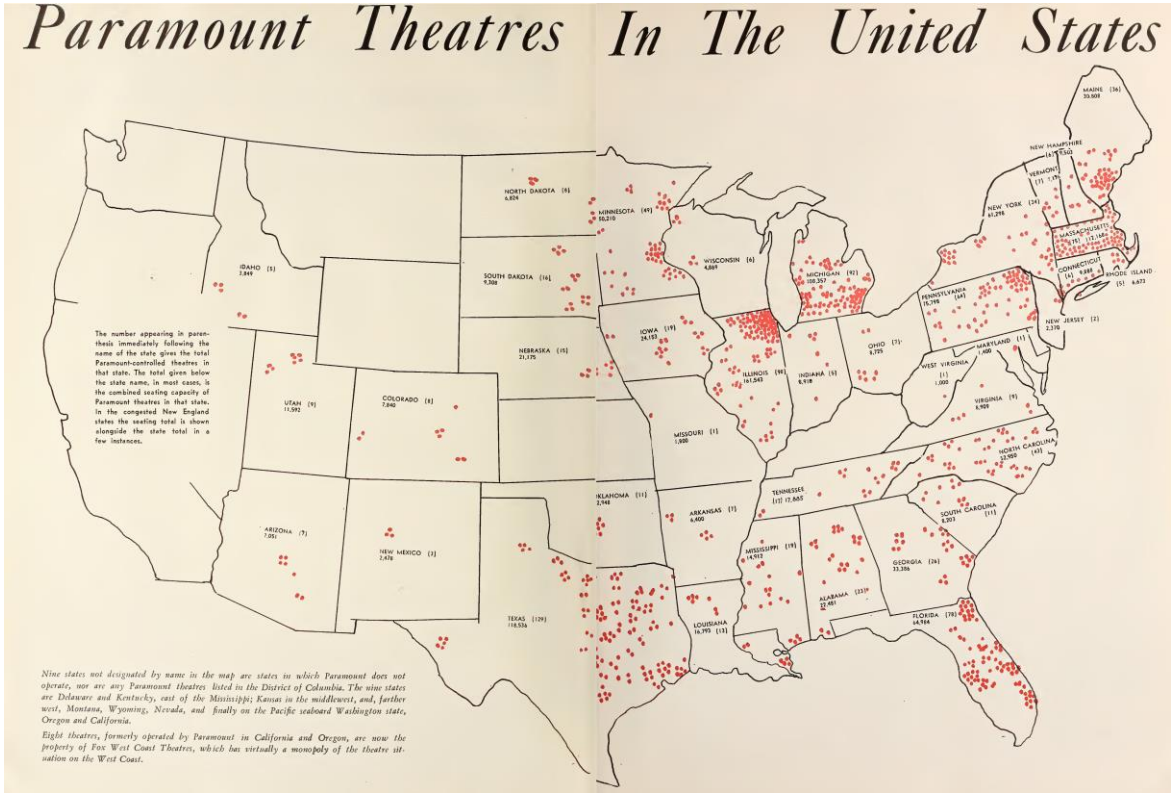
> *TNEC,* The Motion Picture Industry*, 1941*[48]

In May 1948, the Supreme Court confirmed Thurman Arnold's conclusion by ruling against the foundations of the industry's vertically-integrated, oligopolistic structure in the long-awaited resolution of the *Paramount* case. Delivered at the same time as the Court handed down judgements in two other cases involving the monopoly buying power of large theatre circuits, *Schine Chain Theatres* and *Griffith*, the *Paramount* decision reversed the outcomes of the two previous occasions on which a systemic approach had been taken to the industry's trade practices.[49] In the 1933 NRA Code of Fair Competition and the 1940 Consent Decree, which had halted proceedings in the *Paramount* case for four years, both documents had accepted, "dignified and [given] rigidity to" the industry's established patterns and trade practices. Both had been so favourable to the major companies that they were entirely repudiated by the independent exhibitors, in whose interests both settlements had originally been proposed.[50]

The principal source of exhibitor complaint, and hence of litigation, came from the expansion of producer-distributors into exhibition, and specifically into first-run exhibition. This happened in three phases: firstly, from 1918 to 1921, when Adolph Zukor drove the expansion of Famous Players-Lasky against First National through a series of mergers and

take-overs; secondly, from 1925 to 1929, when innovating Wall Street firms such as Goldman Sachs and Lehman Bros. underwrote the expansion of Paramount and its rivals, particularly Warner Bros. and Fox, to create the five fully integrated companies; and finally from 1935 to 1939, after the Big Five had rationalised their theatre holdings following the Crash, when they realised that they could channel profits into first- and second-run theatres, and did not need to own large chains of subsequent-run theatres.[51] The third wave largely involved the growth of unaffiliated chain circuits like Crescent, Schine and Griffith, which also became targets of the Department of Justice in the late 1930s.

In the 1930s, the five vertically-integrated majors controlled more than eighty percent of all metropolitan first-run theatres, between seventy and eighty percent of first-run theatres in cities with populations greater than 100,000 and sixty percent of first-run theatres in cities with population between 25,000 and 100,000. In most of these locations, one of the affiliated circuits controlled most or all of the first-run theatres.[52] The majors were their own best customers: the affiliated circuits, which comprised thirteen percent of the total number of theatres, provided 45 percent of the majors' total rental income. In the largest part of their business, therefore, the majors negotiated with each other, alternating the roles of distributor and exhibitor in each location. Because they had built their circuits principally by buying existing properties, the five circuits each occupied distinct and different areas of the country, as the maps in **Figure 1** illustrate:



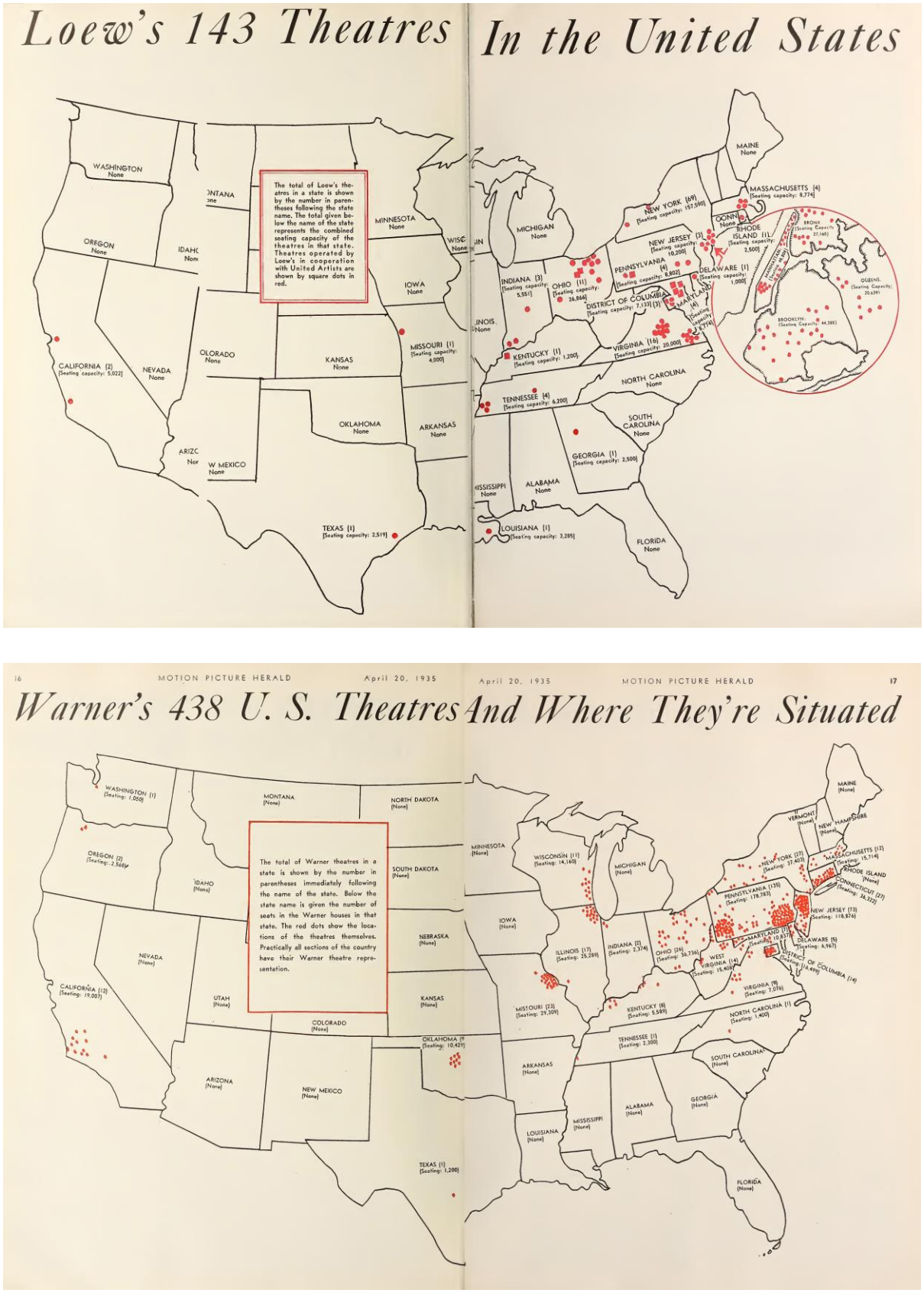


Figure 1: In January, February and April 1935, Motion Picture Herald published maps of the theatre holdings of Paramount, Warner Bros. and Loews, Inc (MGM). Theatre Holdings, 1935. Comparable

maps of the holdings of Twentieth Century-Fox and RKO were planned but never published. Motion Picture Herald, January 5, 1935: 10-11; February 2, 1935: 12-13, April 20, 1935: 20-21.

Describing the situation in 1941, Daniel Bertrand, Duane Evans and E.L. Blanchard of the Temporary National Economic Committee (TNEC) explained that the major companies 'have each retained well-scattered interests in large prior-run theaters in metropolitan locations, but have … acquired rather separate and distinct areas or spheres of control.' About half of Paramount's 1,200 theatres were in the South, where the other majors operated only a handful of first-run theatres in key cities. The same situation pertained in Maine, New Hampshire, Vermont, North Dakota, South Dakota, Minnesota, Iowa, eastern Nebraska, northern Illinois, and Utah. Fox's 538 theatres were predominantly in California, Oregon, Washington, Montana, Wyoming, and Colorado, and they were also the only affiliated exhibitor in Kansas, western Nebraska and most of Missouri and Wisconsin. Warner's theatres were concentrated on the Atlantic coast, with the largest holdings in Pennsylvania, New Jersey, New York, and Connecticut, and others in Massachusetts, the District of Columbia, Maryland, Delaware, Virginias, Ohio, Illinois, Wisconsin, Oklahoma, and Kentucky. Half of RKO's 132 theatres were in New York and New Jersey, with other concentrations in in Ohio and Michigan. Loew's Inc, the parent company of MGM, concentrated its ownership in New York City, Connecticut and Ohio. The TNEC authors added, however, that this broad description 'does not indicate clearly just how neatly the exhibition interests of these companies are segregated.' This was better indicated by mapping the exact locations of the majors' holdings. For example,

> although both Paramount and Warner's have important exhibition interests in the State of Pennsylvania, the theaters of each company are so located as not to compete with one another. Warner's theaters are located in the western part of the State around Pittsburgh and in the southeastern corner centering in Philadelphia. Most of the Paramount theaters, on the other hand, are in the northeast section of the State, in the Scranton and Wilkes-Barre area, with a few theaters clustered together on the extreme west border of the State. …
>
> Loew's and R-K-O both have important chains of neighborhood theaters in New York City. Neither of these companies, however, has extended its holdings into the New York counties immediately to the North. These are dominated by Paramount. Further upstate the picture again changes, and there are groups of R-K-0 and Warner theaters.
>
> … This division of the exhibition branch of the industry into separate areas of control has not only eliminated competition in exhibition between the major companies, but also has made each major company the dominant element in every territory in which it operates, even where opposed by powerful independent interests.[53]

These geographical concentrations produced both local market power and, at a national level, a requirement for reciprocal preferences in the five majors' dealings with each other. Because distributors had percentage contracts with first-run theatres, each major had a vested interest in the success of the other majors' theatres.

> As a distributor, each was compelled to give the other four selective contracts for exclusive first runs in their metropolitan downtown theaters in order to have any of its own films shown in the later-run theaters of those leading circuits. Likewise, as an exhibitor, each gave some preference to the others' films in exchange for similar preferences.[54]

The combination of distribution and first-run exhibition gave distributors allocative control over the whole market's access to both product and profit, enabling them to concentrate profit in first-run exhibition.

At the local level, each distributor divided the territory served by each of their exchanges into zones, allocated each theatre in each zone a place in the sequence of runs through which each of their films was released, and attached a schedule to that sequence. Zones, runs and clearances were not formally agreed between the majors. In 1930, the MPPDA tried to develop uniform zoning and clearance plans through the Film Boards of Trade in each key centre. As General Counsel of the Film Boards of Trade, Charles Pettijohn argued that 'Every sales executive for every national distributor in New York City should have on his desk the type written zoning and protection plan for each of the thirty-one or thirty-two zones,' so that they could treat 'all exhibitors with the same consideration accorded them by other distributors and in conformity with the zoning and protection plan voluntarily set up by fair minded men representing all elements in the territory in question.'[55] 'A fair and practical zoning and clearance schedule in all territories,' he maintained,

> would bring pictures to every theater quicker and fresher, thereby better serving the public. If the plan is intelligent, every theater will know what pictures are available, and when. Distributors will get their revenue quicker and no theater from the largest to the smallest will be able to unreasonably hold up pictures over subsequent runs, without losing their protection.[56]

Only a small number of such plans were agreed, however, and the *Youngclaus* case, decided in 1932, ruled them to be in breach of the antitrust laws.[57] Nevertheless, the next year the NRA Code Authority renewed the attempt to draft uniform clearance and zoning plans, but abandoned the task of compromising the competing interests involved as impossible. There was, however, a high degree of consistency in practice, since clearance periods were frequently set by early-run exhibitors rather than by the distributors themselves. As the

general sales manager of RKO told a New York court, the exchange manager 'usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors.'[58] Unsurprisingly, however, this uniformity of practice created the impression that the distributors conspired to create a single price scale.

The principle of clearance was not disputed, and it was never subject to direct legal challenge.[59] The system had evolved from the General Film Company's practice of charging higher prices for access to its newest films, and the circularity of its operation – that higher costs justified longer clearances, which justified higher prices – was an outcome of its evolution. The availability of clearance justified the expenditure on elaborate exhibition venues that attracted a high run status because of their location and facilities. This, in turn, required that they pay high rental fees, commonly as much as one hundred or two hundred times more than a late subsequent-run theatre might pay.[60] For them to get a return on this expenditure, or even be viable, they required the competitive advantage over their cheaper rivals provided by clearance. To safeguard their investment in building stock, first-run exhibitors used their buying power to impose extended clearance arrangements on distributors. As these arrangements became fixed they cemented in an existing hierarchy of theatres, discouraging new entrants.[61] This circularity, largely taken as an unavoidable and acceptable feature of the system in the 1930s, came under increasing scrutiny after the *Paramount* suit had been launched. Critiquing the terms of the 1940 Consent Decree, the editors of the *University of Chicago Law Review* questioned its insistence that 'clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures':

> It is indeed strange that the Government would sanction a device which is nothing more than a very effective price-fixing mechanism. … It is argued that because a prior-run exhibitor is burdened with high overhead costs and is charged high rentals for his favored run he must be granted clearance protection in order to maintain high admission prices. The reference to high rentals simply means that once the industry has determined that first runs shall bring high admissions it is justified in employing a device for effectively maintaining those prices. It would seem that if the cost of a choice location, expensive buildings, and equipment cannot be met without the aid of a rigid price-maintenance mechanism then the capital invested would be better employed in other fields.[62]

As **Figure 2** illustrates, the length of first-run clearance periods and the size of the areas they covered varied widely between locations.

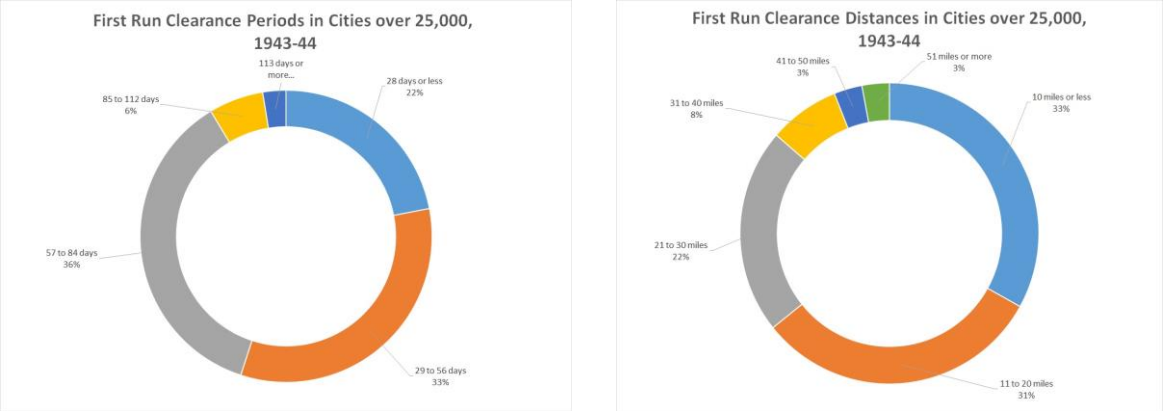


Figure 2: Clearance periods and distances in cities with populations over 25,000, 1943-4. SOURCE: United States v. Paramount Pictures, 66 F. Supp. 323 (S.D.N.Y., 1946), Exhibit 442, compiled from Defendants' Answers to Interrogatories Nos. 6, 7, 8, 9, 10, and 11.

In practice, the length of first-run clearance in any location depended on what the affiliated circuits controlled. In Atlanta, for example, where Paramount and Loew's shared first-run but neither had subsequent-run theatres, first-run clearance was sixty days, and first-run theatres collected about 70 percent of all admission revenues.[63] In Chicago, where Paramount subsidiary Balaban & Katz (B&K) had extensive subsequent-run theatres, first-run clearance was 21 days and first-run theatres took between 35 and 50 percent of the city's box office. But as **Figure 3** illustrates, B&K's ownership of the large neighbourhood theatres using the six weeks of pre-release locked all but a few independent exhibitors out of access to the majors' product until seventy days after its opening. As the *Illinois Law Review* observed, this meant that most independents gained access to the movie only after it had passed through three or four consecutive runs in B&K theatres, which 'has the effect of double-milking the film of profits and, so far as box office value to the subsequent run exhibitor is concerned, often leaves a deflowered product.'[64]

At the time of the *Paramount* suit's lodgement, there were four groups of exhibitors operating, each of approximately the same size when measured by the group's total seating capacity: circuits affiliated with the majors; unaffiliated circuits, which varied in size from four cinemas to over 200; independent exhibitors operating in geographical locations where

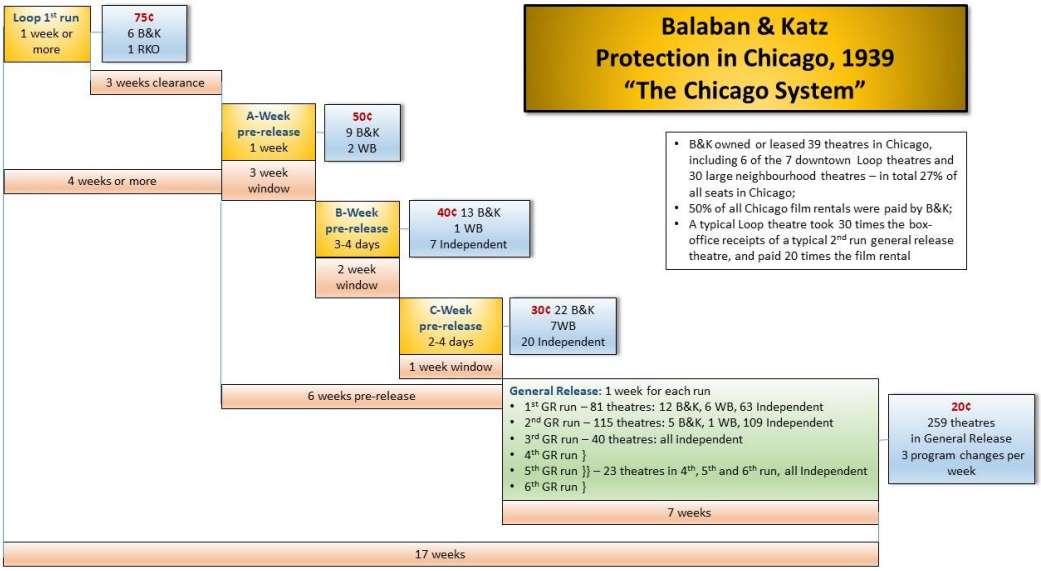


Figure 3: 'The Chicago System' of Protection, 1939. Source, 'Restraints on Motion Picture Exhibition and the Anti-Trust Laws,' Illinois Law Review of Northwestern University, 33 (1938-39): 424-46.

they had no direct competition, such as a one-theatre town, which were known as 'closed towns'; and independent exhibitors in open or competitive situations, which would include almost all the independent exhibitors operating subsequent run in urban areas. The relative sizes of these four groups, in terms of the number of theatres and seats, and their share of the rental market, is illustrated in **Figure 4**.

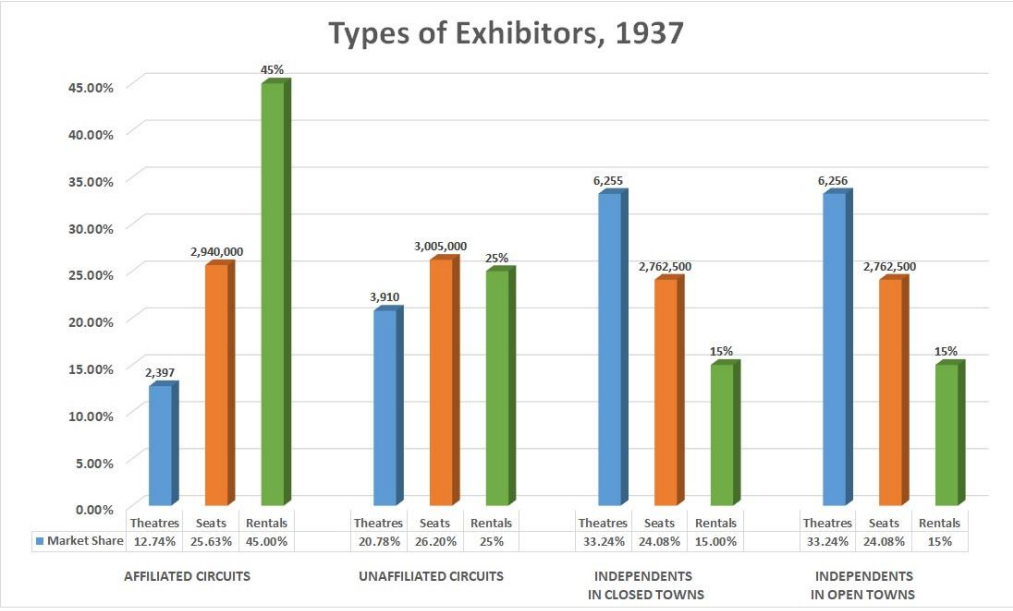


Figure 4: Types of Exhibitors in 1937. Source: Business Week, July 30, 1938. Division between Independents in closed and open towns is an approximation derived from industry sources.

These four groups had substantially different bargaining power with the distributors. With both of the first two groups, distributors commonly negotiated with the circuit as a whole. In addition to negotiations over clearance periods and subsequent-run admission prices, circuits might negotiate a variety of beneficial long-term and flexible contract terms.[65] The largest unaffiliated circuits operated in territories unoccupied by the affiliated circuits, and the terms of their negotiations were often similar.[66] The independent exhibitors in the last two groups, on the other hand, were treated to a much more restricted bargaining framework around the Standard Exhibition Contract or its equivalents, to their fixed position in the protection system, and to the distributors' very strong preference to treat their dealings with independents as wholesaling, through the sales practices of block booking and blind buying. What was called 'compulsory block booking' became a highly charged political issue in the 1930s largely because the independent exhibitors' organisations saw it as their most effective point of leverage in their political campaigns against the majors, but its economic effects were in all likelihood much less critical than was commonly claimed.[67] Detailed examination of subsequent-run advertising could establish whether the independent exhibitors' rhetoric about the extent of the inflexibility imposed on exhibitors actually had substance.[68] One limited examination of one theatre for one month suggests that for independents operating in closed towns, the owner's monopoly of exhibition still left him with considerable bargaining power with distributors.[69]

By far the weakest bargaining position was held by independent exhibitors in open towns, where they were in direct competition with a circuit, and the court cases contain numerous instances of prejudicial behaviour on the part of one or more majors towards such competitors, over access to first-run pictures and decisions over re-zoning, as well as accounts of independent owners being forced to sell their theatres or a partial interest in them to a circuit in order to gain access to a sufficiently high clearance position to remain in business. Among a number of examples drawn from the *Paramount* case trial record, Michael Conant cites the Strand Theatre of Taunton, Massachusetts, as typical:

> When Paramount was the lessee, the theater was licensed first-run films. When the Paramount lease was not renewed, the new independent exhibitor was refused first-run films by all five major firms. Because it could not cover costs on second-run films, the theater closed.[70]

In 1932, an independent exhibitor testified that their box office receipts had fallen from $1,000 a week to $300 'when the freshness and quality of pictures were lowered by protection' granted to the Paramount theatre in a neighbouring town.[71] The government's suit against the Crescent theatre chain described how the chain had practically eliminated competition:

> Independent exhibitors have been induced to sell their theaters to defendant exhibitors under the threat, express or implied, that if they refused to sell,

> defendant exhibitors would open competing theaters in the same town and prevent the independent exhibitor from procuring desirable pictures. In a number of instances, independent exhibitors attempting to compete with defendant exhibitors have found it impossible to procure sufficient pictures to keep their theaters in operation. In addition, defendant exhibitors have lowered their prices, giving away large sums of money as prizes, and operated some of their theaters at a loss with the purpose and effect of driving their competitors out of business and giving defendant exhibitors a monopoly in the exhibition of motion pictures in the area in which they operate. By the use of such tactics defendant exhibitors have forced a large number of independent exhibitors in the States of Tennessee, Kentucky, Alabama, Mississippi, and Arkansas out of the motion-picture business.[72]

In a petition to the House Committee on the Judiciary for relief from 'contracts, combinations, conspiracies and monopolies in the motion picture industry' in February 1937, H.M. Cole of the Allied States Association of independent exhibitors offered an analogy from a more conventional business to explain 'the plight of the independent exhibitors':

> Let me assume, therefore, that … a dealer in men's clothing should apply to the several clothing manufacturers for a stock of specified models of suits and overcoats and receive the following reply, not from one, but from all:
>
> You may have our line of suits and overcoats but we have no samples or descriptive matter and you must agree to take all of the garments of whatever design we see fit to make during an entire year. Not only must you take all of our suits and overcoats but all of our shirts, neckties and collars as well. Also, you must buy all of your advertising accessories from us. We have or may have a store of our own in the same town with you and you will be permitted to offer our styles to the public from 30 to 365 days after they have been introduced in our store. We can not tell you just what you will have to pay for our products as we reserve the right to base the price on a percentage of the total receipts of your store. Of course, you will have to guarantee us a minimum price, as we are willing to share your profits but not your losses. We reserve the right to designate the particular day or days of the week on which you may sell certain models and we will regulate the prices charged so as to protect our store against your competition. Some models may be reserved for our store exclusively. If we decide to expand in your territory, or someone comes in that we like better than we like you, we will take the line away from you altogether ...

> This may sound fantastic but it illustrates exactly the conditions under which independent exhibitors are forced to do business at the present time.[73]

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> The struggle for dominance goes forward ruthlessly, with ofttimes little regard for the motion picture industry's social responsibilities. Finally, as power has become lodged in a few hands, it has become necessary for the Department of Justice to take steps to protect the public interest.
>
> *Theodore J Kreps, 1941*[74]

The majors ran the distribution system – the protection system – to secure the maximum advantage to themselves, and they did so ruthlessly. By the late 1930s, they were doing this in close collaboration with a second exhibition tier of unaffiliated circuits. The question was whether any of what they were doing constituted an illegal restriction of trade. At their broadest, all the court cases we have mentioned addressed this question of what the major distributors could do in concert without violating the prevailing interpretation of the Sherman Act. Although it is often suggested that 'the major distributors were well aware that their system of control violated the Sherman Act,' this assertion is highly contestable.[75] The regime was established under the political and economic assumptions of Herbert Hoover's 'associative state,' which encouraged industrial self-government, particularly through trade associations operating in 'constructive' cooperation with the government. These attitudes were embodied in Will Hays, President of the MPPDA, former Chair of the Republican National Committee and the self-proclaimed author of the 1920s dictum that what America needed was 'less government in business and more business in government.'[76] The MPPDA's organisation and regulation of the market through the Standard Exhibition Contract, arbitration and Uniform Zoning was undertaken in frequent consultation with Department of Justice, which endorsed or acquiesced in most of what Hays implemented.[77] Although some of these actions were challenged by the courts, the protection regime was confirmed by the NRA Code, in which – as with other industry Codes – the Roosevelt government acquiesced in the principal trade association, the MPPDA, setting the agenda. Various cases during the 1930s – *Rembusch, Quittner*, and the Appeals Court decision in *FTC v Famous Players-Lasky* – supported the majors' position. In dismissing the complaint against the MPPDA in the *Rembusch* case in March 1934, for example, Judge Coxe declared that 'although a theatre in competition with a large chain of theatres undoubtedly suffers a competitive disadvantage, the Sherman Anti- Trust Law was not made to redress such inherent disadvantages.'[78] That situation only changed in 1935, when the Department of Justice took up the St. Louis case against Warner Bros.

Both the MPPDA and the majors pursued their policies in the 1920s and on into the 1930s under the expectation that their activities were defensible at law. The inconsistent outcomes of the sequence of court cases up to 1936 provided frequent if erratic confirmation of their position. Certainly, they aimed to sail close to the wind and employed highly-paid and capable lawyers to ensure that they were extracting the maximum

opportunity, but they worked on the expectation that as and when they were deemed to have overstepped, a renegotiation through a consent decree would be both possible and appropriate. This expectation was, indeed, fulfilled as late as the 1940 Consent Degree in the *Paramount* case.[79]

Hays was extremely well-connected politically, not only in the Republican party, and the MPPDA ran a substantial political organisation engaged in a continuous and almost always successful campaign against State and Federal legislation that threatened to tax, regulate or censor the industry. Hays' personal interventions with Roosevelt's administration were crucial on three occasions in the 1930s: in 1933, during the lengthy negotiations over the NRA Code, to ensure that the Code sanctioned the majors' preferred distribution and contractual practices regardless of their previous legal state; secondly in 1938, when the Department of Justice was persuaded to abandon the criminal case against the major companies and pursue the *Paramount* suit as a civil case in equity, and was also persuaded not to include the MPDPA itself as a defendant in the case; and finally in 1940 when, five days into the *Paramount* case trial, the Department of Justice suddenly reversed its previously firm position and agreed to negotiate a consent decree which in its final form closely followed proposals developed collaboratively between the MPDPA and the Department of Commerce. As Mary Samuelson has explained, the Department's reversal happened two days after Hays announced the formation of the Motion Picture Committee Cooperating for National Defense, a group committed to distributing and exhibiting short films made by the government to aid in the war effort abroad.[80]

The Supreme Court's decision in the *Paramount* case was the most severe verdict on the Classical Hollywood system of film circulation since its inception in 1918. Rather than being directed against a particular trade practice, the Court's view, confirmed by its judgements in the *Schine* and *Griffith* cases, was systemic. In all three cases, the Supreme Court went significantly further than the trial courts had done in the extent of the remedies that it required, most importantly in requiring the divorcement of theatres from production and distribution. The severity of the verdict resulted not from a change in circumstance or trade practice, or new evidence of the majors' misdeeds, but from a change in the Supreme Court's interpretation of what constituted conspiracy. Most private cases brought against the majors in the 1930s failed because they were unable to prove that the majors had conspired to establish an illegal combination to restrain trade, or that the independent exhibitor had suffered financial loss as a direct result of the majors' actions. But in their 1939 ruling in the *Interstate Circuit* case, the Supreme Court substantially lowered the requirement of proof, explaining that it now considered that:

> an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of

> interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.[81]

This standard, known as the doctrine of Conscious Parallelism, was most forcibly articulated in the Court's *Paramount* decision in 1948.[82] Ironically, the doctrine of Conscious Parallelism was significantly restricted in another case involving the major distributors – *Theatre Enterprises v Paramount* – a mere six years later.[83] Will Hays' political skills had kept the protection system – and with it the Classical Hollywood cinema – in being for 27 years, while the MPPDA organised, regulated and – as far as the majors would allow – restrained some of its worst excesses. If they had managed to keep the system out of the Supreme Court for another six years, they might have kept it in being.

The protection system, which structured who sold what to whom and on what terms, and was designed to protect the majors' profits in distribution and first-run exhibition, also determined who saw what, and under what conditions, in the Classical Hollywood system. Guiliana Muscio is correct to observe that by the 1930s, 'the growth of national corporations with standardised marketing techniques, chain stores with standard brands, national newspaper chains, national magazines, radio and movies meant that most Americans were consuming the same leisure-time cultural products.'[84] But in the case of movies, they were not consuming them at the same time as each other. Whatever the pattern of theatre ownership in the largest American cities, clearance ensured that metropolitan audiences seeking the movies that were advertised in their national magazines, on the radio and city billboards, and reviewed in their newspapers, were directed to the highest-priced venues.[85] Fan culture similarly encouraged the movies' most committed consumers to see the newest pictures in the theatre where they were first shown. Audiences who were outside this orbit by choice, geographical circumstance or their ability to pay would wait months until the same pictures, no longer new in either public currency or the material condition of their prints, reached them. In the small towns and rural communities with ready access to only one venue, audiences' exposure was further restricted by the exhibitor's contractual arrangements with whichever distributors he dealt with; in all likelihood, two-thirds of Hollywood's A-features would never reach them. In 1936, *Harrison's Reports* commented that for many independent exhibitors, the protection system had the same effect as if the distributors had refused to sell to them, since by the time they could show them, 'the pictures … have become stale in the minds of the theatre goers; and … they have little chance of filling their theatres.'[86] To the extent that a national film culture existed among audiences in the 1930s, it was mediated by these issues of some viewers' timely access to the industry's product. What effect this differential and temporally extended availability had on the place of cinema in the lives of its audiences is a promising subject for further research.

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Notes:

[1] George S. Ryan, 'Anti-Trust Litigation in the Motion Picture Industry No. 6: Monopoly of Product,' *Harrison's Reports*, May 23, 1936: 84.

[2] Daniel Fairfax, 'We Live in a World of Images: Interview with Dana Polan,' *Senses of Cinema* 83 (June 2017), http://sensesofcinema.com/2017/film-studies/dana-polan-interview/).

[3] Russell Meeuf, *John Wayne's World: Transnational Masculinity in the Fifties* (Austin, TX: University of Texas press, 2013), p. 11.

[4] Meeuf, *John Wayne's World*, p. 11.

[5] Simon During, 'Popular Culture on a Global Scale: A Challenge for Cultural Studies?' *Critical Inquiry*, 23:4 (Summer, 1997): 810, 817.

[6] During, 'Popular Culture': 824-6.

[7] Harold D. Lasswell, 'The Structure and Function of Communication in Society,' in Lyman Bryson, ed., *The Communication of Ideas: A Series of Addresses* (New York: Institute for Religious and Social Studies, 1948), p. 37.

[8] For example, Mike Chopra-Gant, 'Dirty Movies, or: Why Film Scholars Should Stop Worrying About *Citizen Kane* and Learn to Love Bad Films,' *Participations*, 7:2 (2010): 294, 304.

[9] *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 US 230 at 244 (1915).

[10] Catherine Jurca, 'Distribution and Exhibition in Warner Bros. Philadelphia Theaters, 1935–1936,' in Daniel Biltereyst, Richard Maltby and Philippe Meers, eds., *The Routledge Companion to New Cinema History*, (New York: Routledge, 2019), p. 287.

[11] Charles Pettijohn, testimony to the *Motion-Picture Films (Compulsory Block Booking and Blind Selling), Hearing before the Committee on Interstate and Foreign Commerce*, U.S. House of Representatives, 76th Congress, 3rd Session (Washington, D.C.: Government Printing Office, 1940) (hereafter Hearings, 1940), p. 462; David Palfreyman, report, 'Trade Relations in the Motion Picture Industry,' 1935 Motion Picture Code of Fair Competition file, MPPDA Digital Archive, Flinders University Library Special Collections (hereafter MPPDA Archive) Record #2530, accessed September 21, 2019: https://mppda.flinders.edu.au/records/2530.

[12] U.S. Temporary National Economic Committee, *Investigation of Concentration of Economic Power Monograph No. 43, The Motion Picture Industry – A Pattern of Control* (Washington: Government Printing Office, 1941) (hereafter TNEC), p. 9.

[13] Mae D. Huettig, *Economic Control of the Motion Picture Industry; A Study in Industrial Organization* (Philadelphia, PA: University of Pennsylvania Press, 1944), p. 115.

[14] Daniel Bertrand, *The Motion Picture Industry*, (Washington, DC: National Recovery Administration, Division of Review, 1935), p. 27.

[15] The process was described in a 1940 legal case between Twentieth Century-Fox and a Baltimore theatre: 'Commonly only four to ten prints are made for the district served by the Washington office. Generally one of these is distributed to each of the larger cities within the States served from the Washington branch office for what is called the first-run of the pictures, which is the greatest revenue producer for the distributor, as it is said that about 50% of the total revenue from the exhibition of any one picture comes from the first run. It is also a common feature of the license for the exhibition of the first run to provide clearance of twenty-one days over subsequent runs in the same city. After this period has expired subsequent runs of the picture are licensed to other theatres in the same city, usually called 'neighbourhood' theatres; and there are later exhibitions of the picture at still other theatres; there usually being a clearance period of variable amount between the first and subsequent runs at neighborhood theatres in the same competitive territory. It is only by this procedure of first and subsequent runs that the limited number of prints can be utilized in the numerous theatres within a district.' *Westway Theatre, Inc. v. Twentieth Century-Fox Film Corporation et al*, 30 F. Supp 834-5.

[16] 'Fire Loss $4,447 In Twelve Years,' *Motion Picture Herald*, February 5, 1938: 61; 'The Motion Picture Dollar,' *The 1933 Motion Picture Almanac* (Chicago: Quigley Publishing, 1933), p. 17.

[17] 'Highlights of Film Statistics Assembled by U.S. Department,' *Motion Picture Herald*, February 18, 1939: 37.

[18] 'Fire Loss $4,447 In Twelve Years,' *Motion Picture Herald*, February 5, 1938: 61.

[19] *International Motion Picture Almanac 1937-1938*, p. 6. Citing distributor complaints about unserviced projection equipment causing damage to prints, *Variety* reported that 'in previous days [prints] could safely be shown for 15 to 20 consecutive engagements.' 'Exhibitors Have Permitted Equipment to Deteriorate To Such An Extent Damage To Prints Is A Worry,' *Variety*, March 6, 1934: 11; 'Expenditures on Prints for 1936-37 Will Establish a New High Record,' *Film Daily*, October 5, 1936: 1,10.

[20] These figures are for Fox's 1932-3 season, cited in the MPPDA 1936 pamphlet, 'The Wholesale Distribution of Motion Pictures,' quoted in *Harrison's Reports* 18;2 January 11, 1936: 5. It would be very instructive if we were able to write the history of a single print, to establish how far it travelled, over how many screenings and how long a period. The documentation to write such a history for

every print of every Classical Hollywood film once existed in the records of the 'custodian of prints' responsible for their shipping and physical handling in each branch exchange, but there is as yet little evidence that any of these records have survived. See Howard T. Lewis, *The Motion Picture Industry* (New York: D. Van Nostrand, 1933), pp. 53, 58-9.

[21] 'Protection' was the original term used to describe the system, but as George S. Ryan noted in 1936, 'because of its unsavory connotation the term 'Protection' has come into disrepute, and in recent years the practice has been frequently designated as 'zoning and clearance.' George S. Ryan, 'Anti-Trust Litigation in the Motion Picture Industry No. 7: Protection,' *Harrison's Reports*, May 30, 1936: 85.

[22] For a discussion of the Standard Exhibition Contract, see Richard Maltby, 'The Standard Exhibition Contract and the Unwritten History of the Classical Hollywood Cinema,' *Film History* 25:1-2, (April 2013), 138-153.

[23] Paramount Exhibition Contract, 1939, in Hearings, 1940, p. 235.

[24] "Notes: The Motion Picture Industry and the Anti-Trust Laws," *Columbia Law Review* 36 (1936): 646.

[25] Joint Brief of Interstate Circuit et al. to the Supreme Court, *Interstate Circuit v. United States* 306 US 208 pp. 9-10, quoted in David A. Butz and Andrew N. Kleit, "Are Vertical Restraints Pro- or Anti-competitive? Lessons from *Interstate Circuit*," *Journal of Law and Economics* 44 (2001): 146.

[26] According to industry lawyer Louis Nizer, 'The reason admission price should be considered in determining the reasonableness of clearance is that it is one of the elements which determines the intensity of competition.' In order to redress 'the possibility that patrons will wait to take advantage of the lower admission price … the clearance should be large enough to preserve to the prior run the economic benefits which it has bought.' Nizer, *New Courts of Industry*, p. 114.

[27] License agreements also stipulated that subsequent run theatres could not advertise a coming attraction until after its first-run engagement had been concluded. *United States v. Paramount Pictures*, 334 U.S. 131 (1948), Appendix to plaintiff's brief, pp. 137-47, cited in Michael Conant, *Antitrust in the Motion Picture Industry: Economic and Legal Analysis* (Berkeley. University of California Press, 1960), p. 62.

[28] Adrian Athique, 'Imagining a Decent Crowd at the Indian Multiplex,' in Karina Aveyard and Albert Moran eds., *Watching Films: New Perspectives on Movie-Going, Exhibition and Reception* (Bristol: Intellect, 2013), p. 384.

[29] Lewis, *The Motion Picture Industry*, p. 205.

[30] Jeffrey Klenotic, 'Class Markers in the Mass Movie Audience: A Case Study in the Cultural Geography of Moviegoing, 1926-1932,' *The Communication Review* 2:4 (1998): 490-1.

[31] Simon N. Whitney, *Antitrust Policies: American Experience in Twenty Industries Volume 2* (New York: The Twentieth Century Fund, 1958), p. 154.

[32] Pettijohn, testimony to House Committee on Interstate and Foreign Commerce, *Motion Picture Films: Hearings Before the Committee on Interstate and Foreign Commerce*, 74th Congress, 2nd Session, March 1936, p. 433. Howard T. Lewis suggested that although these late-run rental prices did not make 'a reasonable contribution toward production costs,' the distributors would consider 'any rental figure which more than covers the actual selling cost … and actual physical distribution … worth accepting.' Lewis, *The Motion Picture Industry*, p. 185.

[33] Quoted in *Harrison's Reports*, March 7, 1936: 39. *Motion Picture Herald* described the St. Louis case as 'The most bitter contest engaged in between the large interests and the independents since the Motion Picture Patents war.' *Motion Picture Herald*, May 9, 1936: 64.

[34] In their 2001 article on the *Interstate Circuit* case, David Butz and Andrew Kleit argue that the distributors' uniform actions in that case should properly be understood as a Nash equilibrium. Named after mathematician John Forbes Nash, Jr., who won the 1994 Nobel prize for Economics for its discovery, a Nash equilibrium describes a condition in game theory in which, in a non-cooperative game, each player is making the best decision possible for themselves when they take into account the decisions of the other players. Butz and Kleit argue that the nearly-identical nature of the contracts between the major distributors and Interstate was the outcome of such a situation, that it was therefore 'inappropriate to infer collusive behavior from it.' As a result, they assert that the crucial assumptions behind the case's legacy in antitrust law and economics are flawed. Butz and Kleit, 'Are Vertical Restraints Pro- or Anti-competitive: 156. A comparable argument, without the benefit of Nash's formulation, was made by Judge Gunnar Nordbye of the federal district court at Minneapolis in 1936, when he ruled that the limitations placed by distributors on subsequent runs clearance and zoning schedules 'are the results of the distributors' own individual experience and are dictated by its individual initiative for its own benefit,' and their uniformity provided no evidence of any conspiracy. *Shubert Theatre Players Co. v. Metro-Goldwyn-Mayer Dist. Corp.* (unreported, D. Minn., Jan. 30, 1936), quoted in *Motion Picture Herald*, February 15, 1936: 13. Later that year, Federal District Judge Merrill E. Otis of the district court at Kansas City, Missouri, also found in favour of the distributors, concluding that 'the explanation which is consistent with innocence is so much more reasonable than the explanation which imputed illegality,' and leading Gabriel Hess, the MPPDA's General Counsel, to declare that 'the decision of Judge Otis has upheld what long has been contended by distributors to be their right in the distribution of pictures and settles much disputed questions of law.' *Rolsky v. Fox Midwest Theaters, 1932-1939 Trade Cas*. (CCH) 55,132 (W.D. Mo. 1936); *Motion Picture Herald*, August 15, 1936: 53.

[35] 'Does the Sherman Act Prohibit the Adoption of Standard Contracts and Arbitration Agreements by Trade Conferences?' *Yale Law Journal* 40 (1930-31): 640.

[36] Most startlingly, the difference in legal outcomes occurred in February 1934 when, within two weeks of each other, courts in Philadelphia and Minnesota reached diametrically opposed decisions over the question of whether the unanimity of distributors' action towards an exhibitor demonstrated the existence of a conspiracy to restrain trade in breach of the Sherman Antitrust Act. *Motion Picture Herald*, February 15, 1936: 13.

[37] *In re Famous Players-Lasky Corp*., 11 F.T.C. 187 (1927), at 207, cited in Alexandra Gil, 'Breaking the Studios: Antitrust and The Motion Picture Industry,' *NYU Journal of Law and Liberty*, 3 (2008), 99.

[38] Ryan, 'Anti-Trust Litigation in the Motion Picture Industry – No. 8,' *Harrison's Reports*, June 6, 1936: 92.

[39] The Code's initial proposal to prohibit giveaways such as 'dish night' altogether met with strenuous opposition from crockery manufacturers, who claimed it would lead to 'closed dish factories, unemployed men and retarded recovery.' The final version of the Code prohibited 'rebates, such as premiums in the form of gifts or other things of value' only if 75 percent of affiliated and unaffiliated exhibitors in a territory voted in favour of doing so. Opponents of these restrictions complained that department stores and other businesses 'in which showmanship is not

an inherent requisite' were free to use prizes in order to attract customers, and argued that 'hundreds of small theatres have been able to exist by virtue of schemes of this kind which support pictures of ordinary entertainment. They contend that these plans create the habit amongst hesitating patrons of visiting the theatre when otherwise they would be tempted by free radio programs to remain at home.' Louis Nizer, *New Courts of Industry: Self-Regulation under the Motion Picture Code* (New York: Longacre Press, 1935), pp. 62, 68-9.

[40] Donald R. Brand, *Corporatism and the Rule of Law: A Study of the National Recovery Administration* (Ithaca: Cornell University Press, 1988), p. 159.

[41] *Box Office*, October 19, 1935: 3; Palfreyman, 'Trade Relations in the Motion Picture Industry,' September 1935, MPPDA Archive, Record #2530, accessed September 21, 2019: https://mppda.flinders.edu.au/records/2530.

[42] Franklin D. Roosevelt, speech at Madison Square Garden, October 31, 1936. *New York Times*, November 1, 1936: 1.

[43] Among 'the members of the consuming public,' Arnold argued, 'there is a widespread demand for localized public control rather than centralized private control over the operating policies of the theatres.' First Draft of the Explanatory Statement for the *Paramount* case, June 24, 1938, quoted in Giuliana Muscio, *Hollywood's New Deal* (Philadelphia: Temple University Press, 1997), pp. 159-60. Muscio notes that although this argument was not included in the final draft of the Explanatory Statement, the objective of alleviating this situation 'was always active and traceable in the later phases of the case.' Muscio, p. 161.

[44] *Motion Picture Herald*, May 21, 1938: 17.

[45] Muscio, *Hollywood's New Deal,* p. 163.

[46] Department of Justice, Statement of Grounds for Action re *US v. Paramount Pictures Inc. et. al*., August 17, 1939 (Washington, DC: Government Printing Office, 1939), p. 3.

[47] TNEC, *The Motion Picture Industry*, pp. 31, 33.

[48] TNEC, *The Motion Picture Industry*, p. 55.

[49] The Schine and Griffith chains were the two largest independent theatre circuits in the country, with around 150 theatres each. The major distributors had originally been co-defendants in both cases, which concerned the circuits securing distribution agreements that deprived competitors of first- and second-run films.*United States v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres v. United States*, 334 U. S. 118; "Notes: The Sherman Act and the Motion Picture Industry," *The University of Chicago Law Review*, 13:3 (April 1946): 349; Muscio, *Hollywood's New Deal,* p. 153.

[50] "Notes: The Sherman Act and the Motion Picture Industry": 352.

[51] Conant, *Antitrust in the Motion Picture Industry*, p. 26. The number of theaters owned by the major companies fell from 3,600 in 1930 to 2,225 in 1935, a decline of 40 percent. TNEC, *The Motion Picture Industry*, p. 7.

[52] A metropolitan theatre was defined as one located in one of 35 'key cities,' 31 of which were the main distributing centres for the major companies. Affiliated circuits controlled exhibition in 73 of the 92 cities with population over 100,000; they operated one or more first-run theatre in 200 of the 283 cities with populations between 25,000 and 100,000. All the first-run theatres in Albany, Boston, Brooklyn, Charlotte, Chicago. Cincinnati, Cleveland, Dallas, Des Moines, Houston, Kansas City, Memphis. Milwaukee, Minneapolis, Newark, New Haven, New Orleans, Oklahoma City, Philadelphia,

Salt Lake City. St. Paul and Washington DC were controlled by affiliated circuits. TNEC, *The Motion Picture Industry*, pp. 11-12.

[53] TNEC, *The Motion Picture Industry*, pp. 14–16.

[54] Conant, *Antitrust in the Motion Picture Industry*, p. 61

[55] C. C. Pettijohn to the Presidents of Film Boards of Trade, June 27, 1930, quoted in George S. Ryan, 'Anti-Trust Litigation in the Motion Picture Industry, 8: Protection (Continued),' *Harrison's Reports,* June 6, 1936: 89.

[56] Pettijohn to Film Board of Trade of Des Moines, IA, September 1930, quoted in Lewis, *The Motion Picture Industry*, p. 222.

[57] 'Notes: The Sherman Act and the Motion Picture Industry': 352.

[58] *United States v. Paramount Pictures, Inc*., 66 F.Supp. 344 (S.D.N.Y. 1946), quoted in Gil, 'Breaking the Studios': 108.

[59] The editors of the *Illinois Law Review* observed in 1938 that 'reasonable clearance is never objectionable; the small operator usually is ready to concede that some provision for precedence in exhibition privileges is necessary to protect theaters with superior operating and advertising facilities that are willing to pay higher prices for films.' Comment: 'Restraints on Motion Picture Exhibition and the Anti-Trust Laws,' *Illinois Law Review of Northwestern University,* 33 (1938-39): 430.

[60] 'Under the present system of wholesale distribution a very large number of theaters now operating secure the identical photoplay for $10 or $15, for which other theaters pay as much as $15,000 or $20,000.' Benjamin Werne, *The Neely Anti-Block Booking and Blind Selling Bill – An Analysis* (New York: Contemporary Law Pamphlets, New York University School of Law New York, 1940), p. 16.

[61] The 1940 Consent Decree specified that the criteria for determining reasonable clearance were: the admission prices of the theaters involved; their character, location, size, and facilities; their operating policies, such as double-billing; the rental terms on which they did business with the distributors; and the extent to which the theatres involved competed with each other for patronage. As Michael Conant observed, however, 'reasonable clearance is a concept analogous to 'fair' price, with no measurable standards, and thus not administrable.' Conant, *Antitrust in the Motion Picture Industry*, pp. 98, 213.

[62] Notes: 'The Sherman Act and the Motion Picture Industry': 354-5.

[63] Conant, *Antitrust in the Motion Picture Industry*, p. 68.

[64] The article noted that while a picture would have theoretically only been playing for three or four of the ten weeks before general release, it may in fact 'have been playing week in, week out when it was supposed to be 'dead.'' Moreover, the method of 'rationing out' pictures to B&K theatres for double bills meant that 'the combine can give its 'A' theaters two of its very best pictures for exhibition during the same week, and the same two pictures may be placed onto the 'B' and 'C' theaters,' but that because the general release of these pictures could be staggered by a week, they were not simultaneously available to independents for double bills. As a result, patrons of the 'A,' 'B' and 'C' theatres who had seen both pictures would be unlikely to attend an independent theatre showing either of them on a double bill. 'Restraints on Motion Picture Exhibition and the Anti-Trust Laws': 431. B&K's selective contracts also meant that while they had exclusive access to all the feature pictures released by Paramount, Warners, Loew's and Fox, they showed less than sixty

percent of them in their Loop theatres, with some of those pictures not receiving their Chicago first run until more than two months after their national release. TNEC, *The Motion Picture Industry*, p. 39. In 1937, independent exhibitors argued that clearance periods were often compounded by the fact that prints were frequently not available to them 'until the lapse of a further period of some 14 to 60 days.' 'Petition for relief from contracts, combinations, conspiracies and monopolies in the motion picture industry to the United States House of Representatives Committee on the Judiciary, Submitted by Allied States Association of Motion Picture Exhibitors,' February 10, 1937, p. 16. MPPDA Archive Record #2843, accessed September 28, 2019, https://mppda.flinders.edu.au/records/2843.

[65] These terms might include *master agreements*, under which a circuit bought for many or all of its theatres under one contract; *franchise agreements* providing contracts over several seasons; and *formula deals,* allowing the circuit to pay rental charges averaged across its overall receipts for a picture, enabling it to allocate playdates and rentals among its theatres to its best competitive advantage. Whitney, *Antitrust Policies*, pp. 152-3.

[66] For example, the Griffith circuit had theatres in 85 towns in Oklahoma, Texas, and New Mexico; Crescent Amusements had theatres in 78 towns in Alabama, Arkansas, Kentucky, Mississippi, and Tennessee. See Whitney, *Antitrust Policies*, pp. 166-7.

[67] What independent exhibitors called 'compulsory block booking' meant, in practice, that distributors would seek to sell a whole block of thirteen, 26 or 52 pictures, and would only sell individual films if they could find no buyers for the block. Independents complained that the cost of individual pictures was 50 percent higher than the cost of the same pictures in a block. The distributors' defence of block booking, that it was the only economically viable way of trading with a large part of the subsequent-run theatres, is in itself quite persuasive, but does not counter the argument that it also pre-empted these theatres' playing time and closed the market to independent producers and distributors. Block booking also obviated much of the potential price competition between pictures that would have occurred if each picture's likely box-office appeal were assessed against its asking price. TNEC, *The Motion Picture Industry*, p24. See also Conant, *Antitrust in the Motion Picture Industry*, p. 79; and F. Andrew Hanssen, 'The Block Booking of Films Re-examined,' *Journal of Law and Economics*, 43 (2000): 395-426, reprinted in John Sedgwick and Michael Pokorny, eds., *An Economic History of Film*, (London: Routledge, 2004), pp. 121-50.

[68] For an example of such work, see Andrea Comiskey, 'Researching and Analyzing the Classical-era Film Distribution as a National System: Findings and Methodological Challenges,' paper delivered at the HOMER Circuits of Cinema Conference, Ryerson University, Toronto, June 2017.

[69] Richard Maltby, 'The Standard Exhibition Contract': 139-40.

[70] Conant, p. 55, citing *United States v. Paramount Pictures*, 334 U.S. 131 (1948), 955-7.

[71] 'Protection Caused 70% Drop, Mrs. Youngclaus Testifies,' *Film Daily*, April 21, 1932: 1.

[72] *U.S. v. Crescent Amusement Company, Inc., et al*., In the District Court of the United States for the Middle District of Tennessee, Nashville division, complaint, civil action No. 54, filed August 1, 1939, quoted in TNEC, *The Motion Picture Industry*, p. 48.

[73] 'Petition for relief,' pp. 19-20. MPPDA Archive Record #2843, accessed September 28, 2019, https://mppda.flinders.edu.au/records/2843.

[74] Theodore J Kreps, Economic Advisor to the Temporary National Economic Committee, Letter of Transmittal, TNEC, *The Motion Picture Industry*, January 15, 1941, p. ix.

[75] Conant, *Antitrust in the Motion Picture Industry*, p. 84. See also Mary Gelsey Samuelson, 'The Patriotic Play: Roosevelt, Antitrust, and the War Activities Committee of the Motion Picture Industry,' PhD thesis, University of California Los Angeles, 2014, p. 17.

[76] Ellis W. Hawley, 'Three Facets of Hooverian Associationalism: Lumber, Aviation and Movies, 1921-1930,' in Thomas K. McCraw, ed., *Regulation in Perspective* (Cambridge, MA: Harvard University Press, 1981), pp. 95-123. Less flatteringly, the TNEC monograph in 1941 described the MPPDA as 'conceived in fear of regulation of the industry by the public and dedicated to the proposition that outsiders should never dictate its policies.' TNEC, *The Motion picture Industry*, p. 6.

[77] In June 1930, Assistant Attorney General John Lord O'Brien wrote to Hays, 'If the new zoning and clearance plan is satisfactory to all of the interests involved, you and your associates are to be congratulated.' Conant, *Antitrust in the Motion Picture Industry*, p. 202. In February 1935, Hays offered to co-operate with the Department of Justice in examining exhibitor complaints so that the MPPDA could 'come to an understanding with the Department as to all bona fide complaints or practices questioned by the Department' and seek to voluntarily eliminate any trade practices the Department regarded as violations of the law ('Copy of notes used by WHH [Will Hays] in presentation of February 28, 1935, to the Attorney General,' Microfilm Reel 14, *The Will Hays Papers*, University Publications of America, 1986). A year later, the Department took up Hays' offer, but after an initial period of cooperation, it emerged that the major companies were unwilling to accept the MPPDA's proposed role as a clearing house for complaints transmitted by the Department (Gabriel Hess to Hays, August 25, 1936, Reel 16, *Hays Papers*).

[78] *Motion Picture Herald*, March 10, 1934: 14, reporting *Rembusch v. Motion Picture Producers and Distributors of America* (S.D.N.Y. 1934) (unreported). In 1936 the editors of the *Columbia Law Review* noted several other judgements between 1932 and 1936 finding protection and clearance to be reasonable, legal and proper arrangements. 'Notes: The Motion Picture Industry and the Anti-Trust Laws': 646.

[79] Except for its restrictions on the scale of block booking and its introduction of trade showings, the 1940 Consent Decree was in most respects similar in its stipulations to the 1933 NRA Code. The editors of the *University of Chicago Law Review* described the decree as 'the antithesis of the ideals of competition and kinetic industrialism reflected in the antitrust laws. The decree, conceived during the most vigorous period of antitrust enforcement since the passage of the Sherman Act, was a blue-print of industrial cartelization.' They noted the irony that the decree 'pleased all but the one group in whose behalf the suit was allegedly undertaken-the independent exhibitors,' who opposed its adoption, characterizing it as 'a capitulation by the Department of Justice as astonishing as it is complete.' The decree also stipulated that the charges against distributors in the *Schine, Griffith* and *Crescent* cases would be dismissed. 'Notes: The Sherman Act and the Motion Picture Industry': 349. See also *Motion Picture Herald,* November 9, 1940: 17, 40-6; November 23, 1940: 18.

[80] Samuelson, 'The Patriotic Play,' pp. 268-84. The Roosevelt administration had begun to withdraw support for Arnold's anti-trust campaign in mid-1940, in the lead-up to that year's election and the need for broad industrial support for its defence preparations. Muscio, *Hollywood's New Deal*, p. 187.

[81] *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 at 227.

[82] The Court found that '"specific intent" is not necessary to establish a "purpose or intent" to create a monopoly but that the requisite 'purpose or intent' is present if monopoly results as a necessary

consequence of what was done.' *United States v. Paramount Pictures, Inc*., 334 U.S. 131 at 173, May 3, 1948.

[83] *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp*., 346 U.S. 537 (1954). See also W. T. Stanbury G. B. Reschenthaler, 'Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases,' *Osgoode Hall Law Journal*, 15:3 (1977): 618-700; William E. Kovacic, Robert C. Marshall, Leslie M. Marx, and Halbert L. White, 'Plus Factors and Agreement in Antitrust Law,' *Michigan Law Review* 110:3, (2011): 393-436.

[84] Muscio, *Hollywood's New Deal*, p. 21.

[85] In the 1934-5 season, the industry spent $70 annually for advertising, compared to $110 million on production. Bertrand, *The Motion Picture Industry*, p. 24.

[86] 'The Present Status of protection or Clearance,' *Harrison's Reports*, September 12, 1936: 145.