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Performing Arts and the Anti-Trust Laws

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THE PERFORMING ARTS AND THE ANTI-TRUST LAWS

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In a sense, the Department of Justice has been America's Ministry of Culture. Except for a recent nexus of the State Department with the American National Theatre and Academy for the presentation of artists abroad,[1] the main connection of the federal government with the performing arts has been by way of the regulatory function of the anti-trust laws. Is this adequate or even proper? Are the arts *sui generis* so as to merit separate treatment? If so, should there be new approaches, perhaps in the form of a Commission or Department of the Arts? It is proposed to explore some of these problems from the point of view of how the anti-trust laws have impinged upon the performing arts.

Unlike baseball,[2] the different media of entertainment have had little or no success in securing any exemption from the federal anti-trust laws. When the Supreme Court decided the Federal Baseball case[3] and held baseball not to be in interstate commerce, *Keith v. Hart*[4] went the other way with respect to vaudeville. Motion pictures were given short shrift on this argument by the Supreme Court in *Binderup v. Pathé*.[5]

When the highest court wrestled with its exemption of the national sport in *Toolson*[6] and re-affirmed its position, it did not see fit to accord the theatre any such grace. In *United States v. Shubert*[7] it condemned the theatre to the controls of the Sherman Act and ended, once and for all, the expectations of at least one law review writer[8] that interstate

† See Contributors' Section, Masthead, p. 449, for biographical data.

1 Edward R. Murrow's filmed presentation of Marian Anderson's visit to Asia on "See It Now" over CBS on December 30, 1957, was a visual example of the tremendous goodwill America's performing artists have encountered in this project. Newspaper stories have reported similar responses to other American performers.

2 Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball Club v. National League, 259 U.S. 200 (1922); cf. Radovich v. National Football League, 352 U.S. 445 (1957); United States v. International Boxing Club, 348 U.S. 236 (1955). See Johnson, "Baseball, Professional Sports and the Antitrust Acts," 2 Antitrust Bull. 678 (1957).

3 Federal Baseball Club v. National League, 259 U.S. 200 (1922).

4 Hart v. Keith, 12 F.2d 341 (2d Cir.), cert. denied, 273 U.S. 704 (1926).

5 Binderup v. Pathé Exchange, 263 U.S. 291 (1923).

6 Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); cf. Radovich v. National Football League, 352 U.S. 445 (1957); United States v. International Boxing Club, 348 U.S. 236 (1955).

7 United States v. Shubert, 348 U.S. 222 (1955).

8 Reich, "The Entertainment Industry and the Anti-Trust Laws," 20 So. Cal. L. Rev. 1 (1946). In 1946 Mr. Reich had good reason to feel that way. Despite Hart v. Keith (supra note 4), the 10th Circuit had held in 1934 that an entertainer in the Chatauqua Circuit was not in interstate commerce (Neugen v. Associated Chatauqua Co., 70 F.2d 605. True, Ring v. Spina, 148 F.2d 647 (2d Cir. 1945), held, at 651, "The Supreme Court has not hesitated to regard the distribution of motion picture films as interstate commerce; . . . and it may seem invidious to draw a different conclusion as to a stage production." However, a year later, Judge Leibell wrote in San Carlo Opera Co. v. Conley, 72 F. Supp. 825, 831 (S.D.N.Y.

commerce in anti-trust suits was a problem to be resolved in entertainment.

With respect to music, consent decrees by ASCAP and BMI in 1941[9] and by Columbia Artists Management, Inc. and National Concert Artists Corp. in 1955[10] eliminated any possibility of arguing that they were intrastate.

Superficially, it would appear that defendants sought to avoid all liability by a ruling that the particular sport or entertainment medium was not subject to the federal anti-trust laws because it was not in interstate commerce.[11] Assuming the defendants had prevailed, as they did in baseball, then plaintiffs might still sue them for violation of the state anti-trust laws.[12] New York and California, for example, the leading centers of the entertainment industry, have anti-trust laws, as do most states. The choice for such a plaintiff is not federal relief versus none at all. Rather, the quality of the relief offered by the Sherman and Clayton Acts is determinant. For example, a successful plaintiff in the federal courts can recover treble damages. Indeed, once damages are assessed, trebling is mandatory.[13] In addition to costs, attorneys' fees may be assessed,[14] while in California, on the other hand, the award of damages is only doubled.[15] Also, a defendant in the federal courts may be sued in the state where he transacts business or may be found.[16] The same defendant may not be amenable to process under state law. An-

1946), "In cases involving the performance of vaudeville acts the courts have held that contracts for personal services of the entertainers were not the subject of commerce even though the entertainers were required to go from state to state."

[9] Consent decree in Civil Action No. 13-95, United States v. American Society of Composers, Authors and Publishers, was entered in the District Court for the Southern District of New York on March 4, 1941. This was amended on March 14, 1950. Consent decree in Civil Action No. 459, United States v. Broadcast Music, Inc., in the District Court of Wisconsin, filed February 3, 1941, was modified on May 9, 1941. For text of the ASCAP decree as modified in 1950, and for the BMI consent decree, see Rothenberg, Copyright and Public Performance of Music 128, 148 (1954). See also, pp. 29-65 for discussion of BMI and ASCAP; and Warner, Radio and Television Rights (1953). Chapter XIII, The Music Industry—the ASCAP Story 323-455.

[10] Consent decrees in Civil Action No. 104-165, United States v. Columbia Artists Management, Inc., Community Concerts, Inc., National Concert and Artists Corporation and Civic Concerts Service, Incorporated entered in the District Court for the Southern District of New York on October 20, 1955.

These decrees are noteworthy because concert music is an area where non-profit organizations play important roles, viz., the audience associations in local communities serviced by Community Concerts, Inc. and Civic Concerts, Inc. and orchestral groups like the New York Philharmonic Society.

[11] See notes 2-8 supra.

[12] For example, the Donnelly Act in New York or the Cartwright Act in California. For analysis and provision of each state, see 2 CCH Trade Reg. Rep. (1956).

[13] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1952). "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." This is § 4 of the Clayton Act.

[14] Ibid.

[15] Cal. Bus. & Prof. Code § 16750 (Deering 1951).

[16] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1952), § 4, Clayton Act.

other factor is that a district court's decree extends to a defendant throughout the United States.[17] A state court of equity may be confronted with questions of power and jurisdiction and due process in connection with its extra-territorial writs.[18]

Moreover, section 5 of the Clayton Act has provided a plaintiff with a built-in system advantageous to him. By virtue of 5(a), judgment by the Government in an anti-trust suit of its own may be introduced as prima facie evidence against the same defendant in certain instances.[19] Section 5(b) permits a tolling of the statute of limitations against such a defendant in favor of private plaintiffs during the pendency of a government suit.[20] Local law may not be so felicitous.[21]

From the foregoing, one might conclude that a plaintiff would be ill advised to sue in the state courts for violation of its anti-trust laws in entertainment. Moreover, considering the fact that radio and television are licensed and regulated by the Federal Communications Commission,[22] one might assume that a plaintiff would not even consider the state courts in those areas. Yet in 1957, a television station brought an action in the state courts for violation of California's anti-trust laws against other stations and numerous television film distributors.[23] Defendants demurred on the ground that television is subject to the FCC and to the Sherman and Clayton Anti-trust Acts which preempt the field. The de-

[17] See, for example, the scope of the decrees entered in United States v. Paramount, Equity No. 87-273, in 1948, 1949, and 1950 and modifications thereof. The decrees were entered in the District Court for the Southern District of New York.

[18] See 1 Pomeroy, Equity Jurisprudence (5th ed. 1941).

[19] 38 Stat. 731 (1914), 15 U.S.C. § 16 (1952). Prior to its amendment in 1955, effective January 7, 1956, § 5(a) read:

> That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: Provided further, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

[20] 38 Stat. 731 (1914), 15 U.S.C. § 16 (1952). Prior to amendment effective January 7, 1956, what is now § 5(b) was the second paragraph of § 5 and read:

> Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

[21] Section 5 of the Clayton Act does not appear to have a counterpart in state anti-trust laws.

[22] Federal Communications Act of 1934, 47 U.S.C. 2807; National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[23] Standard Radio and Television Company v. Chronicle Publishing Company, No. 103194, in the Superior Court of California in and for the County of Santa Clara. The demurrer was sustained in an unpublished opinion dated November 8, 1957.

murrer was sustained and the plaintiff is now appealing. Thus, just when the interstate commerce issue has been laid to rest in the federal courts, with respect to entertainment, its converse has arisen in the state courts. May a party go into the state courts for relief when he and the defendants are concededly in interstate commerce? Or do the federal laws preempt anti-trust relief in such a situation? The question has not arisen in the Supreme Court.[24] If the state court is sustained on appeal, that will end it; if not, state anti-trust laws may become a factor in the entertainment industry.

Whatever the future may bring, the play today is overwhelmingly federal. The cast includes the Department of Justice, which is empowered to enforce the Sherman and Clayton Acts.[25] Investigation is carried on by it to ascertain whether to institute an action, criminal or civil.[26] Its Anti-Trust Division polices the anti-trust laws, handling and processing complaints from private parties. Finally, it sees to it that district court decrees in government cases are enforced and, if necessary, secures contempt citations for wilful violations. In short, the role of the Department of Justice is law enforcement.

Correlative to its role is that of the private plaintiff, whose actions are conceived of as an aid in "policing the anti-trust laws."

Anti-trust Regulation of the Performing Arts

All of the performing arts, then, have come within the purview of the Sherman and Clayton Acts. As a practical matter, it means that the major components of show business are subject to federal regulation. The facts are that the Government has instituted anti-trust actions against defendants in motion pictures, the theatre, music, and radio and television.

However, it appears that only the motion picture industry fought such actions. After losing in the Supreme Court on interstate commerce, the Shubert defendants signed a consent decree.[27] ASCAP and BMI signed consent decrees without going to trial.[28] So did the concert management

[24] This contention was raised by the defendants in their supplemental memorandum and does not appear to be controverted.

[25] 26 Stat. 209 (1890), as amended, 36 Stat. 1167 (1911), 15 U.S.C. § 4 (1952) authorizes the several district attorneys to institute proceedings in equity to restrain violations of the Sherman Act. To the same effect, 38 Stat. 736 (1914), 15 U.S.C. § 25 (1952) with respect to the Clayton Act.

[26] Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 50 Stat. 693 (1937), 15 U.S.C. §§ 1, 2 (1952) provide that persons violating same may be deemed guilty of a misdemeanor punishable by fine up to $5,000 or imprisonment for one year, or both.

[27] United States v. Shubert, Civil Action No. 56-72, Consent decree entered in the District Court for the Southern District of New York, February 17, 1956, reported CCH Trade Reg. Rep. (1956 Trade Cas.) ¶ 68,272.

[28] See note 9 supra.

defendants, Columbia Artists and National Concert Artists Corp.[29] A number of lawsuits involving the television industry are pending by the Government which have not yet gone to trial.[30]

By signing such consent decrees, these defendants have avoided the impact of section 5(a) of the Clayton Act which by its terms does not apply to consent decrees entered into before trial or before evidence is taken. Such decrees may not be used as prima facie evidence. Moreover, section 5(b) has little or no relevancy. Some courts have so construed section 5(a) to be read together with section 5(b),[31] and in this case section 5(b) would not apply at all. In any event, consent decrees are usually entered rather early in the course of an action, so that little time is tolled under section 5(b).

But one branch of the entertainment industry received the full impact of the anti-trust laws by going to trial. It is proposed to explore this in the light of current developments to understand the meaning of the anti-trust laws to the performing arts.

United States v. Paramount—Conspiracy

In July of 1938[32] the Government brought an anti-trust action against the five theatre-owning distribution companies: Paramount, Loew's, Fox, Warners, and RKO, as well as three distribution companies not engaged in exhibition: Columbia, United Artists, and Universal. Some of their subsidiaries and individual officers and directors were joined. Except for United Artists, the other companies were also producers.[33] After reciting the history of the motion picture industry, the complaint then set forth facts tending to show vertical and horizontal integration.

In the course of reciting specific wrongs, the complaint proceeded essentially upon two theories: (a) illegal contract and combination in restraint of trade, and (b) monopolization. The first was based on section 1 of the Sherman Act; the second, upon section 2 thereof.[34]

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[29] See note 10 supra.

[30] These include cases against distributors of motion pictures for television alleging block booking and the suit by the government against Radio Corporation of America alleging conspiracy in connection with its acquisition of the Westinghouse station in Philadelphia. The latter was dismissed by Judge Kirkpatrick on January 10, 1958.

[31] Judge Murphy in Samuel Goldwyn Productions, Inc. v. Fox West Coast Theatres Corporation, 146 F. Supp. 905, 908 (D.C. Cal. 1956), stated: " . . . the two parts of § 5 here in question are to be read together. See Sun Theatre Corp. v. RKO Pictures, 213 F.2d 284, 290 (7th Cir. 1954); Momand v. Universal Film Exchange, supra." His reference was to Judge Wyzanski's opinion in Momand v. Universal Film Exchange, 43 F. Supp. 996 (D. Mass. 1942), aff'd, 172 F.2d 37 (1st Cir. 1948), cert. denied, 336 U.S. 967 (1949).

[32] United States v. Paramount, Equity No. 87-273, was commenced by service of petition verified July 19, 1938, in the District Court for the Southern District of New York.

[33] Id. at 1-27.

[34] P. 83 of the petition contains a heading, "Offenses Charged". At p. 84 the sub-heading is "(A) Monopoly of exhibition in first-run metropolitan theatres." Paragraphs 183-85 thereunder speak of "monopolization". At p. 88, the next sub-heading reads, "(B) Nation-

On November 14, 1940, an amended complaint was filed and on November 20, 1940, a consent decree was signed by the theatre-owning defendants. In the amended complaint, no individuals were named as defendants. Presumably the complaint was so amended so that some of the defendants might sign the consent decree.

In addition, the Government changed the theory of its complaint. Whereas the term, conspiracy, had appeared only incidentally in the 1938 complaint and then virtually *in haec verba* with section 1 of the Sherman Act,[35] in the amended complaint it assumed a predominant position, with monopolization retreating into the background.[36] The gist of the amended complaint became conspiracy to violate the anti-trust laws in violation of section 1. Why the drastic shift in the theory of the complaint? Since this was a civil action, the wrongs spelled out in section 1—"contract, combination, or conspiracy . . . in restraint of trade," and "monopolization" in section 2 of the Sherman Act—must be considered as different and distinct categories of torts.[37]

It is submitted that this shift was suggested by the decision of the Supreme Court in *Interstate Circuit v. United States*[38] which was decided in February, 1939. The court adverted to a circular letter by the head of the Interstate Circuit in Texas to various officers of the distributors and explained its impact and their actions with respect thereto in the language of conspiracy.

Conceptually, politically and statutorily, the Government had cogent

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wide monopoly of exhibition by producer-exhibitor defendants." Paragraphs 193, 194, 198 thereunder speak of "monopolization." The next sub-heading at p. 95 reads, "(C) Monopoly of Production". At p. 101 the next sub-heading is "(D) Trade practices imposed upon independent exhibitors" and at p. 108, "(E) Benefits, favors and advantages extended by the defendants to each other." The offenses charged in (D) and (E) are more akin to contracts and combinations in restraint of trade than conspiracy.

35 26 Stat. 209 (1890), as amended, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1952) reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade . . . is hereby declared to be illegal." On p. 83, for example, the petition refers to violations of the Sherman Act by "contracting, combining and conspiring to restrain interstate trade and commerce."

36 In the amended and supplemental complaint, filed November 14, 1940, there is a heading, "VII. Offenses Charged", with the following sub-headings:

A. Conspiracies to unreasonably restrain and monopolize the production, distribution and exhibition of motion pictures participated in by all of the distributor defendants.

B. Conspiracies to unreasonably restrain and monopolize the exhibition of motion pictures participated in by the producer-exhibitor defendants.

C. Conspiracies to unreasonably restrain and monopolize the production of motion pictures participated in by the producer defendants.

D. Combinations of which each producer-exhibitor defendant is a member which are illegal per se.

E. Illegal contracts between each distributor defendant and circuit theatres.

F. Illegal coercion by each producer-exhibitor defendant.

G. Illegal contracts made by each distributor defendant with exhibitors generally.

37 Strictly speaking, this may be a matter of classification and definition of torts. See Prosser, Torts § 1 (2d ed. 1955).

38 Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

reason to make this shift of emphasis in the complaint. To begin with, there can be a criminal conspiracy and also a civil one. The area encompassed may be that of crime or that of tort, or both. Burdick quotes the British definition formulated by the Commissioners on Criminal Law in England in 1843, "The Crime of conspiracy consists in an agreement by two persons (not being husband and wife), or more than two persons, to commit a crime, or fraudulently or maliciously to injure or prejudice the public or any individual person."[39]

Corpus Juris Secundum defines civil conspiracy as " . . . a combination of two or more persons by concerted action to accomplish an unlawful purpose, to accomplish some purpose not in itself unlawful by unlawful means."[40] This is virtually the definition adopted by the courts dealing with anti-trust cases.[41]

But the ancient writ of conspiracy as a civil action of the common law achieved rapid growth. By the time of passage of the Sherman Act, it embraced a wide field[42] and its principles were far reaching.[43]

Carson could write in 1887, "In some respects the crime is peculiar. Although compounded of the two elements of *combination* and *attempt*, it is made to consist in the intent, in an act of the mind, and the formation of this intent, by the interchange of thoughts, is made itself an overt act, done in pursuance of that interchange or agreement. . . . The fact of confederacy is the gist of the offence."[44]

Stated another way, " . . . there must be a preconceived plan and unity of design and purpose for the common design is of the essence of the conspiracy."[45] An overt act in pursuance of the conspiracy is sufficient to establish liability.[46]

It is settled hornbook law that each conspirator is jointly and severally liable for all damage resulting from the conspiracy and that a person entering a conspiracy at a later date is liable for all acts, whether done before or after his entry, carried out in pursuance thereof.[47]

Thus the Government in 1940 utilized the notion of conspiracy which

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[39] Burdick, "Conspiracy as a Crime and as a Tort," 7 Colum. L. Rev. 229, 230 (1907).

[40] 15 C.J.S., Conspiracy § 1 at 996 (1939).

[41] United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 293 (6th Cir. 1898). Taft, J., affirmed, 175 U.S. 211 (1899), "A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means."

[42] Carson, Law of Criminal Conspiracies and Agreements, As Found in the American Cases 91 (1887).

[43] Ibid. "In Lord Coke's day the law was limited to consultation and agreement between two or more, to appeal or indict falsely and maliciously." Burdick 1 op. cit. supra note 39, at 231, "the principle . . . is very far reaching."

[44] Carson, op. cit. supra note 42, at 92.

[45] 15 C.J.S., Conspiracy § 2 at 996, 997 (1939).

[46] In order to recover under the anti-trust laws, a private party plaintiff must prove conspiracy, an overt act in support thereof and damage.

[47] 15 C.J.S., Conspiracy §§ 18-19 at 1028-30 (1939).

commended itself for its simplicity as a concept. Moreover, common design could be proved by inference, by circumstantial evidence as in *Interstate.*

Secondly, the time was propitious. Historically, the term, "conspiracy" was one of opprobrium. Conspirators against government and law and order could strike terror in any law abiding citizen. Historically, governments could rally popular support against conspiracies. Whether or not this was in the minds of the framers of the amended complaint in the latter part of 1940, conspiracy was in the air. There was a war in Europe. In the spring of 1940, the Nazis had overrun Norway with the aid of a carefully conceived plan.[48] Plots and conspiracies of all kinds were in the air during these years of crisis. Should the amended complaint be used as a basis for trial, it charged what was essentially a dirty word, conspiracy.

Coincidentally, the Sherman Act lent itself admirably to such a formulation. The Sherman Act was conceived in terms of the events of its day. Denominated an anti-trust law, its purpose was to regulate trusts and other combinations in restraint of trade. The common law trust was one of the main devices used for industrial concentration and control. The trust instrument represented a form of agreement as well as a compound enterprise. The term "contract" was broad enough to encompass the former and the term "combination," the latter.[49] A search of the debates in Congress reveals scarcely any consideration of the meaning and effect of the term "conspiracy."[50] Perhaps the term was added to cover labor combinations which, at that time, were considered in some circles as conspiracies. If so, it took the express exemption of labor unions from the anti-trust laws by the passage of section 6 of the Clayton Act in 1914 to void that purpose.[51]

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[48] Homeless German children who had been reared and fostered by Norwegian families after World War I returned in 1940 as tourists. With their intimate knowledge of the country, they were of inestimable value to the invasion of Norway. Indeed, 1940 was the year of the realization of the plans for the invasion of Denmark and the Lowlands as well as the occupation of France.

[49] The term "combination" in business is also a term of art and is not necessarily coterminous with its legal classification. See Haney, Business Organization and Combination (3d ed. 1934), and Taubman, Joint Venture and Tax Classification 140 (1957).

[50] Bills and Debates in Congress Relating To Trusts, S. Doc. No. 147, 57th Cong., 2d Sess. (1903). It is noteworthy that the bill as originally submitted by Senator Sherman did not contain the term "conspiracy". When reported out by Senator Edmunds on April 2, 1890, it contained the present language.

What is astonishing is the virtual absence of debate and even discussion with reference to the term "conspiracy". The committee reports merely reiterate the language of the bill but add nothing. In short, there is scant illumination as to Congressional intent. Perhaps the change was considered a matter of draftsmanship.

[51] Clayton Act, § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1952). "The labor of human beings is not a commodity or article of commerce . . . nor shall such organizations . . . be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

At any rate, it is noteworthy that Kales' casebook and treatise of 1916 and 1918, respectively, used the phrase "contracts and combinations" in his titles.[52] The term "conspiracy" was not used. His treatise did not even index it. For that matter, Handler's casebook, published in 1937, indexes the term "criminal conspiracy" directly, but not "conspiracy".[53] Indeed, more recently, Mr. Handler opined, "For all practical purposes, 'combination' is synonymous with 'conspiracy'."[54]

Unfortunately, for all practical purposes, the distinction between the two has made a world of difference. Yet it appears that for a long time prior to *United States v. Paramount,* combination and conspiracy were treated as synonymous. When the shift in emphasis turned to conspiracy notions, its effects were somewhat obscured by semantics.

The fact is that combination is not the same as conspiracy. Its connotations differ. Combination per se is neutral. It does not connote illegality. By itself it means coming together for one purpose or another. Combination in restraint of trade does not sound criminous.

Conspiracy, on the other hand, is inherently unlawful, either in end or means. Because of its historical and political origins, it has overtones of moral turpitude. Burdick has defined moral turpitude as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man or to society in general."[55] Looked at from the point of view of the state, conspiracy is a heinous plotting to subvert, overthrow, or at least upset law and order. Conspiracy may become power, the power of shadow government. No state can or will tolerate it.

Regulation of corporate combination by the state has been operative in history since at least the Roman Empire.[56] Conspiracy as a threat to the state can be analogized to *infamia* of Roman law. Burdick writes of

52 Kales, Cases on Contracts and Combinations in Restraint of Trade (1916); Kales, Contracts and Combinations in Restraint of Trade (1918). Cf. Thornton, The Sherman Anti-Trust Act c. XI, Conspiracies (1913). This adds nothing other than common law rules. See Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 612 (1914). "But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done. . . . "

53 Handler, Cases and Other Materials on Trade Regulations (1937). There is a cross reference under Criminal Conspiracy in this index to "See Sherman Anti-Trust Act". Under Sherman Anti-Trust Act there is a reference to "Conspiracy in restraint of trade."

54 Handler, "An Anti-Trust Dictionary" 38, 40 in American Bar Association Section on Anti-Trust (1953). Professor Handler considered the meaning of Contract, Combination and Conspiracy. It is noteworthy that he rejected the concept of joint venture, stating, "'Joint venture' may be a label. But it can hardly be applied to every agreement or combination to restrain trade."

Yet one writer, Hale, "Joint Ventures: Collaborative Subsidiaries and the Anti-Trust Laws," 42 Va. L. Rev. 927 (1956), considers joint ventures where entity A and entity B set up a new entity C. Cf. Taubman, op. cit. supra note 49, at 207-09 re joint venture corporate instrumentality doctrine.

55 Burdick, Principles of Roman Law and Their Relation to Modern Law 210 (1938).

56 Taubman, op. cit. supra note 49, at 36, 47.

the latter, " . . . where a necessary witness to a legal transfer of property later refused to testify to such fact of transfer, he became thereafter 'infamous,' incapable of being a witness and unworthy to have testimony given by another in his own behalf. . . . In later days, the censors had great power in placing a stigma upon a Roman citizen's reputation. . . . A note of censure was at times made against a name in the list of citizens, signifying that the individual was morally unfit or unworthy, by reason of his disgraceful conduct or occupation, to render service to the state."[57]

Burdick adds: "Under our law, the term infamous may signify the mode of criminal punishment inflicted, or may refer to the fact that one is disqualified from testifying in a court of justice."[58]

It is submitted that section 5(a) of the Clayton Act has the effect of rendering the anti-trust laws into a statute of infamy. Its purpose was succinctly stated by President Wilson who, in a joint address to Congress on January 20, 1914, asked for legislation to assist the private litigant by use of the government resources during its anti-trust suit.[59] Congressional debates prior to passage of the Clayton Act indicated concern that introduction of a judgment obtained by the Government in a later private action as conclusive evidence would be unconstitutional.[60] The act as passed changed the phrase to prima facie evidence.[61] There is no doubt that a judgment obtained by the Government offered as conclusive evidence would have the effect of making the same defendant the equivalent of "disqualified from testifying in a court of justice."[62] Even if the defendant could formally testify in the second suit, it would be

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57 Burdick, op. cit. supra note 55, at 208.

58 Id. at 210.

59 I hope that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combination complained of and won its suit and that the statute of limitations shall be suffered to run against such litigants only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of.

51 Cong. Rec. 1,964 (1914).

60 Mr. Webb, 51 Cong. Rec. 16,276 (1914), "The Senate struck out the word 'conclusive' and asserted 'prima facie'. I doubt whether the Courts would have held the 'conclusive' provision was constitutional."

Mr. Reed, id. at 15,824, "I desired to have them made conclusive; but I doubted, and so the Attorney General's office doubted, the ability to make them conclusive." See, Stevens, The Clayton Act, The American Economic Review 49 (1915).

61 Stevens, op. cit supra note 60. "The original House measure had provided that a judgment in favor of the United States should be 'conclusive' evidence." H.R. 15657 was introduced by Representative Clayton on April 14, 1914. Section 5 thereof the judgment or decree would constitute . . . "conclusive evidence of the same facts, and be conclusive as to the same issues of law," reported in Bills and Resolutions Relating to Trusts, Sixty-Third Congress, 1914.

62 Burdick, op. cit. supra note 55, at 210.

futile. Conclusive evidence of conspiracy rendered by offer of the prior judgment would be determinative.

It is submitted that the statute as finally drawn does not materially lessen the effect. One characteristic of conspiracy is that the common law allows little or no defense to the charge other than denial and a finding of no conspiracy. True, a beneficiary of a conspiracy may not claim the benefits of it.[63] But plaintiff's fraud in other matters or his unclean hands does not necessarily constitute a defense,[64] although this may go to the matter of his credibility before a judge or jury. A plea of statute of limitations, on the other hand, is a technical defense based on the notion that causes of action should repose if not reduced to action within the time provided by law.[65]

Assuming no defense other than a general denial, we have a situation in which section 5(a) provides a limited form of *infamia*. The defendant is rendered "infamous, incapable of being a witness . . . in his own behalf" until "a stigma" is placed upon its reputation.[66] The Government has proven that the defendant was a conspirator. If received as prima facie evidence, it is thereafter incumbent upon the defendant to offer evidence in rebuttal to dispel the *prima facie* case, which, without more might spell liability. True, there must be an overt act and damage to the plaintiff.[67]

But simply by a charge of conspiracy, a defendant is rendered virtually helpless. Instead of a presumption of innocence, section 5(a) acts as a presumption of guilt with the burden shifted to the defendant to prove innocence.

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[63] Goldwyn v. Fox West Coast, supra note 31. Judge Murphy stated, "Insofar as the government identified the 'target area' of the conspiracy . . . , it is clear Goldwyn was not within that 'target area'; and indeed was charged with being a participant and beneficiary, to some extent at least, in the conspiracies, by reason of his affiliation with United Artists, one of the defendants in the Paramount case. . . . "

[64] For example, an exhibitor found to be falsifying gross receipts of a percentage rental engagement is no defense to his anti-trust suit. It may affect his credibility and be a set-off to the extent of the fraud, but it is no defense.

[65] The esoterics of the interplay of state statutes of limitations with § 5 are remarkable to behold. Compare, Judge Ryan's opinion in Leonia Amusement Corp. v. Loew's, Inc., 117 F. Supp. 747 (S.D.N.Y. 1953), holding New York's six-year statute applied with the recent decision of Judge Levet in the same court, holding New York's three-year statute applicable. Banana Distributors, Inc. v. United Fruit Co., decided December 6, 1957. The metaphysics of the federal courts' interpreting constructions by state courts of state statutes of limitations should disappear after a few more years, once the full effect of § 4b of the Clayton Act, effective January 7, 1956, is felt. This provides a four-year statute of limitations.

[66] Burdick, op. cit. supra note 55, at 208.

[67] Momand v. Universal, 43 F. Supp. 996, 1007 (D. Mass. 1942), aff'd, 172 F.2d 37 (1st Cir. 1948), cert. denied, 336 U.S. 967 (1949). . . . "standing alone a conspiracy does not invade any private rights." See also, Myers v. Shell Oil Co., 96 F. Supp. 670, 674 (S.D. Cal. 1951), Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196, 208 (9th Cir. 1950), "But private civil anti-trust actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of forbidden 'overt acts' by the conspirators."

United States v. Paramount—Trial and Tribulation

In this context, the Government asked for a trial on the merits in *United States v. Paramount*.[68] Although the original complaint was filed in 1938, trial commenced in 1945,[69] A decree was entered by the three-man expediting court trying the case on December 31, 1946.[70] This decree provided a system of arbitration but no divestiture. Many practices including block booking, blind selling, and fixing of admission prices were declared illegal. Most important, findings of conspiracy were made. Both sides appealed. On May 3, 1948, the Supreme Court handed down a decision remanding in part to ascertain whether divorce and divestiture of the theatres owned by the affiliated circuits should be decreed.[71] On remand, the expediting court so found and so decreed.[72] The findings as to conspiracy found in the 1946 decree which the Supreme Court had affirmed were repeated in various decrees subsequent thereto.[73]

It is noteworthy that Justice Frankfurter dissented in part, expressing fears about second-guessing the qualified expediting court.[74]

After the expediting court decision in 1946, Armstrong wrote: "*Interstate* expanded the definition of what constitutes a conspiracy. Concert of action towards a common end, not actual agreement so to act, was made the test."[75] This statement aptly expresses the point that the notion of conspiracy was changing conceptually. Yet, writing for the majority, Mr. Justice Douglas referred to "proclivity to unlawful conduct" of these defendants.[76] This is the language of *infamia*, "a note of censure."[77]

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[68] This was done by the filing of an expediting certificate by the Attorney General of the United States, Francis Biddle, on June 12, 1945 asking that a three-man expediting court hear and determine the cause, Civil Action No. 87-273.

[69] The Government opened in October, 1945 and closing statements were heard in January, 1946.

[70] The opinion was handed down for the court by Judge Augustus N. Hand on June 11, 1946, 66 F. Supp. 323 (S.D.N.Y. 1946). Findings of Fact, Conclusions of Law and Decree, as amended February 3, 1947 are reported 70 F. Supp. 53 (S.D.N.Y. 1947).

[71] 334 U.S. 131 (1948), opinion of Douglas, J.; See also, United States v. Griffiths, 334 U.S. 100 and United States v. Schine Chain Theatres, Inc., 334 U.S. 110, all handed down on the same day, May 3, 1948.

[72] Opinion of Judge A. Hand, dated July 25, 1949, 85 F. Supp. 881 (S.D.N.Y. 1949).

[73] As to the major defendants, Loew's, Warners and Fox, on February 8, 1950, as to the minor defendants, Columbia, Universal and United Artists, on February 8, 1950. RKO had entered into a consent decree on November 8, 1948 and Paramount, on March 3, 1949.

[74] 334 U.S. 131 (1948), dissent in part of Justice Frankfurter, as to provisions for arbitration, at 179:

> The terms of the decree in this litigation amount, in effect, to the formulation of a regime for the future conduct of the movie industry. The terms of such a regime, within the scope of judicial oversight, are not to be derived from precedents in the law reports, nor, for that matter, from any other available repository of knowledge. Inescapably the terms must be derived from an assessment of conflicting interests, not quantitatively measurable, and a prophecy regarding the workings of untried remedies for dealing with disclosed evils so as to advance most the comprehensive public interest.

[75] Armstrong, "The Sherman Act and the Movies," 20 Temp. L.Q. 442, 451 (1947), and Supplement, 26 Temp. L.Q. 1 (1952).

[76] 334 U.S. at 147.

[77] Burdick, op. cit. supra note 55, at 208.

By this time, a new facet could come into play to heighten the pronouncement of damnation accorded by section 5(a). Not only could the decree be admitted as prima facie evidence in suits by private plaintiffs, but section 5(b) provided the force to reap the whirlwind. Section 5(b) provided for suspension of the statute of limitations in a suit by a private plaintiff during the pendency of a government action concerning the same matters complained of in whole or in part.[78]

This meant that the government action ceased pending from the date its action became final. When did *United States v. Paramount* cease to pend as to each defendant? Since there was no federal statute of limitations in the anti-trust laws until January 7, 1956,[79] state law had to be considered. With the increase of private plaintiff suits against these defendants post-*United States v. Paramount,* the problems of section 5(b) became metaphysical.[80]

Law has its own logic, unless a statute be unconstitutional.[81] Despite a variety of interpretations and results, the fact remains that upon a finding of finality tolling the statute of limitations, a plaintiff could conceivably go back to 1938 and to the unexpired period of the statute of limitations prior thereto.[82] This means that a private party could bring an action in 1951 or 1952 and upon a finding of admissibility of *United States v. Paramount,* go back to at least 1938, assuming that he had been in operation at that time, and recover treble damages and attorneys' fees, with the presumption of guilt upon the defendants!

No wonder a law review writer in 1952 could state, "Movie cases comprise over 25% of the total private suits in the past eight years and the ratio is constantly rising."[83]

As a footnote thereto, he added, "Of the 367 private anti-trust suits (excluding patent litigation and counterclaims) pending in the United States District Courts in June, 1951, . . . 129 cases were pending against the movie industry . . . thus making the latest available ratio of movie litigation to total private suits approximately 33%."[84]

78 See note 20 supra and Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

79 See note 65 supra.

80 Ibid.

81 The bench may distinguish in order to avoid creating bad precedents. But the sum total of statutes and judicial gloss has the logic that rules will be followed and enforced because they are law. Sometimes, repeal or unconstitutionality will reveal that logic of this sort is not always sense or in accord with reality. Law review writers may cavil at such rules as critics but until the rules are rescinded, they are generally enforced.

82 See the chart entitled, "Chronology" in Leonia v. Loew's, 117 F. Supp. 747, n.36 (S.D.N.Y. 1953), which sets forth the mathematical computations visually with respect to timeliness of suit in relation to tolling of the statute of limitation by the pendency of United States v. Paramount. The chart was prepared by defendants.

83 Comment, "Anti-trust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit," 61 Yale L.J. 1010, 1043 (1952).

84 Id. at 1043 n.219.

Thanks to *Interstate* and *Paramount,* these plaintiffs had the benefit of having to prove a denatured conspiracy while, at the same time, the full impact of conspiracy as *infamia* was retained. If the punishment did not fit the tort, it did not matter. Any collective or concerted action on the part of these defendants would henceforth be *malum per se* as conspiracy. For a while, it seemed that this broadened notion of conspiracy might spill out of the container of conspiracy and even engulf all parallel action. But in *Theatre Enterprises,* the Supreme Court drew the line. It refused to abandon the test of conspiracy in favor of a finding that mere conscious parallelism, the coincidence of a number of competitors taking a similar course, constituted concerted action prohibited by the anti-trust laws.[85] Inferences might be drawn from the similar responses, but proof of conspiracy must be adduced for liability.[86]

Timberg has panegyrized the Sherman Act as " . . . a theorem in constitutional law and sociology, as well as in trade regulation and economics."[87] Such a view may be simplistic. Theorems in geometry and mathematics proceed from determinable known quantities to deduce the unknown. Statutory language assumes new meanings with judicial gloss read into it.[88] In this respect, Handler is correct that conspiracy is now synonymous with combination, subject to the commentary above.[89]

For, as Wharton indicated, with respect to criminal conspiracy, "Nor can we continue to accept the reasons by which this indefinite extension of conspiracy has been justified."[90] According to Wharton, " . . . to extend indictable conspiracies so as to include cases where acts not in themselves indictable are attempted by concert, involving neither false statement nor concerted force, should be resolutely opposed. . . . A distressing uncertainty will oppress the law. . . . No man can know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution."[91]

It is submitted that this has happened to the motion picture industry. As applied, Mr. Timberg's theorem has been simplistic.[92] The approach

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85 Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954). "But this court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

86 Sorkin, "Conscious Parallelism," 2 Antitrust Bull. 281 (1957); Note, "Conscious Parallelism, Fact or Fancy," 3 Stan. L. Rev. 679 (1951).

87 Timberg, "Divestiture as a Remedy Under the Anti-Trust Laws," 19 Geo. Wash. L. Rev. 119, 143 (1950).

88 For example, the equation of conspiracy with concerted action.

89 Handler, op. cit. supra note 54.

90 2 Wharton, Criminal Law 1860 (12th ed. 1932).

91 Id. at 1,859.

92 Timberg, op. cit. supra note 87.

has been in terms of black and white. The approach has been to think in terms of criminous villains and innocent victims to be protected.

Actually highly organized independent groups were anxious to have such government proceedings brought.[93] This does not mean that some of the findings by the Court were unjustified. Rather it means that in an industry characterized by sharp differences, one side was able to get the Government to act and at that, from the exhibitors' point of view, imperfectly. When the theatre-owning defendants abandoned block-booking in the 1940 consent decree in favor of booking in blocks of five,[94] some of the exhibitor organizations lobbied successfully in the state legislatures to pass a block booking act, only to have it declared unconstitutional.[95]

Actually, the exhibitors organizations succeeded in their avowed aim of divorce and divestiture. But the victory has been Pyrrhic. At the same time as the onslaught of government and exhibitor private party plaintiffs upon the motion picture distributors, television began to take its toll upon the motion picture industry. Thousands of theatres closed. Although the expansion of drive-in theatres kept the total number at a constant level,[96] the full impact was yet to be felt.

In the main, the distributors held back from offering their films to television when exhibition recovered somewhat with the aid of 3-D and wide-screen processes such as cinemascope.[97] But the Government considered this to be a conspiracy in restraint of trade and in *United States v. T. C. Fox*[98] endeavored to compel release of features to television. The

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[93] In this respect, the statements of Abram Myers, Chairman of the Board and General Counsel of Allied States Association of Motion Picture Exhibitors as reported in the trade papers are illuminating.

[94] Fox, Loew's, Paramount, Warner's, and RKO entered into a consent decree on November 20, 1940. Section VII thereof provided for licensing of film in groups of five. Columbia, Universal and United Artists were not parties to this decree. Columbia and Universal continued to license a season's product. United Artists, not being a producer, did not license in groups, but sold picture by picture. See, Sturges, "Operation of the Consent Decree in the Motion Picture Industry," 51 Yale L.J. 1175 (1942).

[95] For example, North West Allied, the exhibitor organization in Minnesota, was instrumental in having the Minnesota legislature pass a statute in April, 1941, in derogation of the 1940 consent decree. The Minnesota statute provided for licensing of a season's product in larger groups. In effect, the exhibitors asked for and got "block booking". Pending determination of the act's constitutionality, the consenting defendants petitioned the district court for suspension of the "block of five" sections of the decree in Minnesota. The act was declared unconstitutional. Years later, based upon the decision in United States v. Paramount, some of these Minnesota exhibitors sued and complained of block booking.

[96] See, Report of the Select Committee on Small Business, U.S. Senate, Problems of Independent Motion Picture Exhibitors, IV (D)—Number of Theatres at p. 38 (1956). The figures are taken yearly from 1946-1955. Active 4-wall theatres declined from 18,719 in 1946 to 14,613 in 1955. Active drive-in theatres increased in the same period from 300 to 4,587. Totals: 1946—19,019; 1955—19,200.

[97] Over 4,000 theatres closed while television hit its stride in the interval. By 1953 and 1954, theatrical exhibition picked up with 3-D and cinemascope.

[98] This action was commenced in 1952. United States v. Twentieth Century-Fox, in the District Court for the Southern District of California.

Government lost in the district court.[99] It did not appeal because by then, films were being released to TV and it felt it had achieved its purpose. In this action, some exhibitors were cast as co-conspirators.[100]

Thenceforth the troubles of the industry accelerated. Exhibitors were in competition with the best of prior years on TV,[101] the one for a price, the other, for nothing.[102] The changing pattern of summer upsurge did not materialize in 1957. In the same year, RKO ceased operations in domestic distribution.[103] By the end of 1957, foreign television was making increasing inroads on exhibition abroad, which had hitherto been relatively unaffected by television as in the United States.[104]

To add to the woes of the industry, inflation increased the cost of production.[105] Program features were becoming unprofitable. Producers turned to expensive pictures, the multi-million dollar "block-busters,"[106] to bring the people to the theatre. Emphasis turned increasingly to quality rather than quantity.[107] This brought cries of anguish from the exhibitors that the product shortage was throttling the industry.[108] In response to agitation and applications for permitting divorced circuits to engage in production, the Department of Justice held hearings in October, 1957, with a view to determining whether to permit same.[109]

The circle has now been completed. The heart of the government effort in *United States v. Paramount* was divorce of production and distribution from exhibition. Economic exigencies now compel the very proponents of divorce and divestiture to put Humpty-Dumpty together again.[110]

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99 137 F. Supp. 78 (S.D. Cal. 1955), opinion of Yankwich, J.

100 Theatre Owners of America, Inc., an exhibitor organization which includes some of the larger circuits among its members, was named as a co-conspirator in the complaint. With equal logic, all exhibitor groups could have been so named since it was not to their interest to see features marketed on TV in competition with their theatres. Those conspired against in the theatre in turn conspired against TV! The government complaint showed flexibility in applying the conspiracy notion. But those tarred with the conspiracy brush are not that fortunate. The stigma does not erase but stays on to haunt.

101 Except for United Artists, among the majors, the features sold to TV have not been post-1948. The performing unions have agreed to forego royalties on prior years and no agreement has been consummated for post-1948 films.

102 Viewing commercials is not an economic admission price.

103 RKO continues to distribute films abroad.

104 The ratio of foreign revenue of the film companies to domestic had climbed steadily in the post-war years so as to cushion some of the effects of the domestic decline.

105 A low budget picture is no longer one under $200,000. Those are rare. A low cost feature will cost upwards of $250,000 to produce.

106 To name a few, "Around the World in 80 Days", "Ten Commandments", "Bridge on the River Kwai", "Raintree County."

107 Paramount, Metro (producing arm of Loew's), and Warners reduced their output. Program or second features were virtually eliminated. Columbia and Universal continued to maintain their production. Recently, Fox returned to increased production of second features, but United Artists will produce more quality pictures and fewer supporting ones.

108 Another criticism has been improper spacing by releasing the best pictures for the holidays or summer vacations to produce a feast or famine situation.

109 The Department of Justice, as of this writing, has not yet rendered any opinion with respect to the matters heard and papers submitted on October 4, 1957.

110 The argument is that the divorced circuits should be permitted to enter production.

The Sherman Act is couched in terms of law, but its effects are economic. In theory and practice, it was conceived and has operated as the great restoration. Its norm is competition. Deviation from the norm is considered monopoly. Let monopoly be undone and competition restored and all is well. Competition in its classical form might then flourish.

The Government proceeded on this theory in *United States v. Paramount*. Yet it grievously miscalculated. Perhaps it was misled by the disintegration of the Motion Picture Patents Company monopoly after the adjudication in 1918.[111] After this company was found to have violated the Sherman Act, it could not sustain its predominance; bereft of its monopolistic power, it passed out of existence. But its loss was not felt because it took place in a budding industry in full growth.

But the common law concept based upon a dichotomy between pure competition and pure monopoly is even more unrealistic in a period of decline. At heart, we are perhaps all monopolists. Exhibitors, no matter how small, endeavor to build a circuit. The combination means buying power. Some of the most vociferous opponents of the distributors had and still have important circuits.[112]

In this context, the mathematics of the Sherman Act is bound to constitute destruction of a defendant found liable in a government action. Theoretically, every exhibitor who was damaged as a result of the acts of the defendants could sue for treble damages. Indeed, many exhibitors in their private party suits expressed such a realistic appreciation of the Sherman Act. Exhibitor A would sue the Paramount defendants[113] and name exhibitor B as conspiring exhibitor monopolist. Exhibitor B might sue the same distributors naming exhibitor C, and so on. Occasionally, exhibitor B would have the wit to reciprocate and charge exhibitor A with monopoly in the same suit by way of counterclaim or in a separate suit.[114]

However, since the Paramount consent decree of March 3, 1949 contained no such restriction, American Broadcasting-Paramount Theatres, Inc. has already commenced production.

111 United States v. Motion Picture Patents Company, 225 Fed. 800 (E.D. Pa. 1915), appeal dismissed on stipulation, 247 U.S. 524 (1918). See, also, Upton Sinclair Presents William Fox (1933) and Bertrand, Evans, Blanchard, TNEC Rep. Monograph 43, The Motion Picture Industry—A Pattern of Control (1941).

112 E.g., Nathin Yamins, the Yamins Circuit in the Fall River-New Bedford, Mass. area; Truman Rembusch, the Rembusch Circuit in Indiana; Rube Shor, the Shor Circuit in Ohio; Benjamin Berger, the Berger Circuit in Minnesota.

113 Not all eight distributor defendants are automatically named. One or more might not be sued "for giving the exhibitor what he wants". Sometimes non-Paramount defendants, like Republic, Allied Artists (formerly called Monogram) and Buena Vista (the Disney distributing arm) are joined.

114 In Esquire Theatre Company v. Loew's, Incorporated, Civil Action No. 57C10(1), pending in the District Court for the Eastern District of Missouri, Eastern Division, plaintiff joined the Franchon and Marco exhibitors as defendants. By way of counterclaim, the latter in turn alleged a conspiracy among the distributor defendants and the plaintiff!

The hapless distributors[115] might settle suit by exhibitor A only to be sued by exhibitor B because the settlement violated the anti-trust laws.[116] The reason is that the district courts are forums of law, not regulatory commissions. A settlement duly entered with the approval of the court is not binding upon third persons not party to the suit.

The Limits of Judicial Regulation

Therein lies the dilemma. The Department of Justice and the federal courts are not economic agencies. Their duties are to enforce the law. Neither is a soothsayer with powers of prediction as to the ultimate economic effects of enforcement. The District Court for the Southern District of New York continues to regulate major facets of the affairs of the defendants bound by the various decrees in *United States v. Paramount*. Matters such as the operation of Cinerama by Stanley-Warner, Cinemiracle by National Theatres, acquisition of drive-ins by Loew's, and many other matters are determined from time to time. This federal court may be said to be an important factor in the motion picture industry. Indeed, virtually every anti-trust suit which is lost by a defendant in the motion picture industry spawns a decree insofar as injunctive relief is asked.[117] The effects of judicial regulation are felt in the same manner to the extent consent decrees are entered into. Music, concert and popular, theatre and motion pictures are bound to varying degrees by decrees. A defendant who resists successfully avoids judicial regulation. But the price of failure is fearful. Therefore it has been argued increasingly, of late, that the cause of this disparity, section 5 of the Clayton Act, violates due process and is unconstitutional.[118] In the meantime, quiet submission to judicial regulation post-*United States v. Paramount* is infinitely wiser.

The effect of all this upon the performing arts may be chaos. Salvation has been sought by some in "pay TV," cable or otherwise.[119] Should

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115 In a statement filed with the Subcommittee on the study of monopoly power of the committee of the judiciary, by Mr. Harry Brandt on H.R. 3408 in 1951, with respect to amending the antitrust laws by providing a three-year federal statute of limitations, there appears at p. 5, "No one has yet appeared to tell this Committee who has paid, is paying and will continue to pay the bill for all this industry litigation." He suggests it is paid in the last analysis by exhibitors in the form of increased film rentals. In the first analysis, the brunt is borne by distributors.

116 See opinion of Judge Nordbye in Homewood Theatre, Inc. v. Loew's, Inc., 110 F. Supp. 398 (D. Minn. 1952).

117 Where the plaintiff's theatre is closed, injunctive relief is beside the point.

118 This has been raised in a number of suits recently, but not determined, e.g., Congress Building Corporation v. Loew's, Inc., Civil Action No. 50C1244, in the District Court for the Northern District of Illinois, Eastern Division and Don George, Inc. v. Paramount Pictures, Civil Action No. 3050, in the District Court for the Western District of Louisiana, Shreveport Division.

119 Experiments are now going on in Bartlesville, Oklahoma. Plans have been announced and preparations made on both coasts. In particular, the efforts of Skiatron, Inc., including

it succeed, then free television might be confronted with the challenge now facing theatrical exhibition. Should free TV continue with unabated vigor in its present form, then the networks might be confronted with many of the charges leveled at the motion picture distributors, including vertical and horizontal integration, let alone the spectre of conspiracy.[120] The Government has already commenced several anti-trust actions in television.[121]

What this may mean can be judged from the interrelationship of the performing arts and the central position of motion pictures therein. Playwrights and theatrical producers obtain important revenues from sale of motion picture rights. The same is true of authors and publishers. Music is written for the screen, performed by musicians for sound track recording, and music is popularized thereby.

In addition, America's preeminence in the many of the performing arts is highlighted by world acceptance of its cinema. Hollywood has captured the imagination of the world. Its actors and actresses are renowned. Its films reach the remotest corners of the world.

Can we afford a debacle of a collapse of the linchpin of the performing arts at home and abroad? Subsidy for the arts has been frowned upon as something foreign or alien to self-reliant Americans. Yet unheeding reliance upon the efficacy of the anti-trust laws is not a panacea. If anything, as they now stand, they may extend to television the blows that have been given to motion pictures.

It is ironic that in recent years motion pictures have been produced more and more by independents. This did not result from any of the nostrums of anti-trust enforcement. Production was absolved by the court in *United States v. Paramount*.[122] Although not found to be a monopoly, it nonetheless became increasingly independent, i.e., entrepreneurial.[123] Independent production was not decreed by any court. The economics of production in a highly uncertain market made it feasible.

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negotiations with the San Francisco Giants and Los Angeles Dodgers have been in the news.

120 See, The Television Inquiry, Staff Report, prepared for the Committee on Interstate and Foreign Commerce, U.S. Senate, dated June 26, 1957; Report of the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives on The Television Broadcasting Industry, dated March 13, 1957. "A good beginning point, evidence thus far suggests, is the striking similarity between TV industry structure and that movie pattern condemned in Paramount." Hansen, "Antitrust Activities in Television," reprinted in 2 Antitrust Bull. 99, 107 (1956), prepared by him as Assistant Attorney General in charge of the Antitrust Division for delivery before the Antitrust Subcommittee of the House Judiciary Committee on September 14, 1956.

121 See note 30 supra. See also, McDonough and Winslow, "The Motion Picture Industry: United States v. Oligopoly," 1 Stan. L. Rev. 385 (1949).

122 66 F. Supp. 323 (S.D.N.Y. 1946).

123 Taubman, "Motion Picture Co-Production Deals and Theatrical Business Organization," 11 Tax L. Rev. 113, 303 (1956) and Taubman, op. cit. supra note 51, at cc. XI, XII.

Conclusion—Department and Tribunal of the Arts

Perhaps a fresh look should be taken at the performing arts from several directions. It is difficult to understand why the film industry should enjoy its unique position of bearing the brunt of treble damage suits. As a palliative, Congress should consider amending the anti-trust laws to provide for single damages except for wilful violations.[124] The present system is more than harsh—it is suicidal. America cannot afford this luxury.

Secondly, positive measures should be considered to maintain and strengthen our leadership in the performing arts. A Secretary of the Arts is long overdue. On a small scale, the work of the American National Theatre and Academy abroad has shown what good-will our performers can bring. A Department of the Arts can set up certain objectives of utmost interest to the common weal and coordinate efforts at their realization. For example, it can lend official sanction to a movement for preservation, improvement, and construction of the nation's theatres. It can enlist official support on state and municipal levels for such goals. It can set an example for other nations. For these problems will be worldwide as television makes inroads abroad. It can make a contribution along these lines in the United Nations and UNESCO.

One can argue endlessly about what is art and what is entertainment.[125] Such disputations are beside the point. The analogy of the demise of vaudeville is not apt. The physical plant of vaudeville, the theatres, were retained and transformed into motion picture palaces. Opportunity for vaudevillians appeared in other media, such as radio and motion pictures.

What portends is a difference in kind. Skeptics will point to the renewed vigor of the record industry after its interment by radio. But will there be a record industry if home taping of recordings from broadcasts or records threatens the existence of all commercial recording?[126]

A Department of the Arts must perforce look at the economic portents which law enforcement officials under the anti-trust laws cannot freely do. It can furnish guidance to avoid the ravages of technology upon the performing arts. At the same time, it can encourage nascent forms which

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[124] This was the view espoused by the Report of the Attorney General's National Committee to Study the Antitrust Laws 378-80 (1955). For a contrary view, see Wham, "Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement." 40 A.B.A.J. 1061 (1954).

[125] See Brooks Atkinson's article, "Who Wants What," N.Y. Times, Jan. 5, 1958, § 2, col. 1-2, in which he discusses the meaning of and differences between entertainment and art. It is assumed that the performing arts are broad enough to include both. This may be a pragmatic approach to students of esthetics, but perhaps the only practicable approach.

[126] See, Kupferman, "Rights in New Media," 19 Law & Contemp. Prob. 172 (1954).

appear on the scene, such as the summer festivals, theatres and the like.[127]

American culture is coming of age. Regulation alone is insufficient. Perhaps the regulatory functions of the anti-trust laws can be taken over by such a Department of the Arts. Adjudicatory functions can be vested in a Tribunal of the Arts with either an appellate board or appeals to the circuit courts.[128] Nobody has accused the Board of Tax Appeals or, as later named, the Tax Court, of bias in favor of government or taxpayer. This may avoid many of the recriminations that have beset some phases of the entertainment industry.[129]

Because art is life, new approaches of all sorts with vigor and imagination should be made. The time has come for a more rational ordering of the performing arts.

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127 Music festivals such as Tanglewood, Empire State, summer theatre under the tents, festivals of the arts such as in Boston, Mass., and Birmingham, Alabama, have scarcely been considered.

128 As an administrative board, provisions for review would have to safeguard due process and constitutional rights.

129 In the past, there have been bitter disputes over the efficacy of arbitration in the motion picture industry. Conciliation was recently put into effect as a voluntary means of handling grievances. It is too soon to determine whether it will work or not.