A HISTORY OF BLIND-BIDDING IN THE MOTION PICTURE INDUSTRY SINCE THE PARAMOUNT DECISIONS

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A HISTORY OF BLIND-BIDDING IN THE MOTION PICTURE INDUSTRY SINCE THE PARAMOUNT DECISIONS

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Master of Arts

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by

John Thomas

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ABSTRACT

In the fall of 1979 many of New York state's movie-going public were treated to an unusual trailer, a short film segment prior to the main feature, at many of the state's movie theatres. In this trailer a young married couple seek to purchase a car from a mustachioed salesman, but discover that all the cars are covered with drop sheets that the salesman refuses to remove. Naturally the young couple do not want to participate in this type of one-way negotiations so they seek alternatives. Unfortunately they discover the situation is duplicated everywhere else and they return to the mustachioed salesman and conclude a deal. Despite making the purchase the couple is still not allowed to see what they bought until eight weeks later. At that time they return to the car lot and the drop sheet is removed and the couple discovers that they purchased an old beat up jalopy.[1]

This story had nothing to do with the upcoming features, but was written and produced by New York

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[1] Variety, September 26, 1979, p. 6. Exhibitors placed petitions in their lobbies to get signatures from their customers in order to aid their fight to prohibit the practice of blind-bidding in New York.

state's various exhibition associations in order to provide an analogy to blind-bidding to their customers. Because the practice of blind-bidding is both complex and relatively unknown outside the motion picture industry a common everyday situation was sought to familiarize the public with the plight of the exhibitor. Like the young couple in the trailer, exhibitors in the United States must rent their films sight unseen far in advance of their scheduled playdate, and then must wait months before they are allowed to see what they bought. If unsatisfied with the product at that time the exhibitor, like the young couple in the trailer, has no redress or no right of substitution.

This practice of distributing films sight unseen is known as blind-bidding and its history is the subject of this thesis. The practice began as a result of the Department of Justice's action in the early 1950's to break up the monopoly then inherent in the industry. Following the divorcement of distribution from their theatre holdings the practice began to develop, then mature, and finally engross the industry. This thesis will trace this rise from the mid-1950's until 1980 and the role the Anti-Trust Division played in the history of blind-bidding. Through the analysis and conclusions as well as the omissions of this thesis both the public and its state legislators will be better

informed on the history of the practice. It is important that blind-bidding's history be told now because the possible fate of the movie-going experience and the nation's exhibition industry are currently being decided by various state legislatures across the country. Hopefully this thesis will better inform these people and provoke further and more meaningful discussions on blind-bidding.

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. . . the major producers of films have not been forced to rely exclusively on the excellence of the product itself for profits may contribute to an understanding of many questions concerning the progress of the film as an art form . . .

- Mae D. Huettig, 1944

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February 1981

To the Graduate Council:

I am submitting herewith a Thesis written by John Thomas entitled "A History of Blind-Bidding in the Motion Picture Industry Since the Paramount Decisions." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in History.

L. Paul Hyatt
Major Professor

We have read this thesis and recommend its acceptance:

Thomas P. Dixon
Second Committee Member

Preston J. Hubbard
Third Committee Member

Accepted for the
Graduate Council:

William H. Eccles
Dean of the Graduate School

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CHAPTER I

THE PRACTICE AND THE PARTICIPANTS

The United States motion picture industry now and for more than twenty-five years has been made up of two independent business groups namely: the production-distribution business and the exhibition business. These two groups are interdependent on each other for their livelihood. The motion picture producers, who also are nearly always the distributors of their films, control both the quality, quantity, and availability of motion pictures to the theatre owners. Conversely the theatre owners represent the only available avenue for the producer-distributors to license their product to theatre audiences. As can be expected from such a mutually dependent state of affairs, the two arms of the industry have come to accept that their motives, ideas, and values often conflict with one another. Although each depends on the other for turning a profit, the two sides have been at odds with each other for over the last quarter century. The central issue of their conflict is the means by which the two divide up the receipts from the exhibition of a motion picture. Films have not been sold to exhibitors by the distributors, rather they have

always been rented through a licensing agreement.[1]

At the crux of this conflict between distribution and exhibition over the division of receipts is the blind-bidding process through which the majority of films have been licensed during the last twenty-five years. In this practice the distributor solicits bids from all the interested exhibitors in his market for an upcoming film release that has not yet been completed. Thus the exhibitor must submit his bid blind, having never seen the film, in order to obtain a license to exhibit the film. This practice, known as blind-bidding today, has been a part of motion picture distribution since the early 1950's.[2] Even at that time exhibition was at odds with distribution over the practice. At the 1955 annual convention of the Theatre Owners of America one distributor, Warner Brothers, was severely chastised over the " . . . unfair and uneconomic practice of requesting

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[1]Judge Robert Duncan's Opinion delivered in Allied Artist Pictures Corp., et. al., vs. James A. Rhodes, Case #C-2-78-1031, July 9, 1980, p. 5. Hereinafter referred to as Duncan.

[2]Prior to the Paramount decisions (1940-1951) there existed a close relative to blind-bidding known as blind-selling. In these infant years of the industry blind-selling was a necessary correlate to block-booking--a practice through which the distributors licensed large blocks of films at one time to exhibitors. In those agreements the films were "sold" blind, much like blind-bidding, but then there was no picture-by-picture licensing. This came, and with it the practice known as blind-bidding, following the Paramount decisions. Chapter II will deal with the practice and the Paramount decisions.

bids before exhibitors have had an opportunity to see the picture."[3]

Complicating this distributor-exhibitor relationship is the intense competition that persists within the industry. There are seven major distributors who compete among themselves for the choice theatres, and just as many exhibitors in each of the some 150-250 major markets that compete among themselves for what they believe to be the best films. Furthering this strain are the competitions between the distributor and the exhibitor once they begin negotiations over the actual licensing terms.

The motion picture production industry is a high risk, high profit venture. The cost of producing a major film today threatens to skyrocket towards an average of $6 million per picture. The distributors justify these high expenditures because of the competition provided by television. In addition to the actual production costs there are also certain distribution costs involved (the manufacturing of prints and overhead expenses to maintain the large distribution network within the industry) that often exceed the actual production costs. These distribution costs are referred to as the negative costs within the industry. Accordingly a typical motion

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[3]New York Times, October 10, 1955, p. 31:1.

picture must then recoup at least twice its initial investment before it can begin to show a profit. Because each film product is unique in itself, the process of assessing its potential profitability becomes more complicated. Thus the distributors attempt to share this predicament by procuring favorable licensing terms from the exhibitors.[4]

The distributor begins the licensing process by inviting bids from the exhibitors in his market for an upcoming film. This invitation is referred to in the industry as a solicitation letter. In this solicitation the distributor describes the forthcoming release, lists the names of the producer, director, and the cast, and suggests to the exhibitors what a winning bid must contain. In these suggestions the distributor points out how long he expects the exhibitor to play his film, the suggested percentages for dividing up the receipts for each week of the run, how much of a guarantee (a minimum non-refundable rental fee to be paid in advance of the film's exhibition) he expects from the exhibitor, if any, and where the picture will be exhibited. The entire bidding process occurs prior to the actual completion of film. Thus exhibitor knowledge concerning the contents of the film comes almost solely from the distributor's

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[4]Duncan, p. 6.

solicitation letter.[5]

The solicitation letter also suggests a weekly holdover figure--a division of receipts past the original playtime requested by the exhibitor, and a deadline for submitting the bids. The distributor also will inform the exhibitor as to when he can anticipate the availability of a print, and if there is a print available for a local or trade screening when and where it will be.[6] Occasionally an exhibitor is requested to share in the advertising and promotional expenses, or participate in product merchandising in conjunction with the picture.[7]

Once the exhibitor receives his invitation to bid he must prepare his offer or bid for the distributor. In considering how much to bid, in terms of guarantees and box-office division of the receipts, the exhibitor must reflect over a myriad of factors. The theatre operator must gauge the anticipated gross return on the

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[5]Memo to File from meeting with Steve Schwartz of the Motion Picture Association of America by Homer Branan, M.P.A.A. Lobbyist to the Tennessee State Legislature, 1977.

[6]Motion Picture Licensing, booklet published by the Motion Picture Association of America in May, 1979, p. 2.

[7]Harvey Jay Rosenfield. "Believing Without Seeing: Blind-Bidding in the Motion Picture Industry." Unpublished manuscript prepared at Georgetown University Law Center. January 16, 1979, p. 5.

film by reviewing the facility's seating capacity and the number of times the film will be shown weekly, the anticipated ticket price, and the overhead. In determining his ultimate bid from these and other factors the exhibitor must anticipate how successful the film will be in his particular market during the playtime suggested by the distributor. If the film is licensed through the blind-bidding process, the exhibitor cannot speculate on its potential success based on an actual screening of the product. Instead the exhibitor must adhere to the storyline in the solicitation letter provided by the distributor or search elsewhere for information on the film content.[8] Sometimes there are other avenues open to exhibitors interested in learning more about a film's content. Various trade publications, including Boxoffice, provide occasional resumés on upcoming films. There is also a bimonthly schedule of films published by the Exhibitor Relations Service.[9] On many occasions the film has been adapted from a successful play or book, and in these instances the exhibitor can gain a better understanding of the film's content by referring to the

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[8] Motion Picture Licensing, Ibid.

[9] Affidavit by John Tabor, Ohio exhibitor, to the Pennsylvania House Business and Commerce Committee, August 6, 1979, p. 2.

original impetus behind the film.[10] According to the exhibitors all of these factors are not only true but important as well; however, the most vital factor, to them, is still absent--viewing the product prior to its rental.[11]

Once the distributor receives all the bids for his film they are reviewed and recorded at the branch office. The branch manager will make recommendations to the home office on the bids most likely to generate the maximum rentals for the company. The actual evaluation process for the distributor is much like the exhibitor's process in determining how to bid in that there is no single rule of thumb to use. The highest suggested terms are not always the best bid to accept for the distributor. High terms mandated from a small, poorly run and poorly located theatre is not nearly as attractive a bid for the distributor as a somewhat lower bid from a theatre that is well managed and ideally located. After the winning bidders are selected the actual license to exhibit the film is awarded. The payment of the guarantee, if one has been agreed upon between the distributor and

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[10]Affidavit by Earl Perry, Louisiana exhibitor, to the Pennsylvania House Business and Commerce Committee, August 3, 1979, p. 4.

[11]A Position Paper in Rebuttal to the Booklet "Motion Picture Licensing" published by the M.P.A.A., by the National Association of Theatre Owners, p. 5.

the exhibitor, must be accomplished by the exhibitor two weeks prior to the actual exhibition of the film. During the engagement or the run of the film, the exhibitor will submit a weekly box-office statement to the distributor listing the film's revenues for that period. Based on these figures and the terms in the rental or license agreement, the distributor calculates his share for that week.[12] If for some reason none of the bids are accepted by the distributor all the participating bidders are notified of this development. Once this occurs bidding may start again or the distributor may negotiate directly with each exhibitor.[13]

In the determination of the rental terms there are three paths the distributor and the exhibitor may take in arriving at the final figure for division of the film's receipts. There is the standard 90-10 split with the percentage figure descending gradually in favor of the exhibitor as the run progresses. Additionally, although it is a rarity, the distributor and the exhibitor may arrive at a flat rental or establish a sliding

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[12] Motion Picture Licensing, p. 4. See also Duncan, p. 7.

[13] Rosenfield, p. 6. See also Duncan, pp. 7-8. For an abbreviated description of how blind-bidding works see New York Times, June 19, 1979, Section C, p. 7, and the Wall Street Journal, August 9, 1979, p. 1:1.

scale for division of receipts.[14] The 90-10 split, in favor of the distributor, has been for some time the most widely used formula for the division of film rentals in the industry. This is vividly illustrated in two 1979 Christmas season releases. Columbia Pictures, in soliciting bids for The Rose, suggested the 90-10 deal with descending percentages for a minimum run of ten weeks with a seventy percent floor minimum. A "floor minimum" is always established prior to the film's release in case the film does not realize its guarantee as offered by the exhibitor.[15] At the same time Paramount suggested almost the identical deal for their Star Trek release, except they only insisted upon an eight week run.[16] The actual division of the receipts, based on the rental terms in the agreement, do not occur until after the exhibitor has deducted his house allowance, or "the nut" as it is referred to in the film industry, from the total gross receipts. Once this figure, which is also agreed on mutually between the

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[14] Motion Picture Licensing, p. 5.

[15] Variety, April 11, 1979, p. 5.

[16] Variety, March 21, 1979, p. 38. Take note that in both cases the films were both blind-bid some nine months, as is the case, in advance of the release date. In the Columbia solicitation the distributor "insisted" that the movie be held past the tenth week if it had exceeded the house allowance.

distributor and the exhibitor prior to the actual exhibition of the film, is deducted, the division of revenue then takes place.[17] See Table 1 in the Appendix for an illustration of how the receipts are divided.

A closer examination of some of the actual solicitation letters will illustrate those elements of the bidding process previously outlined more clearly. For example, in 1976 Paramount solicitated bids on five different films all within a thirty day span in one particular market that contained the standard 90-10 deal above " . . . a realistic house expense." In four of the five films the descending percentages for minimum terms were the same: 70-30 the first two weeks; 60-40 the second two weeks; 50-50 the third two weeks; and, 35-65 the balance of the run. Suggestions of guarantees in three of the films ranged from $25-$50,000. Each solicitation contained the same reminder to the exhibitors that Paramount maintained the " . . . right to reject any or all offers and to negotiate with a theatre, or theatres, that in our considered judgment will develop the greatest film rental potential for our company."[18]

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[17] Motion Picture Licensing, Ibid.

[18] See Paramount solicitation letters from Joseph Rathgeo, Paramount Branch Manager, for Marathon Man, Drum, Bad News Bears, Lipstick, and Won-Ton-Ton. These letters are all part of File #60-6-86 in the Judgement Enforcement Section of the Anti-Trust Division of the Department of Justice. Hereinafter all materials from the Anti-Trust Division file will be referred to as JDF.

The actual rental terms vary little from distributor to distributor. In a 1975 Columbia release entitled Bite the Bullet the 90-10 split with a minimum floor of seventy percent descending (identical to the percentages in the 1976 Paramount releases outlined in the previous paragraph) as the run progressed were the suggested terms. Rather than recommending a specific guarantee or advance, Columbia asked the bidding exhibitors to " . . . give strong consideration . . . toward offering . . . a very substantial advance and guarantee."[19] A 1975 Universal solicitation for Jaws contained similar terms. The only major difference was the suggested minimum floor would be 70-30 the first four weeks, 60-40 the second four weeks, and 50-50 the final four weeks.[20] In a follow-up letter Universal indicated that all potential bids for Jaws must demonstrate that the exhibitor would participate in their advertising campaign in that market. In this situation the cost of advertising would be shared

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[19]Columbia solicitation letter, Washington, D. C. Branch, Fred Sapperstein, Branch Manager, April 2, 1975. An advance, like the guarantee, is not due until two weeks before the release of the film. The difference is that an advance is used as a deposit by the distributor to insure that the exhibitor will pay his share. The advance is usually applied to the balance owed to the distributor by the exhibitor.

[20]Universal Film Exchanges, Inc., solicitation letter from Alex Schimel, Branch Manager, Riverdale, Maryland, April 4, 1975.

in accordance with the terms of the actual rental agreement.[21] As could be expected from this similarity in terms the distributors have been subjected over the last decade to criticisms concerning price uniformity.[22] Even the distributor's trade organization, the Motion Picture Association of America, admits that the national average film rental is the 90-10 split.[23] See Table 2 in the Appendix to better illustrate this point.

Also typical in recent license agreements has been the requesting of large guarantees and advances by the distributors for their films. This practice, like blind-bidding, has been part of the film rental procedures within the industry since the Paramount decisions in the early 1950's.[24] The guarantee is nothing more than a sum, agreed to by both the exhibitor and distributor during the final negotiation stages of a license, representing a

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[21] Ibid., April 7, 1975.

[22] Rosenfield, p. 29.

[23] Motion Picture Licensing, p. 6. The seven major distributors, all members of the M.P.A.A., are Paramount, Universal, United Artists, Columbia, Twentieth-Century Fox, Warner Brothers, and Buena Vista (Walt Disney).

[24] Testimony of Harry Wright, III, Counsel to the M.P.A.A., to the Ohio House Judiciary Committee, February 23, 1978, p. 11. See also JDF - Maurice Silverman, Anti-Trust Attorney, to William D. Kilgore, Chief of Judgement Enforcement Section, May 3, 1967, p. 11; New York Times, June 18, 1954, p. 19:1; New York Times, January 27, 1977, p. 37:1.

minimum fee the exhibitor will pay the distributor regardless of the actual box-office receipts.[25] Guarantees, which are not refundable, are estimated at $200,000 per license in major markets and have cost as much as $1.35 million in some cases.[26]

As indicated in the examples of the major distributors' solicitation letters the guarantees, and their amount, are merely suggestions. Exhibitors have frequently bid guarantees that exceed the suggestions supplied by the distributor.[27] To better illustrate this point see Table 3 in the Appendix. The Department of Justice has never prohibited the practice of guarantees. In fact, they have regarded its use as a legitimate competitive tool in determining the winning bids among exhibitors.[28] In 1979 Paramount, in a change of marketing strategy, tested this very principle in the marketplace. The film company made the decision not to include any suggested guarantees for its summer releases that year. By " . . . deciding to let the marketplace determine its worth . . ." Paramount experienced results that far exceeded their original expectations. Not only did the

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[25]Duncan, p. 6.

[26]JDF - Silverman to Kilgore, May 3, 1967, p. 11.

[27]Motion Picture Licensing, p. 7.

[28]JDF - Memorandum by Paul Webber, April 6, 1967.

exhibitors volunteer sizeable guarantees, but they requested longer runs and in some instances even higher rental percentages.[29]

In order to provide a clearer picture of the use of guarantees in the blind-bidding process a hypothetical bidding situation is offered here. In this example the exhibitor has licensed the film on the standard 90-10 split with a guarantee of $5,000. The pre-arranged house nut or house allowance is $4,000. During the first week of the film's run the picture grossed $10,000. From this figure the house nut is first deducted leaving a balance of $6,000 to be split 90-10. Since the film's rentals exceeded the promised guarantee the exhibitor is allowed to share in the gross income. In this case it would be $600 for the first week's run. If the film had generated only $8,000 for the week the exhibitor would have lost $1,000. This is so because the film's revenue failed, after the house allowance is considered, to meet the guarantee offered by the exhibitor. In these cases the distributor discards the percentage figure and takes the guarantee which is the higher figure. Thus the balance, in this case $3,000, is left to cover the exhibitor's operating costs which were $1,000 more than the balance.

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[29] Variety, February 7, 1979, p. 5.

There are two main reasons put forth for the use of guarantees. Since the guarantee, like the advance, is not due to the distributor until two weeks before the film's release, it is a convenient way to assure collection from delinquent exhibitors. Secondly, it is also a means employed by the distributors in evaluating bids. In these cases a large guarantee offered by a new exhibitor can become the vehicle for his entry into an existing market. There is argument, however, that these reasons are mere camouflage to its primary function: as a risk-shifting device by the distributors to enlist the exhibitors into assisting the distributors in the financing of their film products.[30] A case in point was the 1980 Twentieth-Century Fox release The Empire Strikes Back. By November 1979 the company received some $26 million worth of guarantees for the film which did not debut until the summer of 1980. Another recent example was Paramount's 1979 Christmas release Star Trek-The Movie. In this instance Paramount received commitments worth $30 million prior to its release.[31]

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[30] Duncan, p. 13.

[31] Wall Street Journal, August 9, 1979, p. 1:1. The major distributors and their trade organization, the M.P.A.A., are undeniably unyielding in their support for blind-bidding. Conversely, the exhibitors and their trade organization, the National Association of Theatre Owners, are just as vehement in their opposition to the practice. This chapter concentrates on the arguments espoused by both the proponents and opponents of the practice.

Concerning the justification for blind-bidding the distributors put forth three main reasons: securing favorable playdates and location, and financing. The distributors contend that it is necessary for them to blind-bid because many pictures are not completed until immediately prior to their release date.[32] Thus if the distributors had to trade-screen or preview their films to exhibitors following the actual completion of the film, then they may find themselves locked out from desirable playtime and theatres. This fear is compounded somewhat for films destined to be released at one of the three peak periods in film exhibition: the Christmas-New Year's period, Easter, and the summer season. The intra-industry competition among distributors for playdates during these periods is especially intense. Many times this results in a deluge of products on the consumer and exhibitor at one time.[33]

However, it should be noted that there will be no historical analysis provided for either arguments at this time. An extensive analysis will be reserved until the final chapter. The purpose for presenting the arguments now devoid of any analysis is to provide the reader the necessary background into the stands taken by both the participants in the practice.

[32]According to 1977 M.P.A.A. figures the median availability date for a film prior to its release date was eleven days. See M.P.A.A. Memorandum to the Department of Justice, May 8, 1978, p. 34.

[33]JDF - Memorandum by Maurice Silverman to Bernard Hollander, October 23, 1974, p. 1.

For example, the seven major distributors released thirty films between them for the 1978 Christmas season with dire economic results. Consequently only ten films were released in the 1979 Christmas season.[34] In addition to the need for securing playtime in advance the distributors maintain that costly delays would result if they were forced to trade-screen films rather than blind-bid. This results from prolonged interest costs which can be substantial if the delay to the film's release date becomes three to six months, as the M.P.A.A. contends, as a ramification of trade-screening.[35]

According to the distributors it is critical to their marketing strategies to secure favorable playdates and theatres. If they can not obtain such theatres the distributors contend that their film may receive an unwarranted bad reputation for having been exhibited by poor theatres.[36] This situation is already compounded by the lack of quality first-run theatres in the country today. Based on the M.P.A.A. definition of such a theatre it is one with a proven attendance record, quality

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[34] Variety, August 29, 1979, p. 3.

[35] JDF - Silverman to Hollander, October 23, 1974, Ibid.

[36] Affidavit by Peter S. Myers, Vice-President in Charge of Domestic Distribution for Twentieth-Century Fox, January 16, 1978, in Synufy Enterprises, Inc. v. Columbia Pictures Industries, Inc., et. al., August 31, 1977, in M.P.A.A. Memorandum to the Department of Justice, May 8, 1978, p. 29.

prime-time network television advertising with the national release dates for their films. If the film license is delayed until after a trade-screening, then a film may be released without the aid of national advertising since purchases for such coverage must be paid for in advance. It is true that prime network time must be bought six to eleven months in advance and is non-refundable, thus the added importance for the distributors to maintain blind-bidding.[39] The importance of a prime-time network advertising campaign to a film's potential profitability is indicated by the ever increasing expenditures made by the distributors in this area. Today it is not uncommon for the advertising budget of a film to equal its entire production costs.[40]

Increase in box-office admission and the difficulty of entry by new exhibitors into a market are two other reasons the distributors put forth in their arguments against trade-screening as a prerequisite to licensing. Accordingly the distributors claim that higher rental terms will ultimately result from trade-screening with the added costs being passed on to the consumer at the box-office. Additionally, because of the increase in rental terms, new exhibitors will not be able to compete

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[39] Ibid., pp. 38-39; see also Rosenfield, p. 34, and Motion Picture Licensing, p. 9.

[40] Motion Picture Licensing, p. 11.

in a new market with the large exhibition claims which have the necessary capital to meet the increase in rental terms.[41] The distributors find this to be the case, that exhibition is highly concentrated in the hands of a few large chains, in at least fifty of the nation's top 150-250 markets in which the distributors participate in blind-bidding.[42]

Finally, the distributors claim that the exhibitors are not the only ones in the industry that blind-bid and that they should not be protected from this practice while others continue to do so. The distributors contend that they blind-bid when they commit millions of dollars in advance for a project that is no more than an idea at the time. Afterwards the distributors must blind-bid on a screenplay, the director, performances by the actors, and the advertising campaign to support the concept. When the project is finally complete, then the consumer must blind-bid also when they pay to see a film that they

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[41] Testimony by Harry Wright, III, Counsel to the M.P.A.A., to the Ohio House Subcommittee on Commercial Affairs, January 3, 1978, p. 1. See also Memo to File from meeting with Steve Schwartz, Legislative Counsel to M.P.A.A., by Homer Branan, M.P.A.A. Lobbyist to Tennessee, 1977, p. 8.

[42] Ron Schaumburg and G. Gregory Tobin. "Exhibition and Distribution Speak Out On Blind-Bidding." Boxoffice. January 15, 1979, p. 13.

have not seen.[43]

Concerning guarantees the distributors explain that they are required in only some of the license agreements, and are merely a "minimum film rental" that the exhibitor assures the distributor in the license agreement. The movie companies are quick to add that guarantees are not used to finance their films since in effect the distributor's dollars have already been spent by the time the guarantees are due. The exhibitors claim just the contrary. The movie studios maintain that the total amount of guarantees nationwide seldom equals the total production costs on the film. See Tables 4 and 5 for illustrations on this point.[44] Guarantees are also used by the distributors to defend themselves against accusations of uniformity in terms. When viewed in this matter, the distributors point is certainly true. For example, one Salt Lake City exhibitor, who controls several theatres in a two state region, demonstrated over a year's period of time a wide variance in guarantees offered in over 200 license agreements involving all seven of the major distributors. The guarantees in this

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[43]Memorandum by Peyton S. Hawes and Thomas J. Harrold, Counsel to the M.P.A.A., to the members of the Georgia House of Representatives, (undated memo) RE: HB 19/SB 46, p. 2.

[44]Motion Picture Licensing, Ibid.

illustration varied from $3,000 to as high as $125,000.[45]

The exhibitors are equally adamant in their opposition to the practice as the distributors are in their support. These theatre owners object to the practice principally because it subjects them to risks over and above the risks they normally take. In effect, the exhibitors' contention is that they cannot accurately gauge the box-office potential of a film without a preview or a trade-screening of said film. Thus they maintain a constant fear of being misled by the distributors. Because the majority of films blind-bid have either been of top quality or presumably top quality, substantial guarantees have frequently been offered by exhibitors which has contributed significantly to the risk-factor involved. The risk, when one takes into account that the crux of the year's new film products are released at the three main peak periods, becomes compounded if an exhibitor licenses a poor product during one of the

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[45] See Exhibit "O" in Supplemental Memorandum by the M.P.A.A. to the Department of Justice, May 8, 1978. A review of the "Pro" argument for blind-bidding can be seen in two recent articles: The Premier article "Two Sides of the Box-Office Dollar: Blind-Bidding" in the September 12, 1980 N.A.T.O. News Release and the Boxoffice article in footnote #42. Both reviews are presented by Jack Valenti, President of the M.P.A.A.

holiday periods.[46]

Exhibitors also contend that the practice is anti-competitive. To the exhibitors the distributors no longer compete for desirable theatres nor do exhibitors compete for films based on their commercial quality. Instead, the exhibitors are mostly compelled to compete for the distributor's first-run productions based solely on their " . . . inadequate and often misleading information" contained in the story lines of the solicitation letters. Coercion comes into play when the exhibitors, in order to maintain a workable relationship with the distributor, must yield to the licensing demands or run the risk of not having any product to exhibit.

The exhibitors maintain that blind-bidding results in the mismatching of the distributor's motion pictures with the inappropriate local theatres. According to this principle the exhibitors claim they are the ones that are more intimately familiar with the tastes of their local clientele. Instead, the practice of blind-bidding prevents the exhibitors from exercising their knowledge of their audiences standards of artistic

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[46] JDF - Memorandum from Maurice Silverman to William D. Kilgore, May 3, 1967, p. 1. See also Silverman to Hollander, October 23, 1974, p. 1; and, Defendant's Trial Brief, by William J. Brown, Attorney-General of Ohio, in Allied Artist Pictures Corporation, et. al., v. James A. Rhodes, p. 6. Hereinafter referred to as Brown.

quality, thematic interests, and decency. As a result of not having the opportunity to first view the film the exhibitors receive the crux of the public's criticisms concerning poor or indecent films. Not only does this result in a loss of good will between the exhibitor and the community but the exhibitor suffers financially.[47]

Ironically the exhibitors demonstrate an equal degree of concern for the plight of the small or independent exhibitor as do the distributors. Whereas the distributors' concern for the small exhibitor is directed towards their future, the exhibitors are more concerned with their past and their present. The nation's leading exhibitors maintain that the use of high guarantees and rental terms placed the smaller exhibitors at a disadvantage in past and present bidding situations. These concerned exhibitors claim that the large chain operators in the past have been able to afford not only the large guarantees but the luxury of "buying" information about an upcoming release to secure a competitive edge in the bidding process. Compounding this problem is the belief that exists within the realm of exhibition circles that certain large chains are

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[47]See paper entitled "Needed In Ohio: Abolition of Gross Restraints of Trade in the Motion Picture Business," by N.A.T.O. of Ohio, (undated), pp. 1-2; see also Brown, pp. 7-8, and see New York Times, August 22, 1976, Section XI, p. 6:6 for an example of a community protesting the quality and content of films exhibited.

favored in the bidding process by certain distributors.[48]

Exhibitors also refute the assertion that guarantees are used by distributors as a yardstick in determining a minimum bid. The theatre operators maintain that they are in no position to ignore the "hints" from the hand that supplies them with their source of "bread and butter." The showmen suggest that if pictures were trade-screened, the exhibitor could prepare his own terms much like a bidder at a real auction, where the distributor could then reject or accept the bid.[49] More importantly to the exhibitors the use of guarantees in conjunction with the blind-bidding of such poor films as A Bridge Too Far, The Heretic, and Bobby Deerfield, to name a few, are directly responsible for the financial demise of many of the motion picture theatres in the country.[50]

Another complaint against blind-bidding is that it successfully locks out independent distributors from licensing their films to exhibitors.[51] Since blind-bidding

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[48]Brown, Ibid. See letter and attachments of Jay Schultz, Selected Theatres Management Corporation, Lyndhurst, Ohio, to Harry Lehman, February 6, 1978, for an exhibitor complaint of the "buddy system" among certain distributors and exhibitors. See also Variety, April 11, 1979, p. 38.

[49]Schaumburg, p. 14.

[50]N.A.T.O. Anti-Blind-Bidding Legislative Packet, September 1978 edition, p. 12.

[51]An independent distributor is one that is not a member of the Motion Picture Association of America (M.P.A.A.).

entails the commitment of playtime so far in advance of the actual release date, exhibitors have been placed in a position where they command trade-screenings from these independent distributors. This results in either one of two possibilities for these independent distributors. One, because of the commitment of playtime to the majors as a result of blind-bidding the independent distributor would find himself successfully excluded from a first run engagement even though he may retain a completed film product. Secondly, the independent distributor would be placed at a competitive disadvantage with the major distributors (M.P.A.A.) in that he had to trade-screen his products while the majors did not.[52]

The National Association of Theatre Owners, representing over two-thirds of the nation's theatres, refutes the distributor's claim that higher ticket prices would result if blind-bidding were terminated. The exhibitors state that high ticket prices are a result of financial losses experienced through the exhibition of "bombs" or "turkeys," industry terms for poor films, through the blind-bidding process. Naturally the alternative to this would be to allow the theatre showmen to first view their potential products in order to

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[52]Brown, pp. 8-9. See also Letter from [Exhibitor's name withheld], to Robert Rose, Anti-Trust Division, February 21, 1978, in the JDF.

minimize the number of financial debacles.[53] The group also provides a counter argument to the distributors intra-industry analogy that the exhibitors are not the only ones that blind-bid in the business. N.A.T.O. maintains that the major producer-distributors at least have a choice. The choice of what films to finance; stories to accept; actors, directors, and technicians to hire. In addition the exhibitors maintain that the producer-distributors have complete control over their product from start to finish. Then they, the distributors, can enjoy profits from high rental terms, merchandising right, musical rights, foreign theatrical rights, and television rights.[54]

Besides the above mentioned reasons there remains one major reason the exhibitors enunciate in their opposition to blind-bidding: the practice leads to wide-spread discrimination in the bidding process. Discrimination originates from the fact that final prints

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[53]Written address by A. Alan Friedberg, President of N.A.T.O., to the Arizona State Legislature, March 12, 1980, p. 3.

[54]Letter from Joseph G. Alterman, Vice-President and Executive Director of N.A.T.O., to Robert Rose, Anti-Trust Division, May 15, 1978. See attachment "Joint Motion Picture Theatre Association Response to the M.P.A.A.'s April 27, 1978 Memo," May 10, 1978, p. 6.

of the film may be complete and in instances in actual circulation while the blind-bidding process is going on. This situation arises when there are so-called sneak previews or trade-screenings for various trade papers. Obviously if a film is later licensed on the blind-bid basis following a sneak preview or trade-screening, certain exhibitors are at a distinct disadvantage.[55] It is no secret within the industry that when a film is in production there are sometimes 150-200 copies of the script in circulation. Many times copies of these scripts fall into the hands of certain exhibitors, which results in an obvious advantage for a privileged few, who become involved in the blind-bidding of that film.[56]

Discrimination can also result from an appeal by a distributor to the Motion Picture Rating Board. This board, which contains representatives from the exhibition part of the industry, previews all films for their ratings,

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[55]JDF - Letter from Peter Fishbein, Counsel to N.A.T.O., to Thomas Kauper, Assistant Attorney-General, August 7, 1974. See also the N.A.T.O. paper "Matters Presently Pending Before the Anti-Trust Division in Which N.A.T.O. Has Requested Action Against the Motion Picture Distributors." Sneak previews and the discrimination involved are discussed in greater detail in its historical context in Chapter III.

[56]JDF - Letter from Exhibitor [name withheld] to Robert Rose, February 21, 1978. See also Earl Perry's Affidavit to the Pennsylvania State Legislature, August 3, 1979, p. 4.

e.g., "R" - restricted, "P.G." - parental guidance, and "X" - adults only. Needless to say these exhibitor representatives on the board maintain an advantage over their competitors in the blind-bidding process.[57]

According to the exhibitors all these problems could be eliminated if films were trade-screened prior to the actual license agreement rather than blind-bid. When exhibitors make reference to trade-screening they have a definite vision on how it should take place. Ideally the trade-screening of a film should take place at a centrally located theatre within the exchange district. The date of this screening should be made public to all interested exhibitors, and should be made at least a week before bids are due back to the distributor on the film product. The exhibitors would be informed about the screening either through written communication from the distributor or a notice in a widely accepted trade journal.[58]

Trade-screening is not a recent innovation devised by exhibitors to escape the consequences of blind-bidding. Ironically, the majority of the distributors for some twenty-five years expressed a preference to trade-screening

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[57] JDF - Memorandum by Maurice Silverman, September 13, 1974.

[58] JDF - Memorandum by Maurice Silverman, April 12, 1974.

rather than blind-bidding. For a long time from the 1950's and into the late 1960's Buena Vista, the distribution arm for Walt Disney Productions, always trade-screened their products. As a matter of fact they considered blind-bidding commercially undesirable when compared to the benefits of trade-screening. It was Buena Vista's opinion that they actually generated higher terms through trade-screening as compared to the few instances that they had to blind-bid.[59]

One of the major complaints by the distributors concerning trade-screening is that very few exhibitors bother to show up for them when they occur. Historically this has been the case since the first days of trade-screening in the early 1940's. Trade-screening became a standard briefly during this period following a 1940 consent decree between the distributors and the Department of Justice in the Paramount decisions. There is one tale involving a distributor's effort to attract an audience of exhibitors to a trade-screening in New York City in 1946. This particular distributor, who always had problems in getting exhibitors to attend these screenings, decided to include a pass for a free lunch

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[59] JDF - Letter from Joseph J. Laub, Vice-President and General Counsel to Buena Vista Distribution Company, to Maurice Silverman, November 8, 1968. Over the same period of time United Artist maintained a similar policy with the same results.

at Twenty-One, a local restaurant, in the invitations to attend the screening. Even setting the screening time in the late morning failed to improve on the distributor's attendance record for trade-screenings.[60] Since the 1946 incident exhibitors have improved on their attendance record for trade-screenings to some degree. In 1976 and 1977 Columbia screened five films for the New York City market. From over 150 invitations to each screening exhibitor response ranged only four to eight.[61] N.A.T.O. is at a loss, without further evidence pertaining to these examples, in attempts to explain the poor attendance records. One possible explanation the exhibitor trade organization offers is that many of the exhibitor's playdates were already booked up. Also it is quite common in the industry for one booker or buyer to attend a trade-screening representing several different exhibitors.[62]

Aside from the possible discriminatory aspects, the difficulty of entry into the market by independent distributors and exhibitors, and the alleged favoring of

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[60] JDF - Letter from Matthew Miller, Anti-Trust Attorney, to Maurice Silverman, June 9, 1966. See also the "Transcript of Arguments Before the Three Judge Court Held in New York City," January 17, 1946.

[61] See Exhibit "M" in the Supplemental Memorandum by the M.P.A.A. to the Department of Justice, May 8, 1978.

[62] Schaumburg, p. 14. See also Variety, May 16, 1979, p. 7.

certain exhibitors by the distributors, there exists at least one other major detrimental effect to exhibitors from blind-bidding and that is pull-outs. A pull-out occurs when a film, previously licensed through the blind-bidding process, is retrieved from its originally agreed upon playdate because of various reasons by the distributor. This leaves the exhibitor with a considerable vacuum of playtime to contend with. This often occurs on such a short notice that the exhibitor must scramble for a replacement. The search for a substitute film, necessitated because the distributor is under no legal obligation to furnish one, is compounded by the fact that the other distributors have already committed their products to other exhibitors through blind-bidding. In certain instances the only alternative for the exhibitor is to license a previous release or re-run, or face the spectre of a vacant screen. The examples of this withdrawal of a product, usually attributed to production delays, by the distributors have been numerous over recent years. For example, in 1978 such highly touted pictures as Superman, Grease, Lord of the Rings, Comes a Horseman, Going South, Last Waltz, and Apocalypse Now, were all pull-outs.[63]

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[63] Brown, p. 6; Variety, March 8, 1978, p. 6, and see also N.A.T.O.'s "Anti-Blind-Bidding Legislative Packet," September 1978 edition, p. 8.

In the case of the Going South pull-out Paramount, knowing that they were not going to meet the release date as licensed, increased its production time on another project, American Hot Wax, to fill the anticipated void in their production schedules. However, the exhibitors who had originally licensed Going South were not offered American Hot Wax as a substitute. Rather the exhibitors were informed that they would have to bid competitively with other exhibitors with no assurance they would obtain the replacement film.[64] In November 1977 Twentieth-Century Fox entered into licensing agreements for its release of Lord of the Rings. In January 1978 Fox notified its exhibitors that the film was being withdrawn leaving many a thirteen-week gap to fill during the peak summer period in 1978. One Ohio exhibitor earlier had rejected six other films for that playdate in the summer prior to the withdrawal notification. Afterwards he could not obtain any of these.[65]

Thus the intricate elements of the motion picture licensing procedures involving blind-bidding have been exposed. The arguments by both the participants for and against the practice have been described. With

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[64]Duncan, p. 80.

[65]Columbus (Ohio) Dispatch, February 16, 1978, B:7.

the practice and the participants introduced, a better focus of blind-bidding can be obtained by next reviewing the environment it exists in--the industry itself. Since blind-bidding, as it is known today, is a post-Paramount decision phenomena the study into the historical origins and significance of the practice begins with the Department of Justice's anti-trust investigation into the industry beginning in the late 1930's.

CHAPTER II

THE PRACTICE, THE DECISION, AND THE INDUSTRY

Since the infant stages of the American film industry films have been licensed sight unseen to exhibitors.[1] In those early days films were licensed through block-booking, a practice by which distributors licensed films in large blocks of twenty to forty at least a year in advance. A vital component in this practice was blind-selling, the father of blind-bidding. The term blind-selling derived from the fact that these large blocks of films were "sold" to the exhibitors blind or sight unseen like blind-bidding today. By the 1920's the distributors had sophisticated this practice. The distributors would direct their film salesmen once a year, usually in the summertime, to sell their production plans for the forthcoming season to the nation's exhibitors. These salesmen did not carry an inventory of films to sell nor did they have knowledge,

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[1] In Duncan's opinion in the Allied Artist case the Ohio District Judge was not convinced that the practice was " . . . a long established trade practice . . . " The historical evidence, which this chapter and this thesis will show, dates blind-bidding, as it is known today, to the Paramount decisions with its origins back to the very beginnings of the industry.

for the most part, of the company's complete production plans. Sometimes the distributor's salesman could describe several of the future productions in detail, but most were merely assigned a production number for identification purposes. Finally the salesman would blind-sell the company's package through block-booking to the exhibitors. In essence the early exhibitors not only bought films blind, but they also bought blind untitled, undeveloped, and uncreated projects by numbers.[2]

Following the successful block-booking of their films the distributor would send the films to a local film exchange which would complete the delivery process to the exhibitor. At this time films were usually licensed in star groups, i.e., a certain number of Mary Pickford specials or Douglas Fairbanks specials, with a cancellation privilege for the exhibitor if he disliked what he had licensed. However, this privilege could only be exercised after the films had been privately trade-screened. Later when cancellations mushroomed to almost half of all films distributed the studios altered their licensing procedures. Titles, story lines, identification of the cast and crew, and production company, much the same as today's solicitation

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[2]Mae D. Huettig. Economic Control of the Motion Picture Industry. Philadelphia: University of Pennsylvania Press, 1944, pp. 120-122.

letters, were provided to exhibitors in order to aid them in their selection process. Thus by the 1930's films were still licensed or "sold" blind in large blocks once a year with minor modifications in rental terms and information supplied to the exhibitor. For example, one distributor permitted his exhibitors the right to cancel up to ten percent of the films in his block once the exhibitor had seen the reviews on the picture.[3] Most distributors did offer some kind of cancellation privilege; however, if it was exercised by a first-run exhibitor, prominent or key theatres in the top markets who exhibited films on their initial release, the film would still be licensed or "sold" blind to a sub-run theatre, a theatre in an outlining market which exhibited films following the exhaustion of their first or initial run, More importantly none of the distributor's film licensing agreements, as is the case today as well, provided production protection if the picture failed to achieve a profit.[4]

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[3] Fortune. "Loew's Inc." 20 (August 1939): pp. 25-30. See also Huettig, Ibid.

[4] JDF - Memorandum from Matthew Miller to Maurice Silverman, June 9, 1966. See also "Amended and Supplemental Complaint," U. S. vs. Paramount, et. al., filed November 14, 1940.

By the late 1930's these practices and other anti-competitive features provided the impetus behind the Department of Justice's first anti-trust investigation into the motion picture industry. The first suit was filed by Thurman Arnold, the Department's chief of the anti-trust division. The suit cited twenty-eight separate offenses by the distributors. The major objective of the suit and investigations was the ultimate divorcement of the major distributors from their exhibition facilities they owned.[5] The suit, which also sought to eliminate blind-selling, resulted in a consent decree between the government and the major distributors in October 1940.[6] In this decree the five major distributors--Paramount, Fox, Lowe's, R.K.O., and Warner Brothers--admitted no wrong doings and agreed to revamp the system internally. Block-booking was restricted to five pictures while blind-selling was prohibited, meaning that trade-screenings became a prerequisite for film rentals. In addition the five major distributors promised not to seek further theatre holdings.[7]

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[5]Ernst Boremann. "United States versus Hollywood." Sight and Sound 19(February 1951), pp. 418-420.

[6]The major distributors attempted to settle these "offenses" internally. This effort resulted in the creation of the Trade Practices Code in March 1939. This proved to be a folly, and Arnold ruled it illegal and the suit was taken up once again.

[7]Schaumburg, p. 12.

The 1940 decree was only applicable for a three-year trial period. Under the conditions in the decree, block-booking and blind-selling could be resurrected if the minor distributors--Columbia, Universal and United Artists--failed to enter into a similar agreement by June 1942. This never transpired, and the decree expired bringing back to life both block-booking and blind-selling to varying degrees. The Government realized that its piecemeal approach to trust-busting was a failure; consequently the Department reopened the case in 1944 seeking complete divorcement as originally requested by Arnold in 1938.[8]

In 1948 the United States District Court in New York City decided that the major distributors had violated provisions in the Sherman Anti-Trust Act. As a result the defendants were prohibited from block-booking, cooperative theatre management, and price fixing. Rather than licensing films in blocks the distributors were directed to license films individually theatre by theatre on a competitive basis.[9] Blind-bidding was conceived at this point as this thesis will later demonstrate. Specifically concerning blind-selling the court stated:

> Blind-selling does not appear to be as inherently restrictive of competition as block-booking,

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[8] Rosenfield, p. 9.

[9] Schaumburg, Ibid. See also U. S. v. Paramount Pictures, Inc., et. al. (February 8, 1950) 339 US 974 (1950).

> although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type--A competing distributor meanwhile being unable to market its product and in the end losing its outlet for future pictures . . .[10]

Later the United States Supreme Court added to the District Court's statements on competitive bidding:

> The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula.[11]

No one was satisfied with the District Court's decision, and it was left to the Supreme Court to complete the divorcement. By 1953 all the major distributors, with the exception of Loew's, completed their separation from the exhibition part of the industry; Lowe's did so by 1959. Even though the Supreme Court ruled that no formula could be applied in the bidding process, retaining complete discretionary control in the hands of the distributors, the proviso towards the individual licensing of films on a theatre by theatre basis remained. Thus the licensing of a film with the condition that

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[10] Rosenfield, p. 10.

[11] U. S. v. Paramount Pictures, Inc., et. al, 334 U. S. (1948) at 162. See also "Testimony and Memorandum of Law" by Harry Wright, III, Counsel to the M.P.A.A., to the Ohio House Subcommittee on Commercial Affairs, January 3, 1978, pp. 14-15.

others would be licensed at the same time, which was block-booking, was prohibited. In the 1946 decree exhibitors were awarded the privilege of rejecting twenty percent of those features in a block that had not been trade-screened. This they enjoyed until the block-booking prohibition and other features of the decrees were finally incorporated into the decrees of February 1950.[12]

At that time the United States Supreme Court upheld the opinion of the District Court concerning blind-selling. Both courts viewed blind-selling as a lesser evil than block-booking even though the two practices are interdependent on each other. By the time the final decrees were written in 1951, the Government concluded that blind-selling was no longer a major problem within the industry. Because of this view, no injunction was filed against the practice, and it was allowed to foster an offspring known as blind-bidding. The Justice Department assumed that the practice had ceased as a result of the 1940 decree.[13] It is true

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[12]Memorandum by the Motion Picture Association of America to the Department of Justice, April 27, 1978, p. 3. See also letter in JDF - Joseph J. Saunders, Anti-Trust Division Attorney, to Bradd A. Swank, Deputy Legislative Counsel-State of Oregon, March 14, 1978. See also Rosenfield, p. 13.

[13]JDF - Saunders to Swank, March 14, 1978. In 1967 Maurice Silverman, the Anti-Trust Division Attorney who worked tirelessly towards a solution to the

that the five major distributors party to the November 1940 decree adhered faithfully to the provisions pertaining to blind-selling and trade-screenings even after the decree expired in 1942. On the other hand, as the Motion Picture Association of America indicated to the Justice Department in April 1978, it is safe to assume that the practice of blind-selling continued on varying degrees all through the 1940's at the hands of the minor distributors--Columbia, Universal, and United Artists.[14]

Ironically at this time the exhibitors did not regard blind-selling as the supreme evil in the industry as do their counterparts regard blind-bidding today. To exhibitors in the 1940's, those not a part of the cooperative theatre ownership with the major distributors, considered in order of importance block-booking, discriminatory clearances or runs, and blind-selling as the three major evils within the industry. These

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blind-bidding problem in the 1960's and 1970's, met with representatives of all the M.P.A.A. distributors in March in New York City. Many people in the 1960's wondered how the practice was allowed to foster in view of the changes administered to the industry by the Paramount courts. These people felt that the decrees had actually overlooked the practice of blind-selling by accident. The distributors at the time of the March 1967 meeting felt just the opposite. They maintained that the Paramount courts recognized that distribution could not function without some form of blind-licensing. See JDF - Memorandum by Paul Webber, March 7, 1967.

[14] M.P.A.A. Memorandum to the Department of Justice, April 27, 1978, pp. 3-4. See also the "Transcript of Arguments Before the Three Judge Court Held in New York City," January 17, 1946.

exhibitors complained vehemently against the trade-screening requirement in the 1940 decree because of the time consuming practice of previewing all the features. To these exhibitors it was " . . . impossible . . . to see all these pictures prior to purchase . . ." and even concluded that " . . . it would do him [the exhibitor] no good to see them, if he could." Conversely the distributors by the late 1970's would use this very same argument as they confronted the spectre of trade-screening in the anti-blind-bidding legislation on the state level. (See Chapters V and VI on the anti-blind-bidding battles.) This reversal in arguments, caused by the Paramount decisions and vast internal changes within the industry since, are better understood when the state of the industry in the 1940's is examined.[15]

In the 1940's exhibitors offered several sound reasons for being in opposition to trade-screening. When the industry was in its infant stages exhibitors relied more on the novelty of their product rather than the quality to attract and maintain the customer. As the demand for movies increased the distributors began to license films in large blocks through the blind-selling process. Thus by the 1920's exhibitors garnished and

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[15] JDF - Miller to Silverman, June 9, 1966. See also Legal Brief filed by the Independent Theatre Owners Association of New York City in opposition to the November 1940 decree.

maintained a process by which they were assured a steady diet of product to sustain the demand. However, the 1940 decree threatened to interrupt this supply by favoring trade-screening over blind-selling. In the 1930's and 1940's the average theatre exhibited 220 to 312 films a year. According to the 1940 trade-screening proviso the average exhibitor would have spent almost two-thirds of his time just screening films. To these exhibitors it was not only a waste of time but of money as well.[16]

These exhibitors' complaints towards trade-screening actually represented a cover up to their real concern: the maintenance of their cancellation privileges. Prior to the decrees many of the major distributors permitted the exhibitors the right to cancel up to twenty percent of the films in the block. At the time of the 1940 decree the exhibitors pointed out to the District Court the folly of trade-screening minus a cancellation clause. The theatre operators stated that with the trade-screening requirement the major distributors probably would not be able to maintain an inventory of films more than three or four months in advance to meet the large demand. Accordingly this would force the exhibitor to divide his buying or renting of films into

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[16] Ibid; see also "Amended and Supplemental Complaint," in U. S. v. Paramount, Inc., et. al. filed November 14, 1940.

smaller deals, rather than the once a year agreement, which would result in increased operating costs, a loss of time, and higher rental terms. What the exhibitors really desired was to maintain their discount privilege of contracting films a full year in advance, and gain a twenty percent cancellation privilege on all contracts.[17] In the end they were only partially successful. They did gain the right to cancel twenty percent of the films in a block which was actually only one out of five in the post-1940 period. The discount privileges, as did the cancellation privileges, went by the wayside with block-booking by the early 1950's when the final decrees were written.[18]

By the late 1970's and into the 1980's these arguments have reversed. The modern day exhibitors have been and are still continuing to cry out for total abolition of blind-bidding and the reinstatement of trade-screening. This reversal, on the part of the nation's theatre showmen, mirrors the vast internal changes the American film industry experienced since the days of the Paramount decisions. The demand for product has remained constant, however, the supply has drastically

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[17] Ibid.; see also the "Memorandum on Behalf of the Motion Picture Theatre Owners of America - filed to the Court on November 20, 1940."

[18] Duncan, p. 1.

reduced steadily since 1948. Rather than having the luxury of exhibiting some 200-300 films a year as did his predecessors in the 1940's, today's average exhibitor screens approximately twelve films a year to the public. In an industry where only one out of every four of its products produces a profit it is easy to understand why the exhibitors of the 1970's went to the state legislatures requesting permission to view all products before beginning the licensing process.[19]

The Paramount decisions, and other internal and external forces, are largely responsible for the vast changes within the industry over the last thirty years. It is imperative that an overview of these changes be provided before a discussion on the post-Paramount history of blind-bidding can commence. Following the Paramount decisions the major distributors, because of their divorcement from cooperative theatre management, lost much of their incentive to maintain a large flow of film product for exhibition. With production low, intentional or not, the results were the same, a film shortage, which persists today, followed that maintained and reinforced an already strong demand for product.[20] See Table 6 in

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[19]M.P.A.A. Memorandum to the Tennessee State Legislature, February 13, 1978, p. 2.

[20]Alan Trustman. "Who Killed Hollywood?" Atlantic 241(January 1978) p. 64; see also Rosenfield, p. 21.

the Appendix for production figures in the industry since 1948.

It is beyond the scope of this thesis to substantiate that a cartel in fact is at work within distribution that deliberately holds down production in order to maintain a strong demand and high rental terms. The evidence introduced in this thesis will prove contrary to the cartel accusations. But on the other hand it is difficult to deny that the member companies of the Motion Picture Association of America do enjoy similar benefits as those enjoyed by a legitimate cartel. (See Table 7 on how the Paramount defendants have continued to garnish the lion's share of the market since the decisions.) Externally the emergence of television in the 1950's contributed to the demise of both the "B" movie and western. Films previously characterized as "B" movies are now produced by the television industry. A case in point was the 1978-79 television season that witnessed the production of some ninety to ninety-five " . . . two-hour-made-for T.V. feature films at a cost of $1 million per film" by the three major networks. This production figure corresponds almost exactly to the same number of films produced by the major distributors over the same period.[21] Also the Paramount decisions

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[21] John Larmett, Elias Sauada, and Frederic Schwartz. Washington Task Force on the Motion Picture Industry. June 1978, p. 4. Hereinafter referred to as Task Force.

contributed to the film reduction. The block-booking abolition significantly affected the future production plans for both "B" movies and westerns. The courts supplanted block-booking, which assured a steady diet of film product, with the requirement that all films be licensed picture by picture. Thus the major distributors were freed from their former obligation to produce large numbers of films.[22]

Internally the film industry witnessed great changes as well following the Paramount decisions. Following the great divorcement and the erosion by television into the entertainment market, Arthur Krim bought out one of the minor distributors--United Artists--from its surviving members (Charles Chaplin and Mary Pickford). Krim eliminated many of their outside ventures[23] and turned the company into a " . . . film studio without a studio." United Artists became primarily a major distribution organ with the necessary capital to assist in production. This spawned the great wave of independent production in the 1950's. Soon the other studios accepted the Krim formula and consequently cut back on their own productions.[24]

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[22]Rosenfield, p. 19.

[23]New York Times, March 27, 1977, Section III, p. 1:3.

[24]Trustman, p. 65.

Although United Artists made substantial contributions to film art by permitting the independent producers, directors, and stars to create their own work in an atmosphere free from the studio's control, it had adverse effects as well. United Artists eliminated the overhead expense of maintaining a studio as well as the contractual obligation of crew costs. To maintain the necessary cash flow, United Artists distributed the independent productions for thirty percent of the rental revenue plus a fifty percent share of the profits.[25] In the pre-Paramount decisions days crews and stars alike worked under contract to the studio. This permitted the major distributors the luxury of script revisions, re-editing, re-shooting, and re-cutting without experiencing any extra labor costs. However, with the rise of independent productions and the Paramount decisions the demise of contracted labor followed with the emergence of union labor in its place.[26] Today the high crew costs of union labor serves to keep film production costs high preventing sufficient capital to flow to the majors and independent distributors alike for future productions.[27]

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[25]Peter J. Schuyten. "United Artist Script Calls for a Divorce." Fortune 97 (January 1978) p. 130.

[26]Trustman, p. 68.

[27]Task Force, p. 10.

In the 1960's television continued its erosion into the film industry's entertainment market, but prosperity returned with the rise of the stock market and the purchase of some of the major distributors by conglomerates.[28] Because these conglomerates had to part with fifty percent of their net profits every April to the Government they developed a method of circumnavigating this dilemma. One method was through the "laundry principle." This method called for the re-releasing of a picture that proved to be a financial success previously. This practice did little towards alleviating the film shortage, but it was a quick and easy way to make money. Even though taxes still had to be paid on the new income it was accomplished without the additional production costs nor the headache of another audit.

Prosperity in the film industry was momentarily halted with the great stock market crash of 1968 when the conglomerates lost $200 million of other people's money and the entry into the distribution field by the three major television networks. The industry remained

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[28]Paramount was acquired in 1966 by Gulf and Western, United Artists in 1967 by TransAmerica, Universal in 1962 by Music Corporation of America, and Warner Brothers merged with Kinney Services in 1969.

in a financially depressed state until 1971. By that time the television networks had gotten out of the film distribution business and the industry embraced a phenomenon called "Yablansization." In 1970 film producer Frank Yablans made Love Story, and in the process did an outstanding job of promoting and marketing his product. The net results of this effort, a low budget film starring two relatively unknown stars (Ryan O'Neal and Ali McGraw), was a picture that grossed over $100 million. Once again the other major distributors went to school on a successful formula and attempted to reproduce similar results from Yablansization. The major distributors consequently cut back their production and concentrated on hitting the big profit on just one film. To assist the film in generating its maximum profit, heavy promotional advertising and marketing tie-ins such as albums and books were inaugurated.[29] Soon the distributors discovered that the greater the success of the promotional sale to the public, i.e., rental income from exhibition, the greater the returns could be expected from the industry's secondary markets, such as network television, pay-T.V., and cable.[30] Alan Hirshfield,

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[29] Trustman, Ibid.

[30] Written address by A. Alan Friedberg, President of the National Association of Theatre Owners, delivered to the Arizona State Legislature, March 12, 1980. See also Task Force, p. 11. From additional secondary markets such as Feevee, hotel exhibition, video cassettes and discs the distributors grossed $45 million in the year ending June 30 1979 (see Variety, October 17, 1979, p. 8).

former Columbia executive, stated " . . . you count on $1.5 million deal from a network, and a half a million in foreign distribution . . . " and this was in 1977.[31]

The principle of Yablansization has become so embedded in the industry that the " . . . major factor of high budgets is the amount of hype that goes into a picture."[32] For example, the film distributors spent almost $100 million in television advertising alone in 1976. This represented a one hundred percent increase from the 1973 figure, and an additional one hundred percent increase was anticipated for 1980.[33] The success experienced by Paramount (The Godfather), Warner Brothers (The Exorcist), Fox (Star Wars), and Universal (The Sting and Jaws) validated the theory behind Yablansization as well as the decision to curtail production despite the constant demand.[34] The majors previously financed as many as fifty films a year, but with the advent of

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[31]"Finances - The Cash Rich Movie Companies." Business Week. May 16, 1977, p. 115.

[32]Trustman, Ibid. Marvin Goldman, a past N.A.T.O. President, offered a baseball analogy to Yablansization in 1978. He was concerned about the psychological reasoning on the part of the distributors in their constant quest for the home run rather than for the single. See Canadian Broadcast Company's program "Part Four - The Arts and the Profit Motive: Trouble in Hollywood."

[33]"Is It Worth Making Blockbuster Films?" Business Week. July 11, 1977, p. 36.

[34]Trustman, Ibid.

yablansization and the hype or heavy promotional push that accompanies it production dwindled to twelve to twenty films per company by the 1970's. Thus with the laundry principle, and the ever rising number of secondary markets the major distributors enjoyed a very profitable period in the last decade.[35]

The diversification of the conglomerates, which controlled the distributors, became the central theme of the industry's history in the 1970's. In an industry where there has been a constant stream of criticism directed towards a film shortage, the outside ventures by the conglomerates have not set well with today's exhibitors. Normally a business that is in a competitive market, which the film industry is, usually reinvests its profits in efforts to increase output, but this was not the case in the 1970's.[36] For example, Columbia agreed to purchase D. Gottlieb and Company, the nation's largest

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[35] New York Times, August 7, 1977, Section III, p. 12:1.

[36] Task Force, p. 15. In 1967 one Columbia official stated that because of the blind-bidding process the company was able to reinvest its profits into increased film production. The statement was made to Maurice Silverman of the Anti-Trust Division who was attempting to negotiate a reduction in blind-bidding. The Columbia representative said that if blind-bidding was reduced the company's cash flow would be interrupted, consequently film production would decline. Since blind-bidding did continue and film production continued to decline it is apparent that the distributors were not reinvesting profits back into production. See JDF - Memo from Silverman to Kilgore, May 3, 1967.

manufacturer of pinball machines, in 1977 for $50 million. Warner Communications, Inc., the parent company of Warner Brothers, bought out Atari, Inc., the electronic game company, for $28 million. Later, Warners acquired the toy company, Knickerbocker. Warners is also the largest shareholder of Coca-Cola of New York, plus they control their own record company, publishing company, and their own two-way-pay-TV cable system in Columbus, Ohio.[37] M.C.A., Inc., the controlling conglomerate of Universal, is the most diversified of all the major conglomerates. M.C.A. controls a record company, TV productions, the concessions to Yosemite Park, Putnam and Son's Publishing Company, Spencer's Gifts, Inc., a retail and mail order business, and a savings and loan business in Denver, Colorado. M.C.A. did fail in its attempt to purchase Sea World, Inc. in 1977 to Harcourt, Brace and Jovanovich. Others continue to move in this direction, e.g., Metro-Goldwyn-Mayer plans another casino in Reno, Nevada at $120 million and Walt Disney is building a park in Japan with plans for another park in Florida.[38] See Table 8 for 1976 income figures from diversification.

The decision by the Paramount courts to institute picture by picture licensing communicated to the

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[37] Business Week, May 16, 1977, p. 114.

[38] Ibid., p. 116.

distributors the need to develop alternate distribution practices, since block-booking had been prohibited. Blind-bidding, as the subsequent chapters will illustrate, has been the most widely used distribution practice since the Paramount decisions.[39] One practice the distributors used until recently other than blind-bidding to distribute their products is known as four-walling. This process involves the distributor's renting the exhibitor's theatre for a flat fee. Distributed in this manner were such films as Breezy, Billy Jack, and The Other Side of the Mountain. In 1973 Warner Brothers attempted to distribute The Exorcist through the four-walling process, but the Department of Justice blocked this effort because it came very close to the distributor-exhibitor relations in the days prior to the Paramount decisions.[40] Four-walling usually resulted when the distributor made the rental terms on the film so high that the exhibitor was forced either to capitulate to the distributor's request or go without any product. This was the case when Universal leased Radio City Music Hall to exhibit MacArthur in 1977.[41] This practice, even though it was outlawed in

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[39] JDF - See Silverman to Kilgore, May 3, 1967 and Silverman to Hollander, October 23, 1974.

[40] Variety, July 5, 1978, p. 13:1.

[41] Business Week, July 11, 1977, Ibid.

the final Paramount decrees in 1951, continued until the mid-1970's when a Senate subcommittee and the Justice Department began simultaneous investigations into the practice.[42] The Department's investigation resulted in one order barring Warner Brothers from further four-walling activities in the New York City market until 1986.[43]

Another distribution practice developed in the 1970's is the per-capita system. In this process the rental fee is determined by a formula based on the seating capacity of the theatre and the number of customers attending. Warmer Brothers used this practice to some extent up to the 1976 Justice Department investigation. At that time they were compelled to " . . . modify its future license agreements . . ." minus the per-capita system and four-walling.[44] Buena Vista, the distribution arm for Walt Disney, is credited with originating the practice. Exhibitor abuse, such as the drive-ins letting children in free and other such give away promotions, was cited as the need for such a concept. Later, a test case in Massachusetts upheld the system, and the Justice

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[42]JDF - Letter from Senator Phillip Hart to Thomas Kauper, Assistant Attorney-General, April 8, 1975.

[43]Wall Street Journal, April 5, 1976, p. 5:1.

[44]New York Times, April 3, 1976, p. 37:5.

Department has not prohibited its use. In August 1978 General Cinema Corporation, the nation's largest exhibition chain, filed suit against Buena Vista's per capita clause as a method of price fixing. Under this formula Buena Vista had charged that General Cinema owed them an additional $77,308 from their distribution of Pete's Dragon. When General Cinema refused to pay, Buena Vista threatened to withhold delivery of their Jungle Book film. General Cinema paid the balance of the Pete's Dragon rental fees only to discover after their exhibition of Jungle Book, Buena Vista would claim that they owed an additional $16,000 according to the per capita formula.[45]

The major distributors have discovered, in the post-Paramount decision era, that it is extremely profitable to distribute the works of independent productions, e.g., Universal acquired the rights to distribute ten independently produced films in 1977. The economic advantages to this are obvious:

1. Because of the majors vast network of film exchanges (there are over thirty between the majors in the country) there is no extra cost of personnel involved;

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[45] Variety, December 21, 1977, p. 26. There has been at least one instance of suspected block-booking since the Paramount decisions. In 1977 Twentieth-Century Fox was fined $25,000 and court costs for attaching the movie The Other Side of Midnight to its license agreements pertaining to Star Wars. See Wall Street Journal, September 13, 1978, p. 8:3.

2. The distributor gets to see a finished project before the company decides to invest its own money into the project;

3. There are no budget problems.[46]

In recent years both Buena Vista and Columbia have announced and carried out its intentions to venture more into this area.[47]

One may thusly conclude that with the decline in the major distributors film production and their espoused desire to pick up independent production, an environment conducive to increased independent film production would exist especially in a market where there is a high demand. But this is not the case. The barriers to entry for the independent producers and distributors alike are difficult. The first barrier is the spiraling cost of production which is fostered by the major distributors reliance on high promotional support and their acquiescence to the high salary demands of the industry's labor supply. The second barrier is the ability to organize financial support for his project. And if the independent is successful in the first two areas he must arrange distribution for his project which can be the

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[46] Variety, December 14, 1977, p. 3.

[47] Variety, October 25, 1978, p. 6.

most difficult barrier.[48]

This point raises the question of industry concentration in distribution during the post-Paramount decision period. Even though there are three minor distributors at work in the market today (American International Pictures, AVCO Embassey, and New World Pictures) the M.P.A.A. member distributors control the major share of American and Canadian film rentals.[49] (See Table 9 in the Appendix on the major distributor's share of this market.) Coinciding with the exit by the three television networks from movie distribution and the beginnings of Yablansization, the industry has become increasingly concentrated. In 1972 the major distributors captured 77.4 percent of the market and by 1978 it was almost ninety percent. During that period, from 1972 to 1978, United Artists acquired the distribution obligations of M.G.M.'s products; Warner Brothers bought out National General Pictures, an independent distributor; and, Allied

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[48] Task Force, p. 9. See also Duncan, p. 6. The M.P.A.A. cites cost at $5.4 million per picture through 1977. See Motion Picture Licensing, p. 8.

[49] Ibid. The M.P.A.A. points out that there are thirty-five independent distributors today. From these distributors only ten films were released in 1977 that grossed over $1 million. See Exhibit "F" in M.P.A.A. Supplemental Memo to Department of Justice, May 8, 1978, p. 9. In February 1979 three independent distributors closed down in Chicago because " . . . of lack of product, lack of playdates. . . ." See Variety, February 14, 14, 1979, p. 5.

Artists, Cinema Center, and Cinerama, all at one time leading independent distributors, have retired altogether from distribution.[50]

Although exhibition is less concentrated than distribution the characteristics are similar: dominance and strength are in the hands of a few.[51] The exhibitors freely admit that there are about fifteen major chains and another 300 smaller circuits with five or more theatres. Approximately eighty-five percent of all the rental income from exhibition comes from only fifteen percent of all the theatres.[52]

On the reverse side of the coin the nation's exhibitors have been also guilty of questionable business practices. For years exhibitors have been notorious for their double-bookkeeping of the box-office receipts. The motive behind this is clear: deprive the distributor of much of the rental income as possible.[53] In 1976 the major distributors, in a united stand, won two court

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[50] Brown, p. 3.

[51] Duncan, p. 1.

[52] Joseph G. Alterman, Executive Director of N.A.T.O., to Robert Rose, Anti-Trust Division, May 15, 1978. See Attachment "Joint Motion Picture Theatre Association's Response to the M.P.A.A.'s April 27, 1978 Memo to the Department of Justice," p. 2. See also Rosenfield, p. 33.

[53] Testimony of Harry Wright, III, to the Full Committee of the Ohio House Judiciary Committee, February 23, 1978, p. 4.

decisions involving under reporting of the receipts by exhibitors. A Federal District judge in Texas, in what proved to be a landmark case for the distributors, because they were allowed to use one law firm to represent them all, ruled one exhibition chain to pay almost a half million dollars to the distributors for under reporting receipts.[54] During the latter months of 1976, the same law firm uncovered in an audit of a Virginia chain of theatres that the exhibitor was $220,000 in arrears to the distributor. After a series of court appeals the distributors were not only cleared of duress charges, but ultimately received the amount owed them.[55]

One other particular practice that exhibitors employ, which provokes the distributors as much as under reporting, is splitting or product splits. In this arrangement the exhibitors in a given market meet periodically and arbitrarily determine who will bid on what film and when. In the industry this is sometimes called "card night" because the exhibitors will get together and play cards while they choose who will exhibit what film.[56] Aiding the existence of splitting, according to the distributors, is that exhibition in the

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[54] Wall Street Journal, June 18, 1978, p. 15:6.

[55] Wall Street Journal, August 3, 1976, p. 4:1.

[56] Wall Street Journal, May 31, 1977, p. 4:3.

top fifty markets in the country is in the hands of four or less individuals. (This figure may vary from distributor to distributor.)[57] The M.P.A.A. claims that splitting, as of April 1977, existed in over 365 markets in all fifty states.[58] As today's distributors see it the situation is thus: there exists in almost every major market, a handful of exhibitors who collectively can look to seven major distributors for products that they will ultimately split between themselves. Obviously, the practice eliminates any competitive bidding.[59]

In 1977 the Justice Department warned nationwide distributors and exhibitors to cease participating in this practice because it was market allocation and bid-rigging, both practices being in violation of the Paramount decrees.[60] Despite this the practice continued within the industry into the 1980's. Many exhibitors continued on in hopes of bringing on a court decision to clarify the issue once and for all. Yet still other exhibitors felt that splitting " . . . was the most equitable method yet conceived for protecting

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[57] M.P.A.A. Supplemental Memorandum to the Department of Justice, May 8, 1978, p. 6. See also Exhibit "C" in Memo.

[58] Ibid., p. 7; see also Exhibit "D" in Memo.

[59] M.P.A.A. Memorandum to the Department of Justice, April 27, 1978, p. 7.

[60] Wall Street Journal, April 4, 1977, p. 4:2.

exhibitor, distributor, and the public. . . ."[61] Following the Department's 1977 warning, distributors in those markets where the exhibitors did heed the warning did experience an upswing in bidding and rental terms.[62] Ultimately the issue did come to trial first in April 1978. At that time a United States Court of Appeals judge in Las Vegas, Nevada upheld the validity of splitting for nine western states.[63] However, in May 1980 the Justice Department filed a civil anti-trust suit to block the practice in Milwaukee. Named as defendants in the suit were United Artists Theatre Circuit of New York City (not affiliated with the distributor by the same name), Kolberg Theatres, Inc. of Chicago, and two other Milwaukee exhibitors. Also in May 1980 a Virginia Theatre Company, Greenbriar Cinemas, Inc., challenged the April 1977 departmental warning in court. The case, which is known as the Greenbriar case, which went to trial on May 5, 1980, will ultimately decide the issue once and for all for the industry.[64]

There has been one example in recent years where a distributor practiced what in effect was splitting.

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[61] Wall Street Journal, April 5, 1977, p. 7:1.

[62] Wall Street Journal, May 31, 1977, Ibid.

[63] Variety, April 19, 1978, p. 6.

[64] Wall Street Journal, May 6, 1980, p. 21:2.

In the early 1970's United Artists attempted to place their films in various theatres without soliciting bids. This was done in an attempt to match the pictures with the right theatres, and to try to spread the United Artists product around to more exhibitors. United Artists felt that bidding tended to be anti-competitive at times because it would lead to a decline in the number of theatres. Although United Artists did not actively solicit bids on these particular films, they did receive all bids from any exhibitor who maintained "a suitable theatre." The Justice Department had no problem with this situation so long as the exhibitors remained content.[65]

Similar situations of informal splits in many of the major metropolitan markets existed in the exhibition business in recent times. For a long time in Chicago, following the Paramount decisions, the so-called track system was prevalent. In this system certain exhibitors represented the source or track for certain distributor's films. In return for the exhibitors open support or open track for the distributor's product, the theatre operator received " . . . generous settlements on terms following the run of the picture." In 1977 it was believed that the Chicago track system was undergoing some reorganization.[66]

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[65] JDF - Memorandum by Maurice Silverman, May 2, 1973.

[66] Variety, October 12, 1977, p. 5.

In New York City a modern day caste system existed in a predetermined three tier organization of the city's movie houses. This system determined who would get the first runs and sub-runs, and in what locales.[67]

The exhibitors today as a result of the film shortage and high rental terms have turned to other means to supplement their income. Besides the installation of pinball machines in many houses, the use of on-screen commercials is a practice that many exhibitors are turning to for additional income. Both these practices the distributors find particularly upsetting because the movie companies feel they should be allowed to participate in these areas of income. One distributor, Twentieth-Century Fox, attempted in late 1977 and 1978 to stop exhibitors from showing commercials by preempting " . . . on screen advertising revenue into their grosses for contracts."[68] Another distributor, Warner Brothers, merely stated they

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[67] Wall Street Journal, May 31, 1977, p. 4:3. It should also be noted concerning New York City Exhibition that United Artists Theatre Circuit was ordered in 1976 by the Justice Department to divorce itself from some twenty-three units because of " . . . monopolistic practices." See Wall Street Journal, July 27, 1976, p. 35:2.

[68] Variety, January 18, 1978, p. 30. See also Twentieth-Century Fox solicitation letter on Damien-Omen II, Cincinnati Branch, December 6, 1977. The letter states: "Your offer must advise whether your theatre shows screen advertising . . . and if so, how many minutes of such advertising are shown at each performance of a picture? The company regards all income . . . as part of the gross receipts of the theatre."

would not accept bids on Superman from those exhibitors who used commercials.[69] It should be noted that the exhibitors do not receive a flat fee for these commercials; rather it is based on customer count over the entire run of the advertisement.[70]

Distributors also complain that they are not permitted to share in the concession income, a revenue source that earns seventy to eighty percent gross profit, earned by the exhibitors.[71] The exhibitors maintain that if not for the income generated by concessions they would not be able to operate profitably. According to Phillip Lowe, President of the National Association of Concessionaires, this is true. In 1978 exhibitors took in over $500 million in concession income, a figure that corresponds to the net profit made by exhibition over the same period. As it stands today both distribution and exhibition alike have refused to allow the other to participate in their respected income from secondary markets.[72]

Recent events in the industry seem to dispel the distributor's claim for the added income generated by the

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[69] Variety, December 14, 1977, p. 28.

[70] Variety, October 5, 1977, p. 5.

[71] Motion Picture Licensing, p. 12.

[72] Variety, February 28, 1979, p. 7.

exhibitor's on-screen advertising. In addition to the already mentioned secondary markets enjoyed by the distributors, there remain other avenues available for the movie companies to ease the financial burden of film production. In the late 1970's Columbia received a "multi-million dollar investment" from Time, Inc., to assist in film production.[73] Later Columbia struck a deal with Home Box Office (a subsidiary of Time) to distribute its films to this pay-T.V. outlet.[74] Universal, Twentiety-Century Fox, and Columbia all maintain a consistent cash flow from re-release and syndication of their television productions. Columbia, Universal (M.C.A.), Fox (Capitol), and Warner Brothers (Reprise) all control record companies which is a convenience when marketing sound-track albums to one of their pictures.[75] In 1976 Paramount and Sony announced a joint venture to distribute films to the video-cassette market. Fox, Holiday Inns, and Bell and Howell are locked up in a deal where the 780,000 rooms in the Holiday Inn network can view feature length films via satellite.[76] In the last year Columbia, Universal and Paramount announced plans

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[73] Wall Street Journal, June 22, 1976, p. 11:1.

[74] Wall Street Journal, March 6, 1976, p. 6:3.

[75] Business Week, May 16, 1977, pp. 114-118.

[76] Wall Street Journal, August 4, 1976, p. 10:5.

to formulate their own pay-T.V. cable system to be known as Premiere.[77]

According to the exhibitors the absence of guaranteed playdates made the distributors reluctant to produce large quantities of films to meet the demand. Consequently, most notably the last decade, exhibitors sought to finance their own film projects. One of the most ambitious of these projects was the 1977 venture supported by the National Association of Theatre Owners called Exprodico. This project never got off the ground because of a lack of solid financial support, and a spurt of increased film production in 1979 by the major distributors.[78] During its planning stages N.A.T.O. attempted to use Exprodico as a bargaining tool to play against the abandonment of blind-bidding by the distributors. Although this and the project failed, N.A.T.O. still clings to the concept in case film production should decline

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[77] Los Angeles Times, September 4, 1980.

[78] Variety, February 14, 1979, p. 6, and see Task Force, p. 4. The failure of Exprodico can also be attributed to two other factors: one, the difficult of the independent, in this case N.A.T.O., to obtain financial support, and secondly, a lack of unity within the exhibition business at that time. The independent exhibitor trade organization, National Independent Theatre Exhibitors, called Exprodico "a waste." (See Variety, February 5, 1977, p. 5.) However, the anti-blind-bidding crusade has helped unite all exhibitors. It was recently announced that N.A.T.O. and N.I.T.E. plan to merge. See A. Alan Friedberg's written address to the Arizona State Legislature, March 12, 1980.

further.[79]

General Cinema, the largest and most diverse exhibition chain in the country, cancelled their original co-production deal with Sir Lord Lew Grade, the British film maker, in 1977 and turned to Columbia for co-production assistance.[80] Capricorn I and Raise the Titanic are two recent illustrations of pictures that received fifty percent of its financial support from General Cinema. The company established a new production arm, General Cinema films, in 1978 with plans to invest in eight to ten projects annually[81] with Columbia carrying out the distribution part for the films.[82] United Artists Theatre Circuit, another large exhibition chain and like General Cinema in that they are not affiliated with N.A.T.O., invests in film productions with the Herndale Film group. Some of their recent joint ventures are Sunburn, The Passage, and the Kentucky Fried Movie.[83] In late 1979 the Justice Department modified a 1950 decree to allow Loew's Theatres to enter into production and distribution

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[79] Variety, Ibid., and Variety, February 5, 1977, p. 6.

[80] Variety, September 28, 1977, p. 6. General Cinema owns Sunkis Sodas, a furniture company, forty-nine soft drink bottling centers, and several television and radio stations. See Variety, December 27, 1978, p. 5.

[81] Variety, August 9, 1978, p. 3.

[82] Variety, August 23, 1978, p. 3.

[83] Variety, August 9, 1978, Ibid.

as long as their movies are not exhibited in their own theatres.[84]

Since the Paramount decisions the industry has successfully weathered changes brought about by the erosion of television into its market; with the rise of the conglomerates and their subsequent diversification, the motion picture industry approaches the $3 billion mark in annual revenues today.[85] Yet all is not well within the industry. In the last ten years the country experienced a thirty-eight percent increase in movie screens, despite pleas to the contrary by leading exhibitors; yet seating capacity declined.[86] Today's average weekly attendance is down seventy percent from the peak figure of 1948.[87] Distribution contributed both negatively and positively to these situations. The movie companies, beginning in the late 1960's, promoted many of the new suburban multi-screen theatres to first-run status. This allowed more of the movie going public

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[84] Variety, December 15, 1979, p. 3.

[85] M.P.A.A. Supplemental Memo to Department of Justice, May 8, 1978, p. 10. The industry claims only three percent of the total leisure dollars spent in the country, but attracts forty percent of all the spectator amusement expenditures. (See M.P.A.A. Memorandum to Department of Justice, April 27, 1978, p. 7.)

[86] Ibid.

[87] Motion Picture Licensing, p. 11.

to enjoy first-run status (seeing a movie at about the same time as those in the large markets); however, this process also maintained high rental terms and high consumer prices. This process and the long playing dates have almost eliminated the independent or sub-run theatres. More than likely, regardless of the ultimate outcome of the current anti-blind-bidding crusade, by the end of the 1980's there will be only a one-tier exhibition industry.[88]

As the industry enters its fourth decade since the Paramount decisions the business of making, distributing, and exhibiting films is an extremely profitable enterprise and will continue to be so. A recent survey by Fortune magazine of the top 500 companies listed Columbia Pictures number one in total return to investors; Fox was eighteenth, Gulf and Western (Paramount) was fifty-eighth and Warners Communications was fifty-ninth. Exhibition only placed one company, General Cinema, in the top one hundred.[89] Distributors claim that exhibition is more profitable than the survey indicates. The M.P.A.A. asserts that the exhibitor receives approximately seventy cents from every dollar spent in the movie going experience.[90] This is a charge that N.A.T.O. calls "staggering" in its

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[88] Variety, August 9, 1978, p. 9.

[89] Variety, May 16, 1979, p. 7.

[90] Motion Picture Licensing, p. 13.

" . . . half-truths, untruths, distortions and factual inaccuracies."[91] This argument, between distribution and exhibition over the division of box-office receipts, represents the cornerstone of conflict evident in the industry since the Paramount decisions. This chapter in its analysis of the industry has pointed out some of the areas of discussion between the two business groups, but the one major dispute between distribution and exhibition has been blind-bidding. The ensuing chapters will illustrate that blind-bidding has been the sore spot in the industry since 1954, and that as long as it continues the threat to the American tribal ritual of moving-going may become real.

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[91] Variety, May 16, 1979, Ibid.

CHAPTER III

THE PRACTICE, THE DEPARTMENT, AND THE PARTICIPANTS, 1955-1968

Following the final Paramount decisions in 1951 the Judgement Enforcement Section of the Anti-Trust Division in the Department of Justice assumed the role of monitor for the decrees. The Division started with only five attorneys and four stenographers during the "trust-busting" era of President Theodore Roosevelt. By the time Jimmy Carter took office in 1977 the Division employed over 450 attorneys and twenty-five economists in its efforts to enforce the nation's anti-trust laws.[1] Shortly after the Paramount decrees were finalized and the divesiture process begun the Division began hearing complaints concerning blind-bidding.

In the mid-1950's and on into the early 1960's the Division fielded "occasional complaints" concerning the practice now known as blind-bidding.[2] Departmental

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[1] Department of Justice: Function and Organization. Government Printing Office, Washington, D. C., 1978, p. 10.

[2] The Department points out that blind-bidding, as the practice is known today, began following the Paramount decisions. Their view is that prior to 1940 it was " . . . really blind-selling since competitive bidding came in later." See JDF - Silverman to Kilgore, May 3, 1967.

procedures at this time dictated that the Division write the accused offending distributor and suggest, even though no prohibition existed, that the distributor make every attempt possible to avoid blind-bidding. The Department would point out that the practice gave rise to certain discriminatory problems in the actual bidding process. In turn the Department would receive a letter back from the offending distributor indicating that the incident had been "unforeseen," and that it was an exception to the company's standard policy not to blind-bid pictures.[3]

One of the first of these incidents unraveled on March 23, 1955. The incident is a historical landmark in the history of blind-bidding because it represents the beginnings of the Division's official policy towards the practice and it also vividly illustrates the discriminatory effects involved in the process. Within the inner circles of the Department the 1955 incident clearly represents the start of the blind-bidding problem that has yet to be settled to the mutual satisfaction of distributor, exhibitor, and monitor alike.[4]

The incident began in Philadelphia when the

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[3]JDF - Maurice Silverman, Anti-Trust Attorney, to Bernard Hollander, Chief of Judgement Enforcement Section, October 23, 1974.

[4]JDF - Memorandum from Maurice Silverman, to William D. Kilgore, Chief of Judgements Enforcement Section, May 3, 1967.

exhibitor of the city's Viking Theatre called the Division on March 23, 1955 to complain about Paramount's solicitation for Strategic Air Command. Paramount informed the Philadelphia market exhibitors that there would be no trade-screenings in that area, consequently the film was to be blind-bid. If the local exhibitors wanted to screen the film a screening date was fixed for the Los Angeles market. Later, Paramount, realizing the economic burden for Philadelphia exhibitors to travel, at their own expense, to Los Angeles for screening, arranged a more convenient screening date in Kansas City. The Viking Theatre exhibitor informed the Department that it was unfair for him to submit to the blind-bidding of this film, particularly one that included suggestions of a $75,000 guarantee in order to be competitive, if the film was being screened in markets other than his. To this exhibitor it was a clear-cut case of discrimination. To the Department it was its responsibility to uncover the roots of this alleged discrimination.

The Department soon took up the matter and uncovered the discrimination involved. It became aware that both Stanley Warner and William Goldman, who controlled large exhibition circuits in both the Philadelphia and Los Angeles markets, theoretically could have viewed the film in Los Angeles and then participated in the blind-bidding of the film in Philadelphia with a

distinct competitive edge over the Viking Theatre exhibitor and other local exhibitors. Paramount was made aware of the situation it had created for the Philadelphia exhibitor and announced that bidding on the film would begin anew. From this experience the Department, which came close to declaring Paramount guilty of discriminatory bidding, developed a policy that has remained constant since. It was the Department's view that for a distributor to screen a film for one exhibitor in one market while another exhibitor in a different market was not offered the same opportunity would be discriminatory and, therefore, " . . . in violation of the provision in the Paramount judgments requireing licensing 'without discrimination' . . . ."[5]

Throughout the remaining years of the 1950's and into the early 1960's this became the standard policy of the Department as it continued to monitor complaints concerning blind-bidding. In 1965, while the Department was involved in a routine acquisition hearing, a different means of discrimination in the blind-bidding process came to light. The case centered around the request by National General Circuit, a large exhibition chain which was also subject to the Paramount decisions, to acquire a theatre in Salt Lake City, Utah. During the

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[5]JDF - See Silverman to Kilgore, May 3, 1967 and Silverman to Hollander, October 23, 1974.

course of the hearing Judge Edmund Palmieri witnessed testimony concerning the effects of sneak previews on the blind-bidding process. It was here that the Von Ryan's Express incident and its relation to discriminatory bidding came into focus.[6]

The drama, involving the distribution of the Twentieth-Century Fox release Von Ryan's Express, unfolded in August 1965 at Grauman's Chinese Theatre in Los Angeles. Grauman's, which was operated by National General Circuit, currently was exhibiting the United Artists picture The Train. The story line of the United Artists release centered around a train during World War II. At the same time Twentiety-Century Fox had ambitions of distributing its forthcoming film, Von Ryan's Express, to Grauman's immediately following the run of the United Artists film. The Fox film also contained a similar story line involving a train during World War II. The buyer and film booker for Grauman's and National General, Daniel Polier, questioned the wisdom of exhibiting one film, similar in theme and content, so closely on the heels of another. When this concern was forwarded to the attention of the Fox officials they invited Polier into a Fox studio for a view of the rough cut of Von Ryan's Express. Polier became

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[6]Sneak previews occur when the producer of the film screens the picture before its release date to gauge the audience's reaction. Afterwards changes in editing may result to varying degrees.

convinced that the films were substantially different and agreed to exhibit the Fox film following the run of The Train. Subsequently the Fox film was blind-bid into the Salt Lake City market where National General was attempting to strengthen its exhibition network. The discriminatory aspects became clear. As a result of the sneak preview or rough cut screening National General assumed an advantage over its competitors in markets where the film was subsequently blind-bid. Although the Department found that Fox had acted for legitimate reasons in its previewing of Von Ryan's Express they let it be known that this was another example of discriminatory licensing that should be avoided in the future.[7]

The discriminatory revelations surrounding the process of blind-bidding exposed at the Los Angeles hearings did not come as a surprise to the Department.[8] Prior to the hearings a veteran attorney in the Judgement Enforcement Section, Maurice Silverman, for some months had been engaged in discussions with each of the seven major

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[7] JDF - Thomas E. Kauper, Assistant Attorney-General, by Maurice Silverman, to United Artists Corporation, February 5, 1978.

[8] During the remaining testimony at the hearings it was also discovered that M.G.M. (The Sandpiper) and Columbia (Good Neighbor Sam, The New Interns, and Synaon) had licensed films similar to the Fox incident, i.e., National General had been sneak previewed four other times which were subsequently blind-bid in markets where National General controlled theatres.

distributors concerning the problems surrounding blind-bidding. Silverman appeared before the hearings and discussed his tentative findings on the subject with Judge Palmieri. Palmieri quizzed Silverman concerning the existence, if any, of a concerted policy among the distributors pertaining to the practice. The anti-trust attorney explained that blind-bidding originates and exists largely because of the intense competition among the distributors to get their products to the best theatres at the industry's peak periods. Thus, if one distributor fails to blind-bid he has placed himself at a distinct disadvantage competitively. Silverman noted that some of the distributors expressed a desire to abandon the practice if every one else did likewise, and that all of them indicated a willingness further to discuss the subject with the Department.[9]

At the close of Silverman's comments Palmieri concluded that the discussions concerning blind-bidding, which had been introduced in these hearings, were to be considered merely exploratory rather than definitive. The New York based Judge recommended to Silverman that more study be conducted on the subject and its market

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[9]JDF - Portions of the Transcript in the National General Case, August 20, 1965, p. 448. See U. S. vs. Loew's Inc., et. al. (Equity #87-273).

effects. After Silverman enthusiastically agreed to the Judge's recommendation the Division attorney added that he wanted all the distributors to be heard before " . . . anything as drastic as an injunction . . ." be entered into, and that from the Department's view the distributors had not, as of yet, discussed the practice between themselves. Naturally if the distributors did this they would, in effect, be subjecting themselves to anti-trust problems. To surmount this problem Silverman suggested that the Government take up discussions with the distributors individually rather than as a unit.[10] Palmieri approved of this idea and commented:

> . . . I think the record justifies the conclusion that there must be further study, further reflection and perhaps even further hearings. The blind-bidding procedure, viewed from a distance and examined in the light of the historical background of the decree, seems to be under a cloud of disapproval, because, as Mr. Silverman pointed out . . ., there was a provision for abandoning in the interim decree [1940] and if it was abandoned it was solely because of the historical accident that blind-bidding was not resumed and it was not necessary.[11]

Ten days later on August 30 Palmieri approved the acquisition and in a final memorandum on blind-bidding he stated:

> The problem of blind-bidding, its raison d'être, and its possible effects upon and competition

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[10] Ibid., p. 466.

[11] Ibid., p. 467.

> for motion picture product, is one of such far reaching importance that further hearings and further study will be necessary. It appears probable that such hearings will take place during the latter part of October [1965].

These hearings never did take place nor has there been evidence that a public record exists documenting a thorough analysis of the practice as called for by Palmieri.[12]

Palmieri was just one of many people who had believed in the mid-1960's that blind-bidding was almost non-existent in the industry, but the Los Angeles hearings confirmed that the practice had not been dormant. It was a fact the Department of Justice had been aware of for some time.[13] Prior to the hearings the Department had been aware of a " . . . proliferation of blind-bidding within the industry."[14] Because of this significant increase, as compared to its use since the Paramount decisions, Silverman embarked on his investigation into the matter as the Los Angeles hearings were beginning, an

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[12]Letter from Peter Fishbein, Counsel to the National Association of Theatre Owners, to Judge Edmund Palmieri, November 15, 1974.

[13]JDF - Silverman to United Artists, February 2, 1975. In the late 1970's during the anti-blind-bidding battle N.A.T.O. will lead the state legislators to believe likewise that the practice had been dormant. However, N.A.T.O. will have the state legislators believe the issue had been moot until the mid-1970's. (See Chapter VI.)

[14]JDF - Silverman to Hollander, October 23, 1974.

investigation that Silverman would conduct over the next ten years. The Los Angeles hearings are also important to the history of the practice because of the involvement of Judge Edmund L. Palmieri in the case. Palmieri would become directly involved in the issue for the next fifteen years. In 1968 he would become the judge that "so orders" the stipulations entered into by the Paramount defendants and the Government.[15]

Silverman began to carry out the pledge he made to Palmieri in the summer of 1966 as he began to meet with the distributors individually. These talks, which lasted three months, conveyed to the anti-trust attorney the feelings the distributors held concerning the practice. When Silverman completed his survey of the distributors he was well aware that a compromise was not eminent nor was there the likelihood that the distributors would ever form a consensus in their attitudes or solutions towards blind-bidding. This was evident to Silverman from the five different reasons given for its existence and three different ideas espoused for its solutions. Because of the varied responses and conflicting interpretations Silverman suggested a joint meeting between distribution

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[15]Fishbein to Palmieri, November 15, 1974. On the eve of his retirement in 1975 Silverman reflected back on his years of negotiations with the distributors as a "tortuous" experience.

and the Government for some time in the Spring of 1967.[16]

During the summer of 1966 Silverman and other Departmental officials met with leaders of the exhibition industry as well. In June Silverman and other members of the Division had journeyed to the Annual Convention of the National Association of Theatre Owners (N.A.T.O.) in New Orleans. There the anti-trust attorneys talked with numerous exhibitors concerning the practice. The Department asked several of the exhibitors if they could furnish documentation concluding that blind-bidding had either a negative or positive effect toward exhibition.[17] Even though these exhibitors later admitted they were "hard put" to supply the documentation necessary to indicate that the practice was either a positive or negative force, they remained steadfast

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[16]JDF - Silverman to Kilgore, May 3, 1967, pp. 11-22. Concerning ideas towards a solution Silverman found that three of the seven distributors were willing to quit the practice if everyone else did; two other companies suggested a limit be placed on the number of films blind-bid per year; and one company said that as long as the exhibitors were afforded a 48-hour cancellation clause, which grants the exhibitor the opportunity to cancel a license anytime from the time the license is first awarded until 48 hours after it has been screened for the exhibitor, blind-bidding would not be a problem. Concerning the reasons given for its existence two distributors said that if they quit the minor distributors would assume a competitive edge; two others cited delays in release schedules, if all films were trade-screened, which would raise interest costs and drive investment away; and, the others stated that the practice helps keep down admission and rental costs.

[17]JDF - Memorandum by Maurice Silverman, June 21, 1966.

in their opposition to blind-bidding.[18] After the convention Joseph G. Alterman, the executive director for N.A.T.O., informed Silverman that the convention passed a resolution stating: " . . . the practice of blind-bidding is an onerous trade practice . . . and stands universally condemned by exhibitors throughout the United States." Alterman also notified Silverman and the Department that N.A.T.O. wanted to appear before Palmieri's court to present their views on blind-bidding.[19] When this failed to materialise by November 1966 N.A.T.O. wrote directly to Palmieri asking permission to hold the envisioned hearings as outlined in the Judge's final memorandum in the 1965 Los Angeles hearings. Once again the hearings never materialized.[20]

It was not as if the Department or Palmieri were ignoring the pleas of N.A.T.O.; rather they plodded along cautiously in the direction of actually holding hearings for some time in July 1967. We know this to be true because Silverman spent a considerable amount of time from the Fall of 1966 until March 1967 attempting

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[18] JDF - Letter from New Orleans Exhibitor [name withheld] to Silverman, July 2, 1966.

[19] JDF - Letter from Joseph G. Alterman, Executive Director of N.A.T.O., to Silverman, June 10, 1966.

[20] JDF - Letter from Julian S. Rikin, President of N.A.T.O., to Palmieri, April 18, 1968.

to round up prospective exhibitors to testify at the envisioned July hearings. In February 1967 Silverman dined with one exhibitor (name withheld), who was a close friend of his, to discuss the likelihood of his appearing as one of the exhibitor representatives at the proposed hearings. Although the exhibitor declined to appear he did supply Silverman with additional documents and materials related to the practice. The exhibitor also recommended several other people to Silverman that he should contact.[21]

From his collection of documents and interviews Silverman was now beginning to understand the nature and frequency of the practice. From his dinner companion and other exhibitors Silverman became aware that only a certain number, not all, of the exhibitors blind-bid for the majority of their products. In the mid-1960's films were mostly blind-bid into the larger markets. This was done for several reasons. Competition for a choice theatre for a film's debut made blind-bidding necessary in this respect. Additionally it was the policy of the distributors to release a film in December into the Los Angeles and New York markets in order for the film to qualify for Academy Award consideration. In

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[21] JDF - Letter from Exhibitor [name withheld] to Silverman, February, 1967. This letter was sent to Silverman's home rather than to his office.

this situation the films would be blind-bid, but afterwards the distributors would hold back the release into the other markets or sub-run areas until March to coincide with the actual Academy Award ceremonies.[22]

The proposed hearings on blind-bidding scheduled for July 1967 did not result because of a combination of factors: the reluctance on the part of several key exhibitors to appear before the court and the failure by Silverman to conclude his negotiations with the distributors by that time. Despite the hesitancy of a few, many exhibitors still continued to provide Silverman with more materials concerning the practice. These exhibitors heard from various industry sources and publications that the Department, under the direction of Silverman, was looking into the practice. Most of the material sent to Silverman were copies of the various distributors' solicitation letters and the exhibitors complaints thereon.[23]

Aside from the obvious complaint against the practice as a whole and the fact that some exhibitors did not participate as much as others, the exhibitors found other areas of discomfort to complain about. These

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[22] JDF - Silverman to Kilgore, May 3, 1967, p. 4.

[23] JDF - Letter from Exhibitor [name withheld] to Silverman, February 9, 1967.

theatre entrepreneurs were annoyed at the seemingly inflexible dictation of terms and the brevity of the story lines provided the exhibitors. For example, here in its complete form is a story line by Paramount in its 1967 release of Easy Come, Easy Go which is typical of the distributor's story line:

> Easy Come, Easy Go is a Hal Wallis Production in Technicolor with Elvis Presley cast as a Navy Lieutenant in an exciting upbeat adventure story filmed in Southern California's most picturesque locales.[24]

A solicitation letter from United Artists concerning its film Casino Royale illustrates the same dictation of terms and brevity in story line. In both cases the distributor did express their apologies for having to blind-bid the product.[25]

Thus armed with this information Silverman met with the attorney representatives from all seven of the major distributors for the first time on March 2, 1967. Over the next five months Silverman and Paul Webber, another attorney in the Judgement Enforcement Section, would meet four more times with the distributor representatives in an effort to reach some accord concerning the practice of blind-bidding. Each meeting was held at the House of the Association of the Bar of

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[24] JDF - See Paramount solicitation letter from D. R. Hicks, Philadelphia Branch Manager, February 7, 1967.

[25] JDF - See United Artists solicitation letter from Chicago Branch Manager, M. Zimmerman, September 20, 1966.

New York City on West 44th Street. The Department's official mission was to obtain views and opinions concerning " . . . the question of eliminating the practice of offering pictures for licensing before they have been trade shown in the exchange district." With this in mind Silverman opened the first meeting with a review of the record in the Paramount decisions as it related to the practice. Afterwards the Division attorney, in the face of twenty-five attorneys representing the seven major distributors, explained some of the ways the practice could lead to violations of the Paramount decrees.[26]

The first meeting between the distributor agents and the Government typified the intense competition and distrust within the distribution realm of the industry. At one point in the meeting the distributor representatives not only were attacking N.A.T.O. for various reasons, but many of the distributor attorneys engaged in a fray with one another. Only Columbia and Paramount made any significant contributions toward a solution. Columbia suggested that the exhibitors appoint a man to the West Coast and one to the East Coast to act as a clearinghouse for all information concerning forthcoming releases. To Silverman and to some of the

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[26]Columbia came with six attorneys; Fox and Paramount had four each; Warner Brothers had three while MGM, Universal and United Artists brought two each.

distributors this was too censor-like. Paramount's suggestion was more realistic. They merely suggested a limit, such as five, be placed on the number of films blind-bid per year. Although neither of the two suggestions came close to realizing a consensus of opinion, Silverman would ultimately adopt the limitation principle espoused by Paramount.[27]

A week later the distributors, Silverman, and Webber all met again at the same locale. If the first meeting was noted for its strife so was the second. The Twentieth-Century Fox agent brought up the idea of confronting face to face the "accusors," N.A.T.O. and the exhibitors, which met with much approval from several of the other attorneys. One of Paramount's attorneys went so far as to demand that the Department furnish the distributors with the " . . . ten most grievous complaints since 1964 . . . for the sake of having something concrete to fight." At this point Silverman reminded the distributors that each of them had their opportunities to discuss the issue with the exhibitors

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[27] JDF - Memorandum by Paul Webber, March 7, 1967. The distributor's agents were upset at N.A.T.O.'s power over the press and the fact that the organization had exaggerated the entire situation. After being attacked by Columbia for not blind-bidding United Artists admitted that it had recently begun the practice because they were continuously being locked out of playdates by their competing distributors who were blind-bidding on a wholesale scale.

individually, but it had not resulted in altering the situation as it existed then.[28]

The limitation principle was brought up again at the second meeting by Paramount. The company's agent suggested that the distributors embark on a two-year trial period where each of the distributors would be limited to five films they could blind-bid annually. Several of the other distributor attorneys favored such a plan, but Silverman dismissed the idea because he felt five too high a figure. MGM suggested that a percentage formula be applied to the number of films blind-bid. They suggested a figure of fifteen percent of the company's annual productions, but the Warner Brothers agent accurately pointed out that this would successfully lock out the smaller distributors from competing and the idea was dropped. From these suggestions the formations of Silverman's envisioned stipulation began to take shape. He liked the limitation principle, but thought five too many--two was more in line. He also liked the idea of testing the stipulation

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[28]The point made by Silverman alluding to the exhibitor's attempts to discuss the issue with the distributors individually is important. In the late 1970's the distributor's lobbyists in the anti-blind-bidding battle will mislead the state legislators into believing that they have attempted to negotiate the issue but the exhibitors have refused to listen. This interchange between Silverman and the Fox attorney proves the M.P.A.A. contention is false. See the M.P.A.A. memo to the Georgia House Industry Committee.

for a two-year period. The Division's attorney had one more idea formulating in his mind that he wanted to introduce to the distributors at this second meeting. The idea concerned the wholesale implementation of the 48-hour cancellation clause in order to grant the exhibitor some sort of protection in the process.

At this time only Universal, its originator, was using the 48-hour cancellation clause in its licensing agreements. Silverman focused in on the Universal attorneys and asked them to explain how the practice worked. Universal's agents explained that the clause granted the exhibitor the right to cancel out of his license any time from the time the license was first agreed upon until 48 hours after the film has been screened to the exhibitor. As the other attorneys for the distributors were contemplating the idea Silverman began to wrap up the meeting. The anti-trust attorney expressed his dissatisfaction with both the percentage concept and the five-film limitation idea. Silverman indicated he preferred a two-film limitation for a two-year period. Above all else, Silverman reminded the distributors, the Department would not sanction a voluntary agreement. The outcome must be settled in court. With that Silverman granted the distributors permission to meet collectively in order to work out some sort of consensus on the position they

were going to take.[29]

Adolph Schimel, Vice-President and General Counsel to Universal, was appointed as the official spokesman for the group. The distributor's attorneys met twice over the course of the next month to formulate their position towards the future of the practice. In early April 1967 a tentative position was finally reached.[30] After Schimel had telephoned Silverman concerning the reaching of an agreement the anti-trust attorney along with Webber journeyed back to New York to review the distributor's proposals. There in Schimel's Park Avenue office the seven point proposal, which was supported by all the distributors save Columbia, was outlined to Silverman and Webber. The distributors recommended: that there be a one-year trial period beginning in January 1968; the limitation on films blind-bid would be four; there would be no prohibition

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[29] JDF - Memorandum filed by Paul Webber, April 6, 1967. Warner Brothers representatives voiced a dissenting opinion towards the 48-hour cancellation clause idea. They pointed out that if all the distributors adopted such a policy it would be conceivable in the future to see exhibitors contracting several films at once, screen them themselves and cancel the ones they did not like and keep the rest.

[30] JDF - Silverman to Kilgore, May 3, 1967, p. 19.

in respect to roadshows;[31] the agreement would be formalized by an exchange in letters rather than a court order;[32] any party could withdraw after one year; a review of the progress of the agreement would commence in September 1968; and the Department of Justice must persuade the minor distributors, specifically Buena Vista and Embassy, to participate in the proposal.

Silverman was disappointed by the distributor's position on the court order. Silverman thought he had made it clear to Schimel and the other attorneys his position on this matter. Once again Silverman told Schimel, the Universal General Counsel, that the Department would not " . . . accept anything short of a court order binding the defendant distributors." Satisfied at last that Schimel now understood his position, Silverman went on to comment on the remaining proposals. The anti-trust attorney told Schimel he

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[31]Roadshows are special films licensed a year or more in advance of its release. These films were lavishly produced and highly promoted films. The film was licensed similar to the four-walling procedure, where the distributor rents the theatre. Because the film was licensed so far in advance exhibitors catered to groups for special rates. Usually these films were shot in 70 mm. film and only a limited number of exhibitors had the facilities to screen these films. Paint Your Wagon is one example of a roadshow.

[32]The reason the distributors were in such opposition to a court order was the fear the Department would return one day and broaden the scope of the decree.

favored a two-picture limitation rather than four; that the roadshow proposal would be acceptable to him if the distributors accepted his two-picture limitation, and that he saw no problems in getting the minor distributors to go along, but on a voluntary basis rather than as part of a court order.[33] The other points of the distributor's proposals Silverman concluded were of lesser importance and were actually a matter of detail which could easily be decided later. The one last major decision reached at this point was Silverman's concession that any film blind-bid with a 48-hour cancellation clause would not count towards the limitation figure. Although Schimel had to check with his colleagues on this matter, the concession would ultimately open the doors for the distributors to blind-bid as they please.[34]

Eventually a third meeting between all the distributor's attorneys and the anti-trust attorneys was agreed upon when Schimel and Silverman reached an impasse over the court order proposal.[35] At this meeting, which

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[33] JDF - Memorandum filed by Paul Webber, April 21, 1967.

[34] JDF - See Silverman to Kilgore, May 3, 1967, p. 22 and Memorandum filed by Paul Webber, April 21, 1967, p. 4.

[35] At this point in the negotiations Silverman confided to his superior, William Kilgore, that he was afraid the whole issue was destined for a full court hearing if the distributors did not rescind from their position in regards to the court order.

met on May 5, 1967, the Columbia representative, now in support of the revised plan, informed Silverman that the distributors would approve a three-picture-limitation if the Department would place no restrictions on roadshows, and drop the court order. Again Silverman registered disappointment with the distributor's reluctance to appreciate his stand on the court order. Issuing one more reminder to the distributors on his position towards the court order, Silverman turned his attention towards the statistics the distributors had brought concerning his request on the degree of blind-bidding existing at that time.

Specifically Silverman wanted to know how many films were blind-bid by each of the distributors during the calendar year of 1966, and the fiscal year ending August 31, 1967. Some of the distributor's attorneys came prepared, others did not. Because of the tardiness of some and questions concerning the accuracy of the others figures the meeting broke up to give the attorneys ample time to complete the Silverman request.[36] Within two weeks Silverman received the information he

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[36] JDF - Memorandum filed by Paul Webber, May 16, 1967. The figures for the calendar year to Silverman at the May 5 meeting were as follows: Columbia 13, Paramount and Warner Brothers 10 each, MGM 8, Universal 4, and United Artists 1.

requested. The results are listed below:

Distributor	CY 1966 Blind-Bid	CY 1966 Total Releases	FY 1967 Blind-Bid	FY 1967 Total Releases
Warner Bros.	13	13	16	16
United Artists	2*	N/A	1*	N/A
Universal	9	N/A	10	N/A
Paramount	9	27	9	31
Fox	18	N/A	15	N/A
Columbia	14	34	13	33
M.G.M.	1	N/A	5	N/A
Total	66		69	

* Films were licensed blind with consent of the exhibitors.

Now that we know what the total production number was in 1966 we are able to determine that the major distributors were blind-bidding approximately forty percent of their products in at least one or more major markets during that year. Silverman became convinced that a limitation must be placed on the practice. The anti-trust attorney confided to Kilgore with a three-picture-limitation he could drastically reduce the practice sixty-seven percent to approximately twenty-one films a year. Thus Silverman recommended that the Department accept the distributor's proposal, but insisted on a court order and a two-year trial period. Before pushing this proposal on the distributors Silverman asked Kilgore if he could meet with several

of the top exhibitors to sound out their reactions towards the proposal.[37]

By the end of the summer in 1967 Silverman had met with his exhibition contacts and delivered the final proposals to the distributors. The Department's final offer included the three-picture-limitation per year; roadshows would be exempt; the distributors would be free to blind-bid more films if the exhibitors were offered the 48-hour cancellation clause; and, a court order would bind the agreement. After receiving Silverman's proposals the distributors requested one more meeting to be scheduled in September.

On September 7, 1967 the two Departmental attorneys, Silverman and Webber, met again with the distributor representatives in New York City. The distributor's attorneys expressed their approval for most of the Silverman package, but the court order still provided the one road block to completion of the deal. Some of the distributor's legal representatives went to great detail in pointing out to Silverman the specific fears they had concerning a court order. One feared a

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[37] JDF - Silverman to Kilgore, May 17, 1967, pp. 1-4. Silverman wanted to meet with his old exhibitor friend that he had dined with back in February plus the current N.A.T.O. president (Sherril Corwin) and the past president (Marshall Fine).

possible treble damage litigation, another feared that the court order would be misinterpreted as a judicial determination against blind-bidding while others claimed the court order would only "becloud the issue further." At this point in the meeting the distributor's attempted once more to convince Silverman to adopt their program of an exchange of letters between the distributors and Silverman before Judge Palmieri, rather than issue a court order. Silverman's patience was now exhausted. He had heard the same complaints for three consecutive meetings and he let the distributors know it. The anti-trust attorney called their proposal utterly impractical and that he was not even going to mention it to his superiors. Silverman pointed out that the distributors had in effect proposed a trade practice " . . . developed through concerted action and sanctioned by the Department of Justice!" something neither he nor the Department would participate in. After Silverman called the distributor's fears exaggerated he reminded them for the last time that the agreement must be bound in court and that N.A.T.O. be given the opportunity to appear before the court as amicus curiae (friend of the court). The distributor's attorneys were taken aback by Silverman's continued stand toward the court order. Obviously at another impasse the distributor's attorneys suggested to Silverman that they

may have to appeal their position to Silverman's superiors. Silverman found no fault in this request because he knew that Kilgore and his supervisor, Donald Turner the Assistant Attorney-General, supported his position.[38]

It is not known positively if the distributors attempted to solicit the aid of any of Silverman's superiors; however, it is known that if they did they were not successful. Ultimately the distributors consented to the Department's views. The only work left to accomplish before the stipulation could be filed in court was for the Department to carry out its pledge to secure the voluntary support of the minor distributors to the concept. This was no small feat. Although all the minor distributors (Embassy, Buena Vista, Walter Reade, Cinerama, and Columbia Broadcasting System) agreed to follow the stipulation it required the entire summer of 1968 to finalize it.[39]

Because it was so late in the year before the Department found out that the distributors would approve the plan, efforts to gain the voluntary support of the minor distributors to the plan were delayed until the

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[38] JDF - Memorandum filed by Paul Webber, September 13, 1967.

[39] JDF - See Silverman to Joseph E. Levin, Embassy, October 16, 1968; Silverman to Walter Reade, September 17, 1968; Silverman to Cinerama, May 2, 1968; Silverman to American Broadcasting Companies, May 22, 1968; and Silverman to C.B.S., June 26, 1968.

following year. Also Silverman wanted to use that time to continue to solicit feedback from exhibitors concerning certain parts of the proposal. It is not known at this time what, if any, were the reactions of the exhibitors towards the proposal. It is a fact that the Department kept the proposal secret from the public until early August 1968.[40] Silverman did tell N.A.T.O. early in 1968 that a proposal may be in the works. In March 1968 a number of N.A.T.O. officials came to Washington, D. C. to apply pressure on the Department to hold hearings on the practice. Finally the Department admitted to N.A.T.O. that negotiations towards a reduction in blind-bidding had been recently concluded and that they soon would be informed of its consequences. No specifics were given N.A.T.O. at this time nor would N.A.T.O. receive any from the three calls they would make to Washington between March and May 1968.[41]

On May 15, 1968 Silverman received the official approval from Kilgore to conclude the proposal. The content of the proposals were identical to those outlined to the distributors except that the two-year

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[40] JDF - Silverman to Cinerama, May 2, 1968.

[41] JDF - Julian Rikin, President of N.A.T.O., to Judge Edmund Palmieri, April 18, 1968.

trial period would commence on January 1, 1969.[42] The Department, which had been under heavy pressure from N.A.T.O., reluctantly agreed to the stipulation. Privately the Department was satisfied that N.A.T.O. would finally get their appearance in court, but doubted that this would placate them.[43] It would still be a few months before N.A.T.O. would know everything about the stipulation. Sometime in June N.A.T.O. received a copy of the stipulation and was informed that it would be filed on August 14, 1968.[44] In early August the Department granted N.A.T.O. permission to appear before the court as amicus curiae. As their representative N.A.T.O. dispatched Sumner Redstone, a prominent exhibitor who owned a chain of theatres in New England and the Middle West.[45]

On August 14, 1968 in the United States District Court of the Southern District of New York in the presence of Judge Edmund Palmieri, Silverman's years of

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[42] JDF - Memorandum from Silverman to Kilgore, May 15, 1968.

[43] JDF - Memorandum by Robert Hammond, Anti-Trust Attorney, to Donald F. Turner, Assistant Attorney-General, May 27, 1968.

[44] JDF - Letter from Julian Rifkin to Judge Palmieri, July 18, 1968. See also Silverman to Joseph G. Alterman, Executive Director of N.A.T.O., August 1, 1968.

[45] JDF - Letter from Edwin Rome, Counsel to William Goldman Theatres, to Judge Palmieri, August 12, 1968.

negotiations bore fruit and the stipulation was so ordered. The five page document called for further study and examination, and incorporated all the proposals agreed upon by Silverman and the distributors for a two-year period. Silverman stated during the oral arguments before Palmieri that the purpose of the stipulation was to reduce substantially the degree of blind-bidding within distribution. Hopefully, blind-bidding would be reduced, Silverman added, from forty-seven percent to seventeen percent over the next two years. The anti-trust attorney was satisfied that the institution of the 48-hour cancellation clause offered the necessary protection for exhibition in the future. Superficially the stipulation seemed to represent a victory for exhibition in their quest to reduce "the onerous practice" of blind-bidding, but, like the proposed hearings, the reduction in blind-bidding and the aid offered by the 48-hour cancellation clause were to cause disappointment to the exhibitors in the future.[46]

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[46] United States vs. Paramount Pictures Inc., et. al., Civil Action No. 87-273. Stipulation filed in United States District Court for the Southern District of New York, August 14, 1968. See also Letter from Peter Fishbein, Counsel to N.A.T.O., to Judge Palmieri, November 15, 1974.

CHAPTER IV

THE PRACTICE, THE JUSTICE DEPARTMENT, AND THE PARTICIPANTS, 1968-1978

The ink on the 1968 stipulation was barely dry before many exhibitors began to denounce the anticipated success of the agreement. In less than one week following the court order one exhibitor wrote Maurice Silverman, the Anti-Trust Division's negotiator for the stipulation:

> It is inconceivable to me that the Department of Justice can be so blind itself as to sponser this plan . . . I think that the position of the exhibitor in the United States has simply deteriorated from one low point to another . . . There is no other industry in the country where these conditions would be tolerated. I simply cannot understand the Department's position.[1]

Even some of the minor distributors were pessimistic concerning the future effectiveness of the stipulation. Buena Vista, the distribution arm for Walt Disney, felt that the goal of the stipulation should have been the promotion of competition within distribution for playdates based solely on quality of product. Concerning the possibility of this happening Buena Vista stated:

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[1] JDF - Letter from Exhibitor [name withheld] to Maurice Silverman, Anti-Trust Attorney, August 19, 1968.

> Frankly, without wishing to appear cynical or pessimistic in any way, Buena Vista doubts this will be the case . . . some two or three dozen competing pictures will continue to be blind-bid every year . . . since most of this continued blind-bidding will probably relate to the no-school playdates . . . it is hard for any but the most hopeful optimist to foresee a substantial reduction in the premature engrossment of desirable playing time . . .[2]

Under a cloud of disapproval from both exhibition and distribution the history of the stipulation period in blind-bidding had begun. Because of the very nature of blind-bidding, the Department of Justice found it difficult to monitor the stipulation's effectiveness during the first two-year period. Since the major distributers licensed most of their 1969 releases prior to the stipulation through blind-bidding, the first stipulation was practically half over before the Department could measure its progress towards reducing the practice. Consequently when the stipulation expired in December 1970 discussions were already under way to engineer a two-year renewal of the stipulation.[3]

One of the leading promoters for the renewal was Judge Palmieri. The District Court judge spoke out in

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[2]JDF - Letter from Joseph J. Laub, Vice-President and General Counsel to Buena Vista, to Maurice Silverman, November 8, 1968.

[3]JDF - Memorandum by Maurice Silverman, October 15, 1968. The department spent most of their time granting exceptions to the three picture limitation rule during the early part of the first stipulation period.

favor of such a renewal on November 24, 1970 at an acquisition hearing involving, ironically, National General Circuit. After the hearing, National General's legal counsel, Harold A. Lipton, wrote Palmieri urging the Judge to conclude the renewal at the earliest possible time.[4] At this same time Maurice Silverman was discussing the subject of a renewal with Adolph Schimel, Universal's General Counsel. Silverman requested that Schimel explore each of the seven other signatory companies on their inclinations concerning an extension. By December 4 Schimel's survey was complete and the distributor's desire to renew the stipulation expressed to Silverman. Because of the lateness in the year Silverman recommended that the extension be entered into "nunc pro tunc" (i.e., retroactive) as soon as a formal extension could be drawn up following the first of the year.[5] The extension was informally agreed to on Christmas Eve 1970 when Schimel's letter of acquiescence to Silverman's recommendations was received by the Department.[6] Formal agreement was not reached until June 1971 because Silverman had to duplicate his efforts of acquiring the

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[4] JDF - Letter from Harold Lipton, General Counsel to National General Corporation, to Judge Edmund Palmieri, November 30, 1970.

[5] JDF - Richard W. McLaren, Assistant Attorney-General, by Maurice Silverman, to Adolph Schimel, General Counsel to Universal, December 4, 1970.

[6] JDF - Schimel to Silverman, December 24, 1970.

voluntary agreements of the minor distributors.[7]

While Silverman was attempting to complete the formal extension process in the Spring of 1971, the National Association of Theatre Owners (N.A.T.O.) tried once again to secure a court hearing from Palmieri concerning their position towards the practice of blind-bidding. During this time N.A.T.O. notified the Department of Justice that the organization was not going to oppose the extension. Additionally N.A.T.O. served notice to the Department that they were in the process of conducting their own analysis into the effects of the stipulation and blind-bidding. To assist them in this study the exhibitor's trade organization requested that the Department furnish them with certain records and documents.[8] In late May 1971 Silverman informed N.A.T.O., after Palmieri deferred responsibility to N.A.T.O.'s request for hearings, that no hearings were likely in the future. Then Silverman updated the organization on the status of the extension,[9] and later he notified them

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[7]JDF - See Letters Silverman to A.B.C., C.B.S., Cinerama, and Buena Vista, April 21, 1971; Columbia Pictures to Silverman, April 29, 1971; and Silverman to Schimel, July 9, 1971.

[8]JDF - Eugene Picker, President of N.A.T.O., to Judge Edmund Palmieri, May 3, 1971.

[9]JDF - Walker B. Comegys, Acting Assistant Attorney-General, by Maurice Silverman, to Eugene Picker, May 26, 1971. See also Silverman to Palmieri, May 26, 1971; Palmieri to Silverman, May 28, 1971; and Picker to Palmieri, May 12, 1971.

that their request for Departmental records would be denied--at least for the present.[10]

It is not known at this time whether or not N.A.T.O. ever obtained these records. We do know that N.A.T.O. continued to go forward with their analysis. By August 1972 the exhibitor trade organization became sufficiently convinced that the stipulation's effects were running counter to the goals envisioned by Silverman. The cause of this was clear--the 48-hour cancellation clause. The exhibitors pointed out to Silverman that by placing a 48-hour cancellation clause in each license the distributors could blind-bid all the films they desired. Silverman, after being adequately convinced by N.A.T.O. that the frequency of blind-bidding was on an increase, decided to follow these matters up with the distributors with further discussions.

With these discussions Silverman hoped to tighten up the loopholes surrounding the use of the cancellation clause. It became obvious to Silverman following these discussions that the distributors had discovered the hidden benefit in the use of the cancellation clause. The distributors first rejected the idea that the clause be eliminated altogether, and then dismissed the suggestion that a quota be placed on its use. Silverman then suggested

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[10]JDF - Richard W. McLaren, Assistant Attorney-General, by Maurice Silverman, to Seymour I. Feig, General Counsel to N.A.T.O., June 22, 1971.

that there be a requirement that a picture licensed subject to the 48-hour cancellation clause be screened either 60 to 90 days prior to its playdate so as to give the exhibitors a reasonable opportunity to seek a substitute if the clause was exercised. According to the distributors the best they could do would be to get the films to the exhibitors seven days prior to release date instead of 60 to 90 days. Having failed in his first three efforts at compromise Silverman offered one more enticement to the distributors in his efforts to correct the abuse of the clause. The veteran Anti-Trust attorney stated he would increase the number of films the distributors could blind-bid (without the 48-hour cancellation clause) from three to four if they would eliminate their use of the clause. As could be expected the distributors adamantly rejected this suggestion as well.[11]

By the end of the second stipulation period in December 1972 Silverman still had not achieved any progress towards modification of the stipulation. Thus by late January 1973 Silverman sought to renew the stipulation in its present form since it was the best he could do at the time. Silverman started the renewal process by requesting Samuel Reice of Columbia's Legal

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[11]JDF - Maurice Silverman to Bernard Hollander, Chief of the Judgement Enforcement Section, October 23, 1974.

Department to gather up the necessary signatures from the other distributors in order to extend the stipulation for two more years through December 1974.[12] Exhibition, specifically the National Association of Theatre Owners, on the other hand was not in favor of an extension this time. N.A.T.O. requested that the Department delay this process in order for the exhibitor trade organization to complete its analysis on the stipulation. For over a year N.A.T.O., denied Departmental records, had been collecting data concerning blind-bidding through questionnaires, interviews, and various trade publications. Nearing the end of their study N.A.T.O. wanted the Department to delay renewal until their analysis was complete.[13]

This the Department did for almost four months. But by May 1973, with no report at hand, Silverman began to start the renewal machinery back up once again. As Silverman was into the motions of this renewal N.A.T.O. called once again requesting a delay in the renewal procedures. Almost frantic the exhibitor trade organization told Silverman that they were close to completion and that they were confident the research would conclusively prove how poor the stipulations had

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[12] JDF - Thomas Kauper, Assistant Attorney-General, by Maurice Silverman, to Samuel Reice, Columbia's Legal Department, January 26, 1973.

[13] JDF - Peter Fishbein, N.A.T.O. Counsel, to Judge Edmund Palmieri, November 15, 1974. See also Silverman to Hollander, September 5, 1974.

worked.[14] Silverman agreed to continue the delay, and set up a future meeting between N.A.T.O. and the Government to review their findings for July.

On July 2, 1973 according to N.A.T.O. "extensive and detailed data" was presented to Silverman and other Anti-Trust Division officials indicating that the defendant-distributors were not only in violation of the stipulation, but the original Paramount decrees as well. N.A.T.O.'s data pertained to the releases of six of the seven major distributors (United Artists excluded) during the calendar years 1971 and 1972. The data demonstrated that these companies had blind-bid 124 films out of 151 released in that period. The N.A.T.O. research indicated three companies had violated their limit of blind-bid films without a 48-hour clause. The most disturbing revelation in the report concerned the number of films blind-bid following either a sneak preview or trade screening. Over seventy-five films were screened one way or the other, prior to the due dates for bids, and then were subsequently blind-bid to other exhibitors. Additionally, another twenty-three films were sneak-previewed before due dates for bids and then subsequently

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[14] JDF - Silverman to Hollander, October 23, 1974. See pages 9 and 10. During this period (January to May 1973) of no formal or informal agreement towards a renewal the major distributors still continued to adhere to the provisions of the stipulation on a voluntary basis.

blind-bid as well. All in all over one-half of the total productions in 1971 and 1972 had been either screened or sneak previewed to selected audiences and then licensed on a blind-bid basis. To N.A.T.O. this proliferation in blind-bidding and its discriminatory ramifications was wreaking economic hardships for many of its exhibitors. Based on these findings N.A.T.O. recommended to the Department that they " . . . institute proceedings before the court supervising the decrees to obtain an order prohibiting blind-bidding."[15]

Silverman was impressed enough from these figures to cancel further renewal efforts and to embark on his own follow-up studies on the contents of the N.A.T.O. report. This follow-up began in August 1973 when Silverman requested from each of the seven major distributors their complete financial and licensing history of all films produced and distributed since January 1, 1971.[16] Many of the distributors balked at the scope of Silverman's request. Bernard Segelin, an M.G.M. official, for one, told Silverman that his company only kept detailed records in

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[15] See N.A.T.O. memorandum "Matters Presently Pending Before the Anti-Trust Division In Which N.A.T.O. has Requested Action Against the Motion Picture Distributors." See also letter Fishbein to Kauper, August 7, 1974.

[16] JDF - Kauper, by Silverman, to Columbia Pictures, et. al., August 17, 1973. For a closer examination of the specific requests see Table 10 in the Appendix. The letter in its entirety is reproduced.

regards to competitive bidding since January 1, 1973; hence, it would become a mammoth undertaking to complete this request. Unfortunately, it is not known in 1980 whether or not if Silverman was ever successful in obtaining this information from the distributors. If Silverman was successful then there is detailed information available to indicate the degree of blind-bidding within the industry between 1971 and 1973. The release of this information would go a long way towards completing the puzzle surrounding the actual degree of blind-bidding within the industry.[17] We do know Silverman spent the remaining months of 1973 and most of 1974 attempting to seek definite modifications in the stipulation. It is also known that N.A.T.O. was sufficiently convinced of the Department's efforts to verify the analysis and conclusions presented at the July 2, 1973 meeting. During the period which Silverman conducted his follow-up studies N.A.T.O. was continuously kept up-to-date to the anti-trust attorney's progress.[18]

In May 1974, with the distributors and Silverman

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[17] JDF - Bernard Segelin to Silverman, August 24, 1973. The information from file #60-6-86 in the Anti-Trust Division was obtained through the Freedom of Information Act. Some thirty-two pages in documents, however, were sequestered by the Department. It is conceivable that the results of Silverman's August 1973 request is part of this information.

[18] JDF - Memorandum by Silverman, October 31, 1973.

still locked in an impasse in regard to modifications in a future formal extension of the stipulation, Peter Fishbein, N.A.T.O.'s General Counsel and one time Aide to Robert Kennedy, followed up on Silverman's progress with Thomas Kauper, the Division's Assistant Attorney-General. After being informed that no progress had yet been made, Fishbein asked Kauper for an additional update on the anti-trust activities recommended by N.A.T.O. at the July 2, 1973 meeting. In a preface to his request Fishbein alerted Kauper to the fact that since the July 1973 meeting Warner Brothers had acquired the minor distributor, National General Pictures, and United Artists had acquired the distribution rights of M.G.M. To the N.A.T.O. counsel these actions seemed to solidify the necessity to institute anti-trust proceedings immediately.[19]

These pleas by N.A.T.O. again fell on seemingly deaf ears. No action took place against the distributors during the summer of 1974 nor was there any evidence that the intensely sought modifications were eminent. In August 1974 the Anti-Trust Division publicly announced that a major effort toward attacking " . . . anti-competitive industries . . ." particularly the more concentrated ones, was being launched. When Fishbein read these reports he wrote Kauper reminding him that

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[19]Fishbein also complained about the recent four-walling by Warner Brothers as well as their practice of showing their own films on their own pay-T.V. system.

motion picture distribution was one of the more concentrated industries. To illustrate this point Fishbein alerted Kauper to the fact that the top nine distributors garnished over 85 percent of the total gross reviews in 1973.[20]

Kauper became convinced enough from Fishbein's reminders to set up a meeting with the N.A.T.O. attorney to review all the matters currently pending involving the motion picture distributors. However, as events demonstrated the real purpose of the August 12, 1974 meeting was simply to reassure N.A.T.O. that the Department had not discarded the N.A.T.O. requests and conclusions. Kauper did review the progress of each of the requests N.A.T.O. had brought up since the July 2, 1973 meeting.[21]

While Fishbein and Kauper were carrying out their dialogue, Silverman was busy attempting to hammer out a formal extension to the stipulation. There is ample evidence available to support the conclusion that Silverman did come close to achieving the modifications sought in the stipulation. The anti-trust attorney did hold several lengthy discussions with each of the distributors during the summer of 1974. Enough progress had been made by September to prod Silverman into

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[20] JDF - Fishbein to Kauper, August 7, 1974.

[21] JDF - Thomas E. Kauper, by Michael B. Green, Anti-Trust Attorney, to Peter Fishbein, September 23, 1974.

confessing to his supervisor, Bernard Hollander, that considerable progress had been made toward agreement on a tightened stipulation.[22] Sufficient progress indeed had been made to the point where Silverman and the distributors were discussing the final wording of the renewed court order. Yet the talks and the modifications fell short somewhere in the Fall of 1974, and the stipulation was destined never to be formally extended nor revised.[23]

The reasons why this highly sought and highly fought for modified stipulation never materialized remain incomplete. We do know that Silverman succeeded in obtaining three concessions from the distributors. A review of these concessions raises extreme doubts as to whether or not N.A.T.O. would have viewed these points as real modifications. Obviously Silverman concluded as much which offers one possible explanation as to why the talks broke down. In any event Silverman's accomplishments were: an agreement by the distributors not to blind-bid when prints are available, notification by the distributors to the Department as to when the prints do become available for films subsequently blind-bid, and, an obligation by the distributors to make every effort possible to secure prints for each film as soon as possible. On the most

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[22] JDF - Silverman to Hollander, September 5, 1974.

[23] JDF - Silverman to Georgiana Morrison, Warner Brothers Legal Department, August 8, 1974. Evidence here indicates Silverman met with Warner Brothers on July 30 and July 31 to work out wording on the final stipulation.

controversial subject, the 48-hour cancellation clause, Silverman failed to achieve any success in dislodging the distributors from their favorable position towards the clause.[24]

As to the Department's future role in the history of blind-bidding, the period from September 1974 to February 1975 was indeed a critical time. First, specific solutions to the blind-bidding problem were discussed and then abandoned. Secondly, the Department decided not to renew the stipulation thus abdicating its role as monitor in the affair. On September 10, 1974 Fishbein called Silverman to inform him of two recent developments. These concerned the fact that the major distributors had already blind-bid their Christmas releases by August, and that the controversy surrounding films licensed by blind-bidding and then appealed to the Motion Picture Rating Board (where certain exhibitors get to view a rough cut of the final print) was brewing once again. As their conversations progressed, talks concerning possible solutions to blind-bidding evolved. First, Fishbein brought up the suggestion that a time limit be placed on the distributors prior to the scheduled release date as to when a film could be licensed through blind-bidding or not. This often mentioned suggestion was dismissed by

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[24] JDF - Silverman to Hollander, October 23, 1974, p. 10.

Silverman because of the unlikelihood the distributors would participate. Fishbein's second suggestion was certainly more innovative, but somewhat less pragmatic. This idea provided that the distributors not be able to blind-bid a film before its release date unless and until a competing distributor offered a picture on a non-blind-bid basis. In effect Fishbein hoped the Department would aid in creating an environment in which each exhibitor could always pick between a screened product or a blind-bid project. Silverman explained to Fishbein that the distributors would not agree to this proposal either. Nonetheless, Silverman did explain the Fishbein idea to both United Artists and Warner Brothers. The two movie distributors reacted negatively towards the idea because it would establish a situation in the industry in which all the distributors would have to keep up with everyone else's production schedule.[25]

By November 1974 N.A.T.O. began to become somewhat apprehensive towards the stipulation issue and its future. It had been sixteen months since Fishbein introduced the documentation contrary to the goals of the stipulation to the Department, and nothing helpful had resulted to date for the exhibitors. There had been no modifications nor any anti-trust proceedings. To N.A.T.O.,

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[25] JDF - Memorandum by Silverman, September 13, 1974.

with the end of the calendar year in sight and with it an end to the voluntary agreements by the distributors to follow the stipulation, they were now facing a critical uncertainty as to the degree of blind-bidding to be allowed in the immediate future. Experiencing little success from its previous appeals to the Department, N.A.T.O. decided to turn to Judge Palmieri for assistance.

On November 15, 1974 Peter Fishbein appealed to Palmieri for hearings on blind-bidding. Earlier Silverman had briefed Fishbein on the proposed modifications. Fishbein, obviously dissatisfied with these concessions, felt that all bidding should be delayed until prints were available. Fishbein in his letter to Palmieri outlined a brief history of the Judge's role in the saga of blind-bidding from the 1965 Los Angeles hearings up to the July 1973 meeting between Silverman and N.A.T.O. The climax in the history came when Fishbein exposed the results of N.A.T.O.'s two and one-half year study into the effectiveness of the stipulations. According to N.A.T.O.'s research Fishbein offered Palmieri four basic conclusions. These were: at least two different distributors violated the three picture limitation requirement (films licensed without the 48-hour cancellation clause), 84.3 percent of the defendant-distributors products were blind-bid between January 1, 1971 and July 1, 1973, the 48-hour cancellation clause was exercised only twice during this period, and in terms of

discrimination over one-half of the films licensed through blind-bidding either were sneak previewed or otherwise screened before the due date for bids.[26] The results of the N.A.T.O. study is shown in Table A, page 120.

The conclusions of N.A.T.O.'s study disturbed Palmieri. As a result the Judge contacted Silverman for advice. Silverman told Palmieri not to be concerned about responding to Fishbein's appeals, and that this would be done in Washington, D. C. by the Justice Department. Embarking on this objective Silverman arranged a meeting between N.A.T.O. and the Department for November 26, 1974. At this meeting Silverman admitted to N.A.T.O. that the future of the stipulation was in great jeopardy.[27]

This was the first time Silverman and the Department publicly announced that the chances of an extension were practically nonexistent. Yet a review of

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[26] JDF - Fishbein to Palmieri, November 15, 1974. Concerning alleged violations of the stipulation by any distributor Silverman remained dubious. The anti-trust attorney felt this way because he came to realize that with the 48-hour cancellation clause the distributors could always obtain the desired result (blind-bidding) without having to violate the stipulation. See Memorandum from Charles Brooks, anti-trust attorney, to Bernard Hollander, February 27, 1976.

Another reason why N.A.T.O. was so apprehensive about the future was a rumor concerning the retirement of Silverman was abound at the time. Silverman would not retire until 1975.

[27] JDF - Memorandum by Silverman, December 23, 1974.

TABLE A

RESULTS OF N.A.T.O.'S STUDY ON BLIND-BIDDING

(Inclusive 1971, 1972, and through July 1, 1973)

Distributor	Total pictures	Total blind-bid	Total blind-bid with no 48-hour clause	Total with a 48-hour clause	Number of pictures where 48-hour clause used	Number of pictures screened before due date on bids	Number of pictures sneak previewed
United Artists	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Universal	24	13	0	13	0	7	0
Fox	39	38	5	33	0	27	10
Paramount	29	25	11	14	0	13	2
Columbia	40	23	12	11	0	7	2
Warner Brothers	36	36	6	30	2	26	13
MGM	48	47	8	39	0	20	3
Total	216	182	42	141	2	96	30

events leading up to the November 26, 1974 meeting offers support to the idea that the Department and Silverman were coming to this decision. Dating back to the summer meetings with the distributors Silverman came to realize the Department and the Anti-Trust Division were becoming more and more entangled in this dispute as a mere regulator rather than enforcer. The prospects of this entanglement became worse as the modifications and concessions were being hammered out. Concerning one proposed modification, the notification to the Department as to when prints do become available, Silverman, after contemplating it awhile, confided to Hollander that this concession " . . . would permit some policing on our part on a continuous basis."[28] This growing uneasiness toward a revised stipulation became more pronounced in Silverman following his September 10 conversation with Fishbein. In the course of this conversation, proposed solutions to blind-bidding were discussed. One solution, recommended by Fishbein, suggested the distributors be restrained from blind-bidding until specified times prior to the release date unless and until a competing distributor offers an alternate film on a non-blind-bid basis. Concerning this complicated solution Silverman wrote in his files: "I, myself, seriously doubt that the procedure

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[28] JDF - Silverman to Hollander, October 23, 1974, p. 10.

is workable. Furthermore, it would get us into a policing problem which I believe we should avoid."[29] By December 1974 Silverman was personally convinced the stipulations had not only failed but they had created more problems the Department had to deal with. The main problem was that it had transformed the Anti-Trust Division into the role of regulator.[30]

Sometime in late January 1975 the Anti-Trust Division decided not to participate in either an extension or a revised stipulation regarding the practice of blind-bidding.[31] The Department did not make the decision known to the participants until February 14, 1975. At that time each of the defendant-distributors received a letter from Silverman announcing the Department's decision. The distributors were reminded that the Department was going to continue to enforce the original Paramount decrees, particularly the one that required all feature films to be licensed "without discrimination in favor of any theatre." To assist the distributors Silverman pointed out several examples of what the Department considered "clear instances of discrimination."

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[29] JDF - Memorandum by Silverman, September 13, 1974.

[30] JDF - Baddia J. Rashid, Director of Operations, Anti-Trust Division, to Thomas Kauper, December 12, 1974.

[31] JDF - Memorandum by Silverman, December 23, 1974.

These were:

1. It is discriminatory to screen for some of the bidding or negotiating exhibitors in a given local market and not for others.

2. It is discriminatory to screen for the exhibitors in one local market and not for those in another if there is an exhibitor involved who operates theatres in both markets.

3. It is discriminatory to screen for the exhibitors in a given local market at a place distant from that local market if any exhibitor in the market concerned also operates theatres in or near the locality where the screening is being held.

4. . . . blind-bidding and blind competitive negotiations should be avoided after production or other sneak previews except where you can be positive that no other exhibitor has attended.

5. It is discriminatory to have products passed upon the Appeals Board of the Code and Rating Administration on which exhibitor representatives sit and then bid or have competitive negotiations for the picture on a blind basis in local markets in which any of the exhibitor representatives operate theatres . . .[32]

On the same day that the distributors were notified Silverman wrote Fishbein and Palmieri explaining the decision. In the letter to Fishbein Silverman promptly pointed out the reason behind the decision:

> . . . the Division feels that the original stipulation was of a regulatory nature and that the proposed revised stipulation is even more so. Since the Anti-Trust Division is not a regulatory agency, the decision has been made not to continue an activity which it is felt did involve us in a regulatory role.[33]

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[32] JDF - Thomas Kauper, by Maurice Silverman, to Columbia Pictures, et. al., February 14, 1975.

[33] JDF - Kauper, by Silverman, to Fishbein and Palmieri, both dated February 14, 1975.

Although N.A.T.O. surely expected as much, Fishbein was still taken aback by the announcement. The N.A.T.O. counsel immediately contacted Silverman following the receipt of his letter. Fishbein asked if the Department had been pressured by the distributors or even politically to succumb. To both inquiries Silverman responded in the negative and merely reiterated the reasons explained in the letter.[34]

The six year experiment to reduce blind-bidding failed because the 48-hour cancellation clause permitted the distributors to blind-bid at their discretion just as they had done before. The thinking behind the institution of the clause was to grant the exhibitors a degree of protection from a film licensed through blind-bidding that later, upon its screening, proved not to be of his liking. Silverman traced the problems surrounding the clause back to its inception. According to Silverman the exhibitors simply misunderstood how it worked. Exhibitors complained that the screenings inevitably took place such a short time prior to the release date or playdate that in the event the film proved to be a disaster there was little time offered to find a substitute. Compounding the problem in securing a substitute was the fact that the other desirable films had already been

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[34] JDF - Memorandum by Silverman, March 4, 1975.

booked to other exhibitors through blind-bidding. The confusion on the part of the exhibitors stemmed from the misunderstanding as to when they could cancel out. The exhibitors thought they could only cancel out after they screened the film, but in reality it could have been done any time from the time the license was contracted until 48 hours after the screening.[35]

Exhibitors were also concerned about distributor retaliation if the clause was exercised. Indeed there were instances of distributor retaliation reported to the Department by exhibitors.[36] In his follow-ups to these reports Silverman rarely found evidence of true retaliation.[37] Yet the loudest of the exhibitor complaints toward the clause, concerning its contribution to the increased frequency in blind-bidding, could not be challenged.[38]

It was this contention, founded in the 1973 N.A.T.O. Study, that spurred Silverman on to his final stage of negotiations on the practice. In these discussions with the distributors, which centered around the envisioned elimination of the 48-hour cancellation clause, Silverman

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[35] JDF - Silverman to Hollander, October 23, 1974, p. 5.

[36] JDF - Memorandum by Silverman, May 2, 1973.

[37] JDF - Silverman to Hollander, October 23, 1974, p. 5.

[38] JDF - Rashid to Kauper, December 12, 1974.

learned of certain examples of exhibitor abuse of the clause as well. According to the distributors, there were some exhibitors who used the clause to cancel out pictures they never intended to screen in the first place. This was done, in effect, to keep the products away from competing exhibitors. In this area the distributors admitted retaliatory measures toward these exhibitors. A degree of retaliation Silverman condoned as long as the distributors could first demonstrate that the exhibitor had in fact negotiated in "bad faith."[39]

Following the abdication notice by the Department the subsequent history of the use of the 48-hour cancellation clause is a varied one. Ironically, many of the distributors temporarily abandoned the practice while others continued to adhere to the provisions of the stipulation on a voluntary basis.

The reason why some of the distributors temporarily abandoned the practice was because of much confusion concerning the practice following a round of discussions with the Department in early 1975.[40] These talks were founded by a series of exhibitor complaints against discriminatory bidding by the distributors as outlined in

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[39] JDF - Silverman to Hollander, October 23, 1974, p. 11.

[40] The abandonment would prove only temporary. In late 1977 many of the distributors will reintroduce the practice in efforts to quiet the furor surrounding the anti-blind-bidding legislative crusade.

Silverman's February 14, 1975 letter. The exhibitors complained that Paramount's Nashville, Universal's Jaws, and Columbia's The Fortune and Bite the Bullet had all been licensed through blind-bidding following a sneak preview.[41] In each of these cases Silverman and the Anti-Trust Division followed up. When Silverman spoke to Universal concerning Jaws, a lengthy discussion soon developed around the 48-hour cancellation clause. Universal asked Silverman if it was discriminatory to extend the use of the clause in licenses earlier awarded prior to any screening, but in fact screenings had occurred between the time the awards of licenses were made and the time the official screening to the exhibitor. Silverman, who had discussed just this very point with Paul Roth, President of N.A.T.O., some time earlier, admitted that in his position he felt it was discriminatory.

Roth pointed out three reasons to Silverman why this would be unfair. First, the winning bidder could use the clause as a wedge in renegotiations for lower terms. Secondly, the winning bidder could, after viewing the film at a preview, hold on to it until the official screening and then let it go, in the meantime keeping the product away from competitors. Thirdly, a large exhibition

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[41] JDF - Memorandum by Silverman, June 16, 1975; Memorandum by Charles Brooks, May 1, 1975; Sanford Wilk, Columbia General Counsel, to Silverman, April 23, 1975; and, Roth to Silverman, April 11, 1975. In two of these cases the distributor alerted the Department of the alleged discrimination prior to a Departmental query.

chain might bid a picture into a number of theatres with the idea of letting it go in a few places--if guarantees and advances are involved, which they often were. By so doing the large chain would be in a position to tie up money which their smaller competitors could not do. After Silverman relayed this information on to Universal they soon decided to abandon the practice of using the 48-hour cancellation clause altogether. Soon other distributors copied the policy of Universal, and as a result the use of the clause reduced significantly in the years following the Department's abdication and the beginning of the anti-blind-bidding battle.[42]

During this brief two-year period the Division continued to be embroiled in the saga of blind-bidding despite the notice given in the February 14, 1975 letter. The Division continued to field exhibitor complaints involving discriminatory licensing as outlined in Silverman's letter. By 1976 another problem surrounding the Silverman letter surfaced. Many exhibitors complained that some of the distributor's sales representatives had interpreted the Silverman letter as the Division's wholesale approval of blind-bidding.[43] One attorney, representing

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[42] JDF - Memorandum by Charles Brooks, May 8, 1975.

[43] In April 1975 the Senate Subcommittee on Anti-Trust and Monopoly investigated the motion picture industry and blind-bidding, but no actions resulted against the distributors. See letter from Senator Phillip Hart to Thomas Kauper, April 8, 1975.

a large non-N.A.T.O. affiliated exhibition chain told the Division he informed his clients, after they had encountered several distributors who were citing Silverman's letter as " . . . authority for blind-bidding in any local market," in his view blind-bidding not only violated the anti-trust and copyright laws but the Paramount decrees as well. The attorney for the large exhibition chain urged the Department to allow the exhibitors to test the validity of these points in private litigation without being at a disadvantage because of the distributor's reliance on the Silverman letter.[44]

Charles Brooks, who assumed Silverman's role in the blind-bidding controversy after the veteran attorney retired, wrote back to the attorney in question, explaining the history behind the Department's actions leading up to the Silverman letter in February 1975. Brooks made it clear that Silverman's letter only referred to the Paramount decrees; thus it took no position on the legality of blind-bidding under the anti-trust laws. Accordingly Brooks could not see how the Silverman letter could be " . . . a source of embarrassment to the exhibitors in private litigation . . . ."[45] The attorney's reply

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[44]JDF - Letter from Counsel [company and name of attorney withheld] to Thomas Kauper, January 20, 1976.

[45]JDF - Kauper, by Brooks, to Counsel name withheld , March 4, 1976.

indicated his dissatisfaction in Brooks' explanation in regards to the Department's actions leading up to the Silverman letter:

> This raises an important question as to the present public utility of the decrees entered in the above case [Paramount] more than twenty years ago. They are regulatory in form and whether you make stipulations with the defendants or write them letters of interpretation you are indeed performing a regulatory function . . .[46]

In 1977 the National Association of Theatre Owners embarked on an ambitious plan to enact anti-blind-bidding laws on the state level. The first year of their plan experienced little luck. The exhibitors found combating the distributors and the Silverman letter too difficult at first. However, in March 1978 the Division indirectly intervened in this dispute and evened matters up somewhat. The counsel for the large non-N.A.T.O. affiliated exhibition chain who had complained in 1976 about the misinterpretation of the Silverman letter by the distributors, and the National Association of Theatre Owners both participated directly in allowing the Division eventually to even matters up somewhat for the anti-blind-bidding crusade on the state level. On February 10, 1978 N.A.T.O. presented Robert Rose and Joseph Saunders, Anti-Trust Division attorneys, with a devastating legal attack against the practice of blind-bidding. Later that

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[46]JDF - Letter from Counsel [name withheld] to Kauper, March 15, 1976.

month the same two Division attorneys heard another legal attack against the practice by the counsel from the large non-N.A.T.O. affiliated exhibition chain.[47]

The Department's non-committal stand toward blind-bidding since the Silverman letter began to shift at this point. Shortly after these meetings Saunders answered a letter from the Legislative Counsel Committee of Oregon which was currently debating the anti-blind-bidding law in its legislature. The committee asked for the Department's views on the practice which Saunders called, after presenting a brief history of the Division's role in the practice, " . . . a practice of dubious competitive merit."[48]

In April, a month after Saunders responded to the Oregon query on blind-bidding, John Shenefield, the Division's new Assistant Attorney-General, answered a similar letter from a representative in the Massachusetts state legislature, which was also currently hearing anti-blind-bidding proposals. Shenefield's five page response was earth-shaking, to both distributors and exhibitors alike, but for different reasons. In one quick swoop Shenefield negated the effects of the Silverman letter as

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[47] JDF - Letter from Counsel [name withheld] to Robert Rose, February 21, 1978. See also N.A.T.O. News Release, April 25, 1978. The development of the anti-blind-bidding crusade and its objectives and motives are given considerable attention in the following chapter.

[48] JDF - Joseph Saunders, Anti-Trust Attorney, to Brad Swank, Deputy Legislative Counsel, State of Oregon, March 14, 1978.

a shield for the distributors by providing the same type of protection for the exhibitors. In statements heretofore never publicly announced by a Departmental official Shenefield admitted that as a result of blind-bidding exhibitors were placed at a disadvantage to distributors in bargaining strength. The Assistant Attorney-General went on to state that blind-bidding was " . . . an anomaly in a system which is based on open competition and free choice . . .," and that " . . . the practice produces relatively few benefits in comparison to its detrimental effect." Shenefield concluded by informing the state legislature in Massachusetts that they " . . . could appropriately conclude that public policy considerations weigh in favor of anti-blind-bidding legislation."[49]

Since the publication of the Stenefield letter it has received wide circulation in the various state legislatures and into the hands of countless attorneys and lobbyists both for and against blind-bidding. Needless to say N.A.T.O. hailed the letter as something just short of a landmark decision. While on the other side the Motion Picture Association of America, the distributor's trade organization, dashed off two lengthy memos to the Department attempting to refute every point

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[49]JDF - John H. Shenefield, Assistant Attorney-General, to David J. Swartz, Representative-Massachusetts State Legislature, April 21, 1978.

made by Shenefield in addition to a demand that the Division retract the letter.[50]

While Shenefield never retracted the contents of the letter he did write Representative David Swartz a clarifying letter. In this response Shenefield reiterated that his conclusions were based " . . . on available information obtained in the course of our anti-trust enforcement activities . . .," and that the Department " . . . believe(s) that our evaluation of the available data resulted in correct tentative conclusions, we wish to emphasize the continuing nature of our investigation of blind-bidding."[51]

It is difficult at this point to measure the effectiveness of the Shenefield letter on the anti-blind-bidding crusade and the future of the practice as well. At the time of the letter only four states had passed such legislation forbidding blind-bidding. Since that time an additional fifteen states have enacted such laws. Shenefield's letter represented the sole source of encouragement exhibition had heard since it began combating blind-bidding in 1955. The Department did

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[50] N.A.T.O. Flash Bulletin, May 8, 1978. See also M.P.A.A. memorandums April 27, 1978 and May 9, 1978 to the Department of Justice.

[51] JDF - Shenefield to Swartz, May 9, 1978.

attempt to reduce the practice in 1968 after years of fielding complaints and investigation. The effort fostered the widespread adoption of the 48-hour cancellation clause which earmarked the stipulation for failure. N.A.T.O. realized this sooner than the Department and embarked on their own study to prove the disastrous effects caused by the stipulation. The Department became convinced that the 48-hour clause was a detriment, and they then made efforts to eliminate or modify its use. However, during the course of this action the Department discovered it had been and would still be cast in a regulatory role as long as they participated in the monitering of the stipulation. Thus the Division decided to terminate the life of the stipulation and instituted a hands-off policy instead. In doing so the Division abruptly closed their doors to the exhibitors' efforts in correcting the "onerous trade practice." Yet they did show the exhibitors that there was one avenue of relief left--the state legislatures.

CHAPTER V

THE MODEL BILL, THE STATES, AND THE PARTICIPANTS, 1976-1980

Following the Anti-Trust Division's decision to withdraw from further regulatory activities involving the blind-bidding question, the future certainly seemed dismal to the National Association of Theatre Owners. First, the distributors (individually not collectively) had for years refused to correct the problem; secondly, the Department had failed in its efforts to reduce the practice;[1] and finally, the Judge, Edmund Palmieri, had refused assistance as well. Thus, all the possible avenues to relief seemed blocked except one. In 1976 Marvin Goldman, then the President of N.A.T.O., became aware of certain regulations in force in Puerto Rico that were designed to prohibit blind-bidding. Goldman, realizing this approach might be N.A.T.O.'s " . . . only salvation . . .," asked Peter Fishbein, N.A.T.O.'s legal counsel, to draw up similar regulations for the nation's

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[1] A look at the Anti-Trust Division's past record would have given N.A.T.O. some clue as to the degree of success they could have expected from the Department's assistance. Since 1906 the Division has been party to over 900 consent decrees while only in 60 of these cases were contempts filed. See Variety, June 13, 1979, p. 5.

state legislatures to consider. With this decision N.A.T.O. now had enlisted the aid of the state governments in their final effort to prohibit the practice of blind-bidding.[2]

The idea of exhibitors seeking governmental aid to solve this problem was not new. At the opening of the Theatre Owners of America convention in October 1955 many of the exhibitors wanted to solicit the assistance of the Federal Government in correcting the blind-bidding problem and other industry woes. However, these exhibitors were persuaded against this idea by other exhibitors who wanted the energies of the organization to be directed toward more pressing problems, e.g., " . . . the film shortage . . . and unreasonably priced films."[3] This form of control by the more moderate sect of the exhibitors over their volatile peers would remain for the next twenty years until all the other avenues had been exhausted.

Following Goldman's decision to carry the blind-bidding crusade to the state legislatures, Fishbein began preparing the model legislation and the legal research into the proposed bill. When Fishbein completed this

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[2]Letter from Jerome Godron, Special Assistant to the President of N.A.T.O., to the author, September 19, 1980. See also N.A.T.O. memorandum on "Methods of Distributing Motion Pictures to Motion Picture Theatres," January 10, 1980.

[3]New York Times, October 7, 1955, p. 21:3.

task the model bill appeared Spartan in length but its effects would prove Herculean. The model bill, which was to be called the "Motion Picture Fair Competition Act," contained two basic provisions. First, it simply stated that blind-bidding would be prohibited within the state, and secondly, that all films first had to be trade screened before bids could be solicited. The main objective of the second provision was to provide specific bidding procedures so as to ensure open-bidding, which is where all the bidding exhibitors are afforded the opportunity to examine all bids following the awarding of the license.[4] In addition to drafting the model bill, Fishbein drew up certain optional provisions for the state exhibitors to consider. These included articles prohibiting guarantees and advances.[5]

By March 1977 drafting and sophisticating the model bill and the constitutional defense of such legislation was complete. Even at this early stage of the legislative battle N.A.T.O. was well aware that their

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[4]See Memorandum from Joseph Alterman, Executive Director of N.A.T.O., to members of N.A.T.O. in N.A.T.O.'s September 15, 1978 edition of its Anti-Blind-Bidding Legislative Packet, pp. 27-29. See also Stephen Brill. "Litigating Bad B.O." Esquire. September 26, 1978, pp. 17-18. See copy of Model Bill in Table 11 in Appendix.

[5]"Optional Additions to the Motion Picture Fair Competition Act," N.A.T.O.'s September 15, 1978 Legislative Packet, p. 30.

model bill would be ultimately tested in the courts. In preparation for this, and the immediate battles on the floors of the state legislatures, Fishbein prepared a sixteen page memorandum detailing the anticipated legal arguments against the bill to be distributed to the various state chapters of N.A.T.O., who would be responsible for implementing the legislation at the state level.[6] The Fishbein memo alerted the state chapters of N.A.T.O. to four legal arguments they could expect. These were: improper use of the state's police power, interference with interstate commerce, preemption of state legislation in this area by the Federal anti-trust laws or conflict in violation of the supremacy clause, and violation of the due process clause. To each of these anticipated arguments Fishbein drafted a corresponding legal defense. As events subsequently unfolded Fishbein's March 1977 prognostications proved remarkably accurate.[7]

In addition to legal preparation provided by Fishbein, N.A.T.O. also instructed its state chapters on what arguments to expect by their opposition, the Motion Picture Association of America, on the floors of the state legislatures. Jerome Gordon, the Special Assistant to the President of N.A.T.O., who has coordinated

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[6]Peter Fishbein to N.A.T.O., Inc., March 29, 1977, pp. 1-16.

[7]Ibid., p. 3. See also Brill, pp. 17-18.

the anti-blind-bidding crusade since its inception, sent out a four page memorandum entailing eleven anticipated points the M.P.A.A. would counter with. To further aid the state chapters Gordon provided them with " . . . suggested answers" on each of these points.[8]

The battle between N.A.T.O. and the M.P.A.A., over enactment of anti-blind-bidding legislation contains the characteristics of a presidential campaign for votes from the electoral college. N.A.T.O. has sought to adopt the model bill in the most heavily populated states, i.e., the states that deliver the greatest revenue to the industry. Correspondingly the M.P.A.A.'s objective has been to prevent these states, at any cost, from falling into the fold of N.A.T.O. Prior to 1977 N.A.T.O. attempted to enact anti-blind-bidding statutes in some states as early as the Fall of 1976 with little success.[9] By the

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[8]Memorandum on Blind-Bidding Bill by Jerome Gordon, September 15, 1978 edition of N.A.T.O.'s Anti-Blind-Bidding Legislative Packet, pp. 1-2. It will not be the purpose of this and subsequent chapters to analyze the history of each state battle. Instead this chapter will focus on the annual accomplishments and objectives of N.A.T.O. A special emphasis will be placed on three state battles in order to magnify the arguments espoused both by N.A.T.O. and the M.P.A.A. Through these illustrations certain strategies evoked by both sides of the issue will be readily realized.

[9]It is important to remember that N.A.T.O., the national organization, does not directly participate in the state battles, whereas the M.P.A.A. does, for obvious reasons which will be explained later; rather it is N.A.T.O.'s state chapters working in conjunction with independent exhibitors that coordinate the individual state battles.

Spring of 1977 N.A.T.O. better prepared and organized, launched their crusade to eliminate blind-bidding on a grander scale. Legislation was introduced in such states as New York, Pennsylvania, Illinois, Texas, Florida, Oregon, Tennessee, New Hampshire, and Louisiana. Yet by the end of the year only one of these states, Louisiana, had passed the model bill. This poor success is largely attributed to effective lobbying by the M.P.A.A. in convincing the states that films would be delayed to their states some three to six months because of trade-screening. The implications of state revenue crossing into border states with no anti-blind-bidding law made many state legislatures reluctant to become the first state to pass such a law. Eventually N.A.T.O. decided to take an unusual political gamble in order to circumnavigate this crucial stumbling block early in their crusade. In Louisiana N.A.T.O. and the state legislators agreed to postpone the effective date of the law for one year in order to buy time for the envisioned passage of similar legislation in Louisiana's border states.[10]

Although 1977 was not a successful year in terms of gaining acceptance of their model bill, N.A.T.O. did learn many valuable lessons from their initial year of full activity towards prohibiting blind-bidding. They

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[10]Memorandum by Homer Branan, M.P.A.A. Lobbyist to Tennessee, from meeting with Steven Schwartz, Legislative Counsel to the M P.A.A., 1977, p. 9.

learned that one of the other reasons why they failed so much was that many of the state chapters decided not only to seek abolition of blind-bidding but guarantees and advances as well in their legislation. This effort quickly failed in states such as Texas and Illinois.[11] Even though N.A.T.O. conceded the year by the summer, because many of the legislatures had adjourned for the year, there were still a few bright spots in addition to the Louisiana enactment.[12] The model bill did pass the Georgia Senate unanimously before being delayed, and was also approved by both the Alabama House and Senate committees before adjournment.[13] More importantly N.A.T.O. realized that in order to assure maximum success in their crusade they were going to have to play on the "locals versus the outsiders" theory with the state legislatures. This they eventually did with phenomenal success to date.[14]

The M.P.A.A.'s attack against the model bill has been directed through the activities of its legal

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[11] Variety, May 18, 1977, p. 7.

[12] Variety, August 10, 1977, p. 24.

[13] Memorandum by Branan, Ibid.

[14] Variety, November 2, 1977, p. 38. See also Wall Street Journal, August 9, 1979, p. 1:1. Marvin Goldman, then the President of N.A.T.O., appeared at the Illinois debate in 1977, but that was one of the last times that the N.A.T.O. lobbyists brought in an "outsider" in their behalf.

department headed by Barbara Scott and Judy Weiss. In 1978 the M.P.A.A. enlisted the services of Alan Dershowitz, Harvard's Constitutional Law Professor, to mastermind their constitutional challenge to the state laws.[15] The basic strategy of the M.P.A.A. and its lobbyists has been to make every effort possible to ensure the bill is delayed from coming to the floor for a full vote of the legislature. The history of this strategy has borne out its importance. As of September 1980 every time the model bill has reached the floor in a state legislature for a full vote it has passed.[16]

The fruits of the M.P.A.A.'s lobbying strategy are illustrated throughout the course of the entire battle since its beginning. In 1977 in Georgia, a comparably small state, the M.P.A.A. was not even aware when the Senate passed the bill.[17] But in Illinois, a much larger state, Barbara Scott appeared personally to prevent the bill from leaving the Senate Labor and Commerce Committee.[18] In the 1979 Texas battle the

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[15]Brill, p. 18.

[16]Written Address by A. Alan Friedberg, President of N.A.T.O., to the Arizona State Legislature, March 12, 1980. See also Memorandum on the "History of SB-46 (Georgia) and Its Companion Bill HB-19."

[17]Memorandum by Branan, p. 9.

[18]Variety, June 15, 1977, p. 34.

anti-blind-bidding bill was delayed in the House Calendar Committee after being successfully passed unanimously in the Senate and the House Committee alike. There in the House Calendar Committee, which schedules all bills for the House to consider, the bill was delayed by the M.P.A.A. lobbyists thus preventing the full House from considering the measure.[19] A similar incident occurred in the Indiana legislature the same year. After the bill was passed by overwhelming majorities in both the House and Senate the bill was delayed from becoming law by the president pro tem of the Senate who was under pressure from M.P.A.A. lobbyists.[20]

While the M.P.A.A.'s lobbyists and Legal Department were counteracting the anti-blind-bidding movement in the state legislatures, the distributors were busy adopting measures to counter the wave of adverse publicity generated towards them because of the growing public awareness of the practice. Many distributors eliminated closed bidding in 1977 in some of their markets. Previously, only Buena Vista permitted open-bidding, but by the end of the year both Fox and United Artists were participating in open-bidding. Universal and Warner

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[19]Letter from Texas State Senator John A. Traeger, sponsor of anti-blind-bidding bills, to author, September 26, 1980. The Chairman of the House Calendar Committee retired in 1980 raising hopes for passage in 1981.

[20]Variety, May 2, 1979, p. 7. Indiana passed the bill in 1980.

Brothers both announced plans to reinstitute the 48-hour cancellation clause in some of its licenses.[21]

In 1978 N.A.T.O. successfully coordinated the launching of their anti-blind-bidding bill in some forty-five state legislatures. By the end of January the bill was well advanced in thirteen states. Yet, as was the case in 1977, in the key states, such as Florida and Pennsylvania, the bills were being delayed by the M.P.A.A. lobbyists after having been approved by the House in both states.[22] But the highlight of the 1978 campaign was the publication of the Department of Justice's letter by John Shenefield in April (see previous chapter). N.A.T.O. and other exhibitors, now armed with an effective statement against the practice, quickly made use of the Department's proclamation. Within four days of the receipt of the Assistant Attorney-General's letter to Massachusetts Representative David Swartz, copies were

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[21]Brown, p. 8. See also Variety, August 31, 1977, p. 3; Variety, October 12, 1977, p. 5; Variety, December 21, 1977, p. 26; and "Memorandum in Opposition to Ohio HB 806." Other distributors continued to voluntarily follow the provisions of the stipulation despite its official demise.

[22]N.A.T.O. Flash Bulletin, January 27, 1978, and Brill, p. 18. See also N.A.T.O. Flash Bulletin, April 21, 1978; Rosenfield, p. 53; Variety, January 3, 1979, p. 7. For a progress report in some sixteen states as of March 1978 see letter from The Neighborhood Group of Motion Pictures, Richmond, Virginia, to Virginia Delegate Alan Demonstein, February 22, 1978.

dispersed to legislators in New York studying a similar anti-blind-bidding bill.[23] In September 1978 N.A.T.O. reprinted the letter in its anti-blind-bidding legislative packet which it did likewise in subsequent editions. And since the publication of the Shenefield letter, every lobbyist for the bill and every legislator that has considered the bill has been introduced to its contents.[24]

The M.P.A.A., in addition to its two lengthy memos to the Department of Justice, attempted to discredit the source of the publication. In Georgia, M.P.A.A. lobbyists reminded the legislators that the Department's letter was " . . . obtained from a low-level Departmental aide . . . ."[25] Also in 1978 the M.P.A.A. began to make reference to blind-bidding as advance bidding to counter the effectiveness of the N.A.T.O. lobbyists "pig-in-the-poke" arguments. It began that year during the key confrontation in Ohio. In July, Jack Valenti, the M.P.A.A. President, engaged in a newspaper debate over the merits of blind-bidding with Charles Sugarmen, the President of N.A.T.O. of Ohio at the time. In the course of his

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[23] JDF - M.P.A.A. Memorandum to the Department of Justice, April 27, 1978, p. 1.

[24] See N.A.T.O.'s "Blind-Bidding Legislative Packet," September 15, 1978 edition, pp. 14-17, and the October 10, 1979 edition, pp. 80-85.

[25] Memorandum on HB 19/SB-46, "Blind-Bidding" to the Georgia State Legislature from M.P.A.A. lobbyists (undated).

statements Valenti made reference that blind-bidding was actually " . . . advance bidding which is in the interest of the movie goer. It allows the truly entertaining film to be scheduled for release at Christmas or Easter or the summer and not delayed . . . ."[26] From here the term advance-bidding became the M.P.A.A.'s substitute jargon for blind-bidding in all its literature against anti-blind-bidding laws.[27]

Interaction between N.A.T.O. and the M.P.A.A. during 1978 centered around two events. In August N.A.T.O. President Marvin Goldman warned Jack Valenti against informing certain state legislatures that film products would be withheld from their states if they voted for the prohibition of blind-bidding. Subsequent events have shown that no films have been intentionally delayed by distributors. This is true because of basic economic survival than threats from N.A.T.O. and Goldman.[28] In October, speaking at N.A.T.O.'s annual convention Valenti called for an end to the "bloody bid war." To accomplish this the M.P.A.A. President proposed a joint summit

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[26] Columbus (Ohio) News-Dispatch, July 13, 1978, b:3.

[27] See Memorandum on HB 19/SB 46, "Blind-Bidding" to Georgia State Legislature from M.P.A.A. lobbyists. See also Variety, July 26, 1978.

[28] JDF - Marvin Goldman to Jack Valenti, August 22, 1978. See also Variety, September 27, 1978.

conference between both the M.P.A.A. and N.A.T.O. This proposed summit, which would have necessitated approval by the Justice Department, never amounted to anything concrete. N.A.T.O. did accept Valenti's offer and negotiations, to some extent, took place shortly afterwards. According to N.A.T.O., which fails to maintain any records related to rapproachment efforts, it was quickly realized that any agreement between the two trade organizations would require some legal basis for enforcement, and when the Department of Justice refused to participate, the " . . . problem seemed insoluble through negotiations . . ." and were subsequently abandoned. The significance of this rapproachment effort is not that future film historians may never uncover documents relating to some summit proposals, but the fact that the Department of Justice reinforced its hands-off policy by refusing to sanction the rapproachment.[29]

By the close of the year in 1978 N.A.T.O. had captured only four additional states (Alabama, Virginia, South Carolina, and Ohio) to its bandwagon bringing the total to five states prohibiting blind-bidding. The plum in this orchard of states, which now accounted for fifteen percent of the total revenue from theatre distribution, was the passage of the anti-blind-bidding law in Ohio.

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[29]Letter from Jerome Gordon to author, September 19, 1980. See also Variety, October 18, 1978.

The Ohio law represented two firsts in the N.A.T.O. crusade. It was the first state to implement successfully restrictions towards guarantees and advances, and it was the first "large state," representing alone almost five percent of the industry's total distribution income, added to N.A.T.O.'s list of anti-blind-bidding states.[30]

As a result of N.A.T.O.'s success in Ohio the M.P.A.A. decided in October 1978 to confront all future blind-bidding battles state by state and to test the constitutionality of the Ohio law in court. Concerning this appeal to the Federal District Court in Columbus, Ohio the M.P.A.A. pledged to carry it all the way to the U. S. Supreme Court, if necessary. This was a definite possibility according to many industry sources.[31]

With the advent of 1979 N.A.T.O. prepared once again, under the leadership of their newly installed President A. Alan Friedberg of Boston, to reintroduce their model bill in twenty-three states. By the close of 1979 N.A.T.O. surpassed this figure by achieving introduction in over forty various state legislatures. This time

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[30] Rosenfield, p. 53. See also Ohio Amended Substitute House Bill No. 806, Sections 1333.05 to 1333.07. Also by the end of the year only Paramount, Warner Brothers, and Universal were offering the 48-hour cancellation clause. In the meantime Fox decided to abandon its open-bidding experiment because of "exhibitor abuse," and it also gave its competiting distributors an advantage as well. See Variety, August 9, 1978 and New York Times, July 10, 1979.

[31] Variety, October 11, 1978, p. 24. The Ohio case is dealt with extensively in Chapter VI.

N.A.T.O. experienced greater success as eleven more states (Utah, Washington, Maine, West Virginia, Oregon, New Mexico, Tennessee, Massachusetts, Georgia, North Carolina, and Idaho) plus Puerto Rico, were added to the growing list of states outlawing blind-bidding.[32]

A. Alan Friedberg, who is also the President of Sack Theatres, a forty-one theatre chain in Massachusetts, continued in the spirit of his predecessor, Marvin Goldman, in carrying on an aggressive anti-blind-bidding campaign. In this effort Friedberg became somewhat overzealous when in February he publicly compared the lobbyist activity of Barbara Scott and Jack Valenti to the "dirty tricks" of Watergate's Donald Segretti. Friedberg, who later played down the comments as a " . . . jocular aside . . . had become incensed at Scott's and Valenti's efforts to persuade state legislators to delay action on their pending bills until the Ohio appeal was heard.[33] As a result of Friedberg's comment Valenti threatened to break off a proposed N.A.T.O.-M.P.A.A. meeting scheduled for late February plus many of the M.P.A.A. lobbyists seized copies of Friedberg's comments

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[32] Variety, January 9, 1980, p. 5. See also N.A.T.O.'s "Anti-Blind-Bidding Legislative Packet," October 10, 1979 edition, pp. 1-60. Here all the state laws are reprinted in their entirety.

[33] Variety, February 7, 1979, p. 5, and Variety, February 14, 1979, p. 4.

published in Variety and distributed them to the state legislators in an effort to depict N.A.T.O. and Friedberg as uncouth hotheads.[34] By April 1979 Friedberg was presented with an opportunity either to prove or disprove the M.P.A.A. allegations towards him as he faced a wave of reversals in the exhibitor's crusade to eliminate blind-bidding. In a week's time blind-bidding bills were successfully delayed in Kansas and Mississippi; in Arkansas Governor Bill Clinton vetoed the law; Louisiana launched a repeal movement in that state while Tennessee Governor Lamar Alexander spoke openly in opposition to the recently passed anti-blind-bidding legislation there.[35]

While Kansas and Mississippi never have passed such legislation to date in February 1981 Friedberg and N.A.T.O. survived the other setbacks. The Louisiana repeal movement, as well as all other similar repeal efforts, failed. According to lobbyists both for and against the model bill, these repeal movements are mostly conducted by the M.P.A.A. lobbyists to demonstrate to their clients that they are still active in their efforts to earn their retainer fees. Politically experienced lobbyists will confirm that it is much easier to enact

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[34]Memorandum to the Georgia House Industry Committee entitled "Good Reasons You Should Vote NO On the Anti-Blind-Bidding Bill," by M.P.A.A. lobbyists, (undated) 1979.

[35]Variety, April 25, 1979, p. 4.

legislation at the state level than it is to repeal legislation.[36] The Arkansas law, which successfully passed both houses, was vetoed by Governor Bill Clinton on April 10, 1979 because he was convinced film production would be withheld from his state and thus a sizable amount of revenue would be denied to the state.[37]

Subsequent events have seen no such withholding of film production sites occurring anywhere. Later in October the North Little Rock Times, following Warner Brother's distribution of The Life of Brian, which satirized the life of Christ, editorialized in favor of trade screening over blind-bidding.[38] In Tennessee, Governor Alexander's comments were taken out of context. The Tennessee Governor did urge the legislature to reconsider the bill, but he did admit that Tennessee's exhibitors were at a disadvantage competitively with the distributors.[39] Also it is important to consider the political ramifications surrounding any governor's actions

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[36]Based on confidential interviews.

[37]Letter from Arkansas State Senator Jim Holstead, sponsor of SB No. 363, to author, September 9, 1980.

[38]The North Little Rock (Arkansas) Times, October 25, 1979, p. 4A.

[39]Variety, May 2, 1979, p. 7.

or standards. In Tennessee Alexander was not going to veto the bill as Clinton did because Alexander did not want to risk the embarrassment of his veto being overridden (which it would have been easily) plus he did not want to lose the political support of the countless exhibitors who journeyed to Nashville to lobby for the bill. On the other hand Alexander did not want to come out too strongly for the bill and run the risk of upsetting Hollywood and hurting Tennessee's own growing movie industry.[40]

During the height of the 1979 campaign the M.P.A.A. published in May of that year a sixteen page brochure entitled "Motion Picture Licensing." This was done to counter the various arguments put forth by N.A.T.O. and its lobbyists to the state legislatures. The booklet did explain in laymen's terms quite well how films were distributed and the ways the rental terms are divided. The brochure also contained a brief overview on the current health of the exhibition industry plus a capsule look at the M.P.A.A.'s legal arguments against the anti-blind-bidding laws. The most astonishing point made in the brochure was, according to the M.P.A.A.'s accounting procedures, that the nation's exhibitors took in 69.1¢ of every dollar spent in the movie going experience.[41]

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[40] Interview with Dennis Clinard, N.A.T.O. Lobbyist in Tennessee, November 17, 1980.

[41] Motion Picture Licensing, p. 12.

Friedberg and N.A.T.O. were astounded at this figure and the other assertions in the booklet once they learned of it. Friedberg called the 69.1¢ figure "staggering" and issued a challenge to M.P.A.A. to publicize their computations. The N.A.T.O. president speculated that the M.P.A.A. had lumped all the revenue from all the runs from all sources to arrive at this figure.[42] Afterwards N.A.T.O. published a rebuttle to the M.P.A.A. brochure in which they attempted to counter each allegation made by the distributor's trade organization. However, the N.A.T.O. "Position Paper," as it was entitled, fell equally short in convincing the reader as to whose contentions were the more accurate. A close examination of N.A.T.O.'s "Position Paper" reveals nothing new in the areas of statistics or rebuttles. The idea was meritable but the effort was incomplete. In thirty-four separate areas N.A.T.O. attempted to refute the contentions in the M.P.A.A. booklet. In their rebuttles to each of these thirty-four contentions N.A.T.O., in every case except one, dealt in generalities rather than specifics. What the two papers do indicate is that both arms of the industry remain reluctant to divulge and use specific examples or concrete statistics in their arguments. Not only does this make it difficult for history properly to judge their respective actions, but the same hardship is applicable to the state legislators who have been and are

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[42] Variety, May 16, 1979, p. 7.

continuing to play referee in this saga.[43]

These points are vividly illustrated in a close examination of the lobbyist activity conducted by both proponents and opponents of the model bill. To demonstrate this a more detailed analysis of some of the individual state battles is in order. For the purposes of this thesis three state battles will be scrutinized: Tennessee, Virginia, and Georgia. The first confrontation offered is the battle in Tennessee. This study will reveal how effective the N.A.T.O. lobbyists were in using the grassroots approach in enacting their legislation.

The debate over the practice of blind-bidding in Tennessee began in 1977. The M.P.A.A. retained, and still maintains, the services of Bill Farris, former head of the state's Democratic Party, and Homer Branan of Memphis to lobby against the bill. The two Memphis attorneys were successful in keeping the bill bottled up in committee in 1977 and 1978. Meanwhile the Tennessee Chapter of N.A.T.O. hired the services of Dennis Clinard and David L. King in 1978 to lobby for the bill. Clinard, as most of the N.A.T.O. lobbyists are, was never approached by the national organization, but he and the other lobbyists' efforts were retained and coordinated

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[43]"A Position Paper" by the National Association of Theatre Owners in Response to the M.P.A.A. Brochure "Motion Picture Licensing," pp. 1-18.

through the state chapter's president and attorneys. In this case when Clinard was approached by Tennessee's President Gene Patterson, the Murfreesboro attorney was furnished with only a copy of the model bill initially. From here Clinard and King researched blind-bidding from various periodicals, trade publications, and newspaper clippings. Once the decision was made to accept the offer the results of the research was compiled into a thirty-nine page booklet entitled "Needed in Tennessee: A Motion Picture Fair Competition Act to Eliminate Gross Restraints of Trade in the Motion Picture Theatre Business" in time for the 1979 session.[44]

Prior to the introduction of this booklet Clinard sent an introductory letter to the members of the Tennessee General Assembly. In this letter Clinard reminded the legislators that he was concerned for the future of exhibition in Tennessee which was up against the " . . . motion picture empire from out-of-state." This would prove only one example of Clinard's effective use of the grassroots approach. This strategy of emphasizing the conflict as a case of the in-staters versus the out-of-staters has worked with unquestioned success in countless state battles.[45] From here Clinard and King traveled all

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[44]Interview with Dennis Clinard, November 17, 1980.

[45]Letter to the Tennessee State Legislators from Dennis Clinard and David King, February 5, 1979.

across the state attending various regional meetings with Tennessee exhibitors. The objective here was to elicit their actual physical support for the upcoming hearings in Nashville.

Before the hearings took place in March 1979 Clinard circulated his booklet to the Tennessee legislators. The contents of the booklet differed very little from similar literature distributed by other N.A.T.O. lobbyists. The booklet described the bidding process and illustrated the "unbusiness-like practices" involved. The Shenefield letter, five anti-blind-bidding articles, and nine different solicitation letters from five distributors were reprinted for the legislator's benefit. The solicitation letters, which all called for the standard 90-10 split with identical minimum terms, were reprinted to illustrate the similarity in pricing among the distributors.[46]

Meanwhile Homer Branan and Bill Farris of Farris, Hancock, Gilman, Branan, Lanier and Hellen, according to more than one state legislator, the most prestigious law firm in the state, began meeting with representatives of the M.P.A.A.'s legal team in 1977. In one meeting with Stephen Schwartz, a M.P.A.A. counsel, Branan and

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[46]"Needed in Tennessee: A Motion Picture Fair Competition Act . . .", prepared by Dennis Clinard and David King, 1979, pp. 1-39.

Farris were briefed on their possible rebuttals and lobbist strategy. As indicated earlier the two Memphis attorneys were successful in 1977 and 1978 in preventing the model bill from becoming law.[47] In 1978 Farris and Branan compiled two separate memorandums to distribute to Tennessee legislators in opposition to the anti-blind-bidding bill. These memorandums attempted to explain how movies were produced and distributed. The literature went on to provide analogies to blind-bidding to prove that the movie industry was not alone in the practice; explained the financial reasons why movies could not be delayed for trade screenings; and offered evidence that the exhibitors were not "totally blind" when they did bid.[48] Later, after Clinard and King asserted that a ban on blind-bidding was needed to prevent Tennessee's communities from viewing unwanted pornographic films, a third memorandum was distributed by Farris and Branan refuting this claim.[49]

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[47]Memo to File from meeting with Stephen Schwartz by Homer Branan, (undated) 1977.

[48]Memorandum in Opposition to Tennessee Senate Bill 1704, House Bill 1875, (undated) 1978.

[49]Memorandum by Stephen Schwartz to Tennessee State legislators, February 13, 1978. It should be pointed out here the similarity in content in literature distributed by both the proponents and opponents in the legislative battle. The M.P.A.A. literature, which is printed on M.P.A.A. stationary and plays into the in-staters versus out-of-staters strategy of the N.A.T.O. lobbyists, in the February 13, 1978 memo is identical to

In Mrach 1979, with the new battle in Tennessee well advanced, Branan and Farris arranged for Jack Valenti to come to Tennessee to testify against the bill, as he had done in a number of situations. Yet this move played effectively into the strategy developed by Clinard and N.A.T.O. of Tennessee. During the same week Clinard and King packed the committee room full of exhibitors from all over the state. Legislators were obviously more affected by this than they were by Valenti's appearance. Consequently by the end of March the bill passed out of the committee and by both the House and Senate, and by early April the legislation prohibiting blind-bidding was signed into law.[50]

A look at the Virginia state battle will reinforce much of the same strategies and arguments employed by both sides in the Tennessee struggle. Virginia was a special state to N.A.T.O. because a sub-office of N.A.T.O.'s, headed by Jerome Gordon, the Special Assistant to the President and coordinator of the anti-blind-bidding battle, is located in Newport News. With this in mind Gordon took personal charge in getting the machinery rolling toward the passage of such legislation in Virginia.

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those issued in Ohio and other states. The Clinard booklet, although different substantially in content, bears the identical title, "Needed in Tennessee . . .", as similar literature distributed in Ohio and other states.

[50] Interview with Dennis Clinard, November 17, 1980. See also Tennessee Public Chapter No. 119, SB No. 89.

Gordon solicited Newport News' own state representative, Alan A. Diamonstein, to sponsor the model bill, and arranged for Paul Schuford of Richmond to head the lobbying effort. In the meantime Guy T. Tripp of Richmond's Huton and Williams firm was retained by the M.P.A.A. to represent them in the 1978 confrontation.[51]

Lobbyist activity both for and against the bill began in early February 1978 prior to the hearings in the House General Laws Committee. Before the House Committee heard the arguments on the bill, Guy Tripp sent delegate Thomas A. Moss, a committee member, an introductory letter with the standard thirteen page M.P.A.A. memorandum describing their reasons for opposition of the proposed anti-blind-bidding bill.[52] Eventually each member of the committee received a copy of this memorandum. Again the contents of the memorandum was similar to other past M.P.A.A. literature. Inside was the usual overview of the industry and its mechanics plus the standard analogies to blind-bidding. The memo also provided standard interpretations as to why movies could not be delayed for trade-screenings and the ultimate consequences, delays in film products and higher ticket prices, if the bill

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[51]Letter from Betty T. Akers, secretary to Alan Diamonstein, to author, October 2, 1980.

[52]Letter from Guy T. Tripp, III to Delegate Thomas A. Moss, February 8, 1978.

became law.[53]

The bill eventually made its way favorably through the House and into the Senate Committee on Commerce and Labor by the end of February 1978. At this time one of the N.A.T.O. lobbyists, Alexander Wellford, wrote William E. Fears, the Senate Committee's Chairman. The contents of this letter pinpoint examples of the effects of both the classic N.A.T.O. and M.P.A.A. strategies:

> . . . expect the M.P.A.A. will try to delay the bill in your committee, and will try to kill it there. I can think of no reason why the bill should be delayed . . . I cannot imagine that any of the arguments that the M.P.A.A. wishes to advance in opposition are not contained in that memorandum, and should think that lobbyists for the Association could very easily present the M.P.A.A.'s position to the Committee without worrying about getting people in from out of town.

Also in the same letter Wellford sent Fears a copy of the recently published "exposé" in Newsweek that week which was especially critical of the movie industry, its accounting procedures, and blind-bidding.[54] Additional copies of the exposé representing the cover story, "Inside Hollywood: High Stakes! Fast Bucks! Shady Deals!" for Newsweek eventually made it into the hands of the other Virginia legislators in a separate

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[53]See attached memo in Letter Tripp to Moss entitled "Memorandum in Opposition to House Bill 353," pp. 1-13.

[54]Letter from Alexander Wellford, N.A.T.O. lobbyist in Virginia, to Virginia State Senator William E. Fears, February 24, 1978.

memorandum in support of the bill.[55] Soon afterwards the Senate duplicated the earlier efforts of the House and approved the bill with ease, and on April 9, 1978 Governor John Dalton signed the bill into law with an effective date of July 1, 1978.[56]

In Georgia the debate on blind-bidding both reinforces old arguments and introduces some new ones. One new argument developed by the M.P.A.A., which actually is in the motif of a threat, attempted to remind legislators that if they pass the bill they may run the risk of losing out in the attracting of film production sites. This withholding threat, which later sufficiently convinced the Arkansas Governor to veto similar legislation, was especially real in Georgia. In 1979 Georgia ranked only behind California and New York in sites for the production of both motion pictures and television shows. Since 1973 Georgia has witnessed the production of over 108 such movies and television shows which brought in an estimated $126 million into the state. Concerning this predicament

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[55]Memorandum on HB/353, "The Virginia Fair Motion Picture Act." N.A.T.O. lobbyists also distributed copies of distributor's solicitation letters to illustrate the similarity in terms, guarantees, and advances. Additionally the N.A.T.O. lobbyists saw to it that the legislators received copies of the latest N.A.T.O. News Release showing the progress of similar legislative efforts in other states. This was a peer pressure move which has been used by both sides of the issue. In the early years of the debate the M.P.A.A. used it frequently, but as more states enacted anti-blind-bidding laws the N.A.T.O. lobbyist began to use the peer pressure ploy.

[56]N.A.T.O. Flash Bulletin, April 21, 1978, p. 1.

the M.P.A.A. lobbyists reminded the Georgia state legislators that " . . . no one can question the fact that this anti-movie industry legislation is not going to make the movie production company feel welcome in Georgia."[57] Before the debate was complete the M.P.A.A. lobbyists reminded Georgia one more time " . . . Georgia's efforts to attract more movies and television productions will certainly not be helped by this legislation" (the underlining is the M.P.A.A.'s). In this same memorandum to the Georgia House Industry Committee the M.P.A.A. lobbyists pointed out the additional reasons why the proposed bill should be defeated. They declared no public interest was at stake, only large exhibition chains would be aided, the industry's national advertising campaigns would be "subverted," and ended with the statement that " . . . the industry has tried hard to compromise the issue but the owners of the large chains refuse to listen, preferring to use state legislaters as industry arbitrators."[58]

This M.P.A.A. ploy failed. The House Industry

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[57]Memorandum from Peyton Hawes, Thomas J. Harrold, Jim Grey, and the M.P.A.A. to the Georgia House of Representatives (undated), 1979. Hawes is a former Georgia State Representative, and Grey is a partner in the Brown-Grey public relations firm hired by the M.P.A.A. The M.P.A.A. also used former Governor Ellis Arnall to lobby against the bill. See Variety, December 20, 1978, p. 62.

[58]M.P.A.A. memorandum to the Georgia House Industry Committee (undated).

Committee reported the bill out of committee 12-7 to the House Rules Committee which placed it on the House calendar for full consideration. At this time the N.A.T.O. lobbyist, John Stempler, prepared a brief memorandum countering many of the M.P.A.A. arguments especially those claims against governmental interference and the withholding of film production sites. Stempler, although personally opposed to governmental interference, pointed out that since the government was already heavily involved in the motion picture business " . . . the cycle of government intervention be completed and thereby restore some balance to the theatre business." To counteract the latter argument the theatre lobbyists alerted the legislators to the fact that most films were now made by independent producers free from the direction of the M.P.A.A.[59]

Also during the course of the debate in Georgia the M.P.A.A. lobbyists prepared "an overview of the issues" involved in the proposed statute for the legislators. In this one page leaflet the M.P.A.A. prepared and provided answers to eighteen questions surrounding the implications of blind-bidding and the bill.[60] When this came out the N.A.T.O. lobbyists seized

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[59]Memorandum "History of Georgia SB 46 (And Its Companion Bill HB 19)," N.A.T.O. Lobbyists, (undated) 1979.

[60]Memorandum "House Bill 19/Senate Bill 46 - Blind-Bidding on Motion Pictures," M.P.A.A. Lobbyists, (undated) 1979.

it and instituted their own replies to each of the eighteen questions. An examination of both papers reveals nothing new nor offers any concrete statistics or revelations concerning blind-bidding and its history or the arguments put forth in support and opposition.[61] In March 1979 the Georgia state legislature passed the bill. The next year the very same Georgia House Industry Committee passed out of its committee a repeal motion, but, like the others, it failed to realize passage.[62]

In 1980 N.A.T.O. retained high hopes for duplicating their 1979 successes, but this was not to be the case. Only three states, Indiana, Kentucky, and Pennsylvania, passed anti-blind-bidding laws. The Pennsylvania law, identical to the Ohio law, contained restrictions toward guarantees and advances. This case, like the Ohio law, is currently being appealed in court. One can only speculate at this time as to why 1980 was not as productive a year as 1979 for N.A.T.O. First, it was an election year which hindered the activities of many legislators. Second, it can be assumed that the M.P.A.A. lobbyists delayed much legislation by asking

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[61] Memorandum on House Bill 19/Senate Bill 46 - Bill to End Blind-Bidding on Motion Pictures, by N.A.T.O. lobbyists, (undated), 1979.

[62] See the Premeire magazine article "Two Sides of the Box-Office Dollar: Blind-Bidding," in N.A.T.O. memorandum, September 12, 1980.

legislators to await the outcome of the Ohio appeal. Since the outcome of the Ohio case was not settled until July 1980, which upheld the Ohio law, the real gauge to test the N.A.T.O. momentum will be the degree of success achieved in 1981.

From the studies of the three isolated state battles we see that both sides of the issue used similar arguments and in some cases word for word pamphlets to espouse their cause. The individual arguments outlined in Chapter I were repeated to a degree here. In summary it can be said that the N.A.T.O. lobbyists have attempted to depict the distributors as a greed-happy out-of-state film cartel that forces them to rent films through a pig-in-the-poke process. To combat the M.P.A.A. arguments these lobbyists have denied that films will be delayed as a result of trade screening and that box-office prices will not rise as a result of the prohibition of blind-bidding. The M.P.A.A., on the other hand, has urged for the defeat of the model bill because it would cause delays, increases in admission, subversion of national advertising, and the discouragement of investment into the industry, all of which would add to the film shortage. All the while they attempted to depict the exhibitors as a special interest group seeking outside assistance in an intra-industry dispute.

Following a close historical analysis, which the

next chapter will provide, it becomes clear that both the N.A.T.O. and M.P.A.A. lobbyists have distorted the history of blind-bidding in their presentations to the state legislators. Consequently these representatives of the state are being grossly misled as they are asked to decide the fate of how films will be licensed in the United States. This decision will ultimately affect the movie-going experience and the future art of American movies.

CHAPTER VI

THE CASE AND THE ANALYSIS

In the Fall of 1977 theatre exhibitors launched their first effort to enact anti-blind-bidding legislation in the state of Ohio. At that time no other state had an anti-blind-bidding law in force, but by the time the Ohio bill became law in October 1978 four other states had successfully enacted such legislation. The Ohio Statute became the most controversial of these early legislative efforts because it was the first law to place restrictions on the use of guarantees and advances in addition to the prohibition against blind-bidding and closed bidding. Because of these added restrictions the Motion Picture Association of America decided to appeal the enactment of the law. This appeal was the first constitutional test of the model bill and its effects were felt immediately by the nation's leading motion picture distributors.

The idea of introducing this legislation in Ohio was brought to the attention of Ohio State Representative Terry M. Tranter from Cincinnati in 1977 by two of the state's most prominent exhibitors: Gene King, the Executive Director for the National Association

of Theatre Owners in Ohio, and Jay Schultz, of Selected Theatres Management Corporation in Lyndhurst, Ohio. Tranter became interested in the legislation, not because he felt that the state exhibitors were being forced to license films sight unseen, but as a member of the International Association of Theatrical and Stagehand Employees Union-Local 754B. The proposal had the potential to preserve the jobs of Tranter's fellow union members in Ohio.[1] With this motive Tranter introduced the bill on June 30, 1977.[2]

Much attention has been directed toward the fact that the Ohio Statute differs radically from all other anti-blind-bidding laws because of its restrictions on guarantees and advances. A close examination reveals that guarantees are prohibited only when a license agreement calls for the exhibitor to make payments to the distributor based on attendance or box office receipts. Furthermore Tranter's legislation pointed out concerning advances, that the distributors could not " . . . condition the granting or execution of the contract upon the payment of such advancements, unless the advance payments do not have to be made sooner than 14 days

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[1]Letter from John J. Caty, Legislative Aide to Representative Terry Tranter, to author, September 11, 1980.

[2]Memorandum to Ohio Legislators by Tranter - "Am. Sub. H. B. 806 (As Reported by the Senate Commerce and Labor Committee)," p. 4.

prior to the exhibitor's first showing of the motion picture. . . ."[3] After the bill became law these provisions were incorporated intact into Section 1333.06 parts A and B of the final statute. Essentially, the law put into writing what was in fact the standard licensing procedures already in force between the distributors and exhibitors.[4] The real differences in the Ohio legislation could be more readily seen in its attention to the defining of "first runs" and "subsequent runs." This work was included to insure that no distributors violated the "clearance" of a contracted exhibitor. In essence Ohio exhibitors wanted in writing the assurance that they could enjoy the sole benefit of exhibiting a film in their defined geographic area without a competing exhibitor screening the same product at the same time. This is what first run and clearance is all about.[5]

Nonetheless these restrictions relating to both guarantees and advances were a first in the history of anti-blind-bidding legislation. These provisions plus the definitions pertaining to runs and clearances made

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[3] Ibid., p. 2.

[4] See Ohio Statutes - An Act (Amended Substitute House Bill No. 806) Section 1333.06 Parts A and B, p. 2.

[5] Ibid., Section 1333.05 Part J. The statute limits first or exclusive runs to 28 days. This was done to enable more theatres to show more films.

the M.P.A.A. and their lobbyists acutely aware of the importance in defeating the Ohio law. Besides representing a test case for future legislation drawn along similar lines, the Ohio law took on an added importance because it was a large state representing more than five percent of the total revenue to the distribution industry. A defeat here would enhance the M.P.A.A.'s arguments that N.A.T.O. was only effective in small rural states and establish a precedent against future restrictions toward advances and guarantees.

Thus with the lines established the first debate on the Ohio law was heard before a subcommittee to the House Judiciary Committee on September 28, 1977. On that date testimony was given by Robert N. Shamansky, one of the N.A.T.O. lobbyists. Shamansky, a Columbus attorney, wasted little time in establishing the out-of-state versus in-state argument as he pointed out that the Ohio exhibitors were the legislators' " . . . neighbors, who are being led to slaughter through grossly unfair business practices indulged in by the so-called studios." Later Shamansky claimed that the sole objective of these conglomerates was to wring " . . . as much money out of Ohio--and anywhere else, for that matter--as possible."[6] Before Shamansky completed his short five page

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[6]Testimony by Robert N. Shamansky, Counsel for N.A.T.O. of Ohio, to the Subcommittee of House Judiciary Committee, September 28, 1977, p. 1.

testimony he made two more references towards the fact that the opposition was from " . . . non-Ohio places" as he presented standard arguments against the diversification within the industry and the causes behind the film shortage. To substantiate these arguments the N.A.T.O. lobbyist from Columbus distributed three recent media articles that were highly critical of the motion picture industry to the members of the committee.[7]

Three months later the M.P.A.A. lobbyists provided their rebuttle to the committee. Harry Wright, III, an attorney from Columbus, along with Stephen Schwartz, the legislative counsel for the M.P.A.A., presented their arguments which were similar to the other M.P.A.A. arguments given in the other state battles. Wright called the model bill anti-competitive and special-interest legislation. In addition to creating delays in films for from three to four months, increasing costs at the box-office, and making entry of new exhibitors more difficult, Wright claimed the proposed legislation was in violation of the nation's anti-trust laws. To provide background to this assertion, Wright called on Schwartz to present a lengthy legal analysis (fifteen pages of

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[7] Ibid., pp. 4-5. The articles were the May 16, 1977 Business Week article, "The Cash-Rich Movie Companies;" an article in the New York Times Magazine of August 7, 1977 which depicted the studios as enjoying similar benefits as a cartel, and an article in New York Magazine which foretells doom for exhibition if the film shortage continues.

testimony) in opposition to the statute.[8]

Contained in Schwartz's legal analysis, which argued that the bill would violate the interstate commerce clause and Federal copyright laws as well, were many of the anticipated legal arguments that Peter Fishbein, the N.A.T.O., Inc. counsel, had forwarned the organization's state chapters earlier in his March 1977 memo. On February 13, 1978 Shamansky provided the same committee the N.A.T.O. rebuttal to Schwartz's legal analysis.[9] On the same day the M.P.A.A. lobbyists were distributing their standard fourteen page memorandum, which was distributed on the same day in Tennessee and other states, describing their basic opposition to the proposed bill.[10]

At the end of February 1978 the bill was still deadlocked in the House Judiciary Committee. On February 28 Wright, who had been in constant contact with each member of the committee since his January testimony, continued his efforts to keep the bill in committee as he testified to the full committee about

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[8]Testimony and Memorandum of Law by Harry Wright, Counsel to the M.P.A.A., to the Subcommittee on Commercial Affairs of the House Judiciary Committee, January 3, 1978, pp. 1-2.

[9]Memorandum by Robert Shamansky in Reply to Harry Wright's January 3, 1978 Testimony, February 13, 1978, pp. 1-5.

[10]Memorandum in Opposition to HB 806, by the M.P.A.A., February 13, 1978, pp. 1-14.

certain evils within exhibition. Wright introduced and explained to the committee the characteristics of product splitting and double-bookkeeping prevalent in exhibition. The Columbus attorney then reminded the legislators that open-bidding, as outlined in Section 1333.07 of the Statute, failed on a voluntary basis in Illinois in 1977. As a final reminder Wright brought to the attention of the legislators that future movie production, which over $7 million had been spent in Ohio since 1976, could be impaired as a result of this legislation. In Wright's summation, which was a brief dissertation on the positive aspects of the interdependency of big business and the nation's economic health, he made two accurate assessments of his opposition's strategy. First, he informed the legislators that the blind-bidding issue had taken on the guise of the big guys, the distributors, versus the little guys, the exhibitors. Secondly, Wright stated that the current anti-blind-bidding legislation in Ohio was a product of a

> . . . national effort by a large national association that is undertaking to utilize the little guy image in their respective states and because it is well aware that the Congress and the Department of Justice . . . will not lend itself to the special interest legislation that is being proposed.[11]

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[11]Testimony by Harry Wright to the Ohio House Judiciary Committee, February 28, 1978, pp. 1-11. Recent film productions in Ohio were: Harry and Walter Go to New York, The Deer Hunter, Harper Valley P.T.A., The Gathering, and The Dark Secret of Harvest Home.

On March 8, 1978 the House Judiciary Committee rejected Wright's arguments and reported the bill out of committee favorably. Eight days later the full House voted 83-10 in favor of the bill, and it was next sent to the Senate Committee on Commerce and Labor for their deliberations. Aiding the exhibitors in their fight to break the House deadlock was a barrage of media support from the Columbus newspapers from February 16 to March 15. In the course of this one month both newspapers, The Columbus Citizen-Journal and the Columbus Dispatch, editorialized in favor of the law. Additionally over sixteen different articles and reports concerning the issue were written. In all of these articles the sympathies were clearly directed towards the plight of the Ohio exhibitors' fight against the Hollywood tycoons.[12]

Two months later the Senate Committee reported the bill out to the Senate floor for final consideration. A week later on June 22, 1978 the Senate approved the bill unanimously, 28-0.[13] Prior to the full Senate vote the the M.P.A.A. thought it had successfully delayed the

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[12]See Editorials by Columbus Citizen-Journal, March 15, 1978, p. 6:1; Columbus Dispatch, February 27, 1978, B:2; also see other articles in the Citizen-Journal, March 14 and 17, 1978; and the Dispatch, February 16, 19, 22, 24, 26, and March 4 and 12, 1978.

[13]Memorandum on Am. Sub. H. R. 806, by Tranter, p. 4. See also Cleveland Plain-Dealer, June 23, 1978, B:4.

bill, but it was brought out on a special calendar and passed. Despite this, Jack Valenti, the President of the M.P.A.A., did not give up on his hope of preventing the Ohio statute from becoming law. In July, before Governor James Rhodes' signature could be placed on the bill for its final stamp of approval, Valenti persuaded Louis Nizer, who once represented the Governor in a libel suit, to journey to Columbus personally to appeal to the Governor for his veto on the statute.[14] When this failed the decision by the M.P.A.A. to test the law on constitutional grounds was soon made.

This appeal in the United States District Court in Columbus went off and on from 1979 until a final decision was reached in the Summer of 1980. Following the decision in Columbus, which upheld the Ohio law, the M.P.A.A. instituted an appeal to the U. S. District Court of Appeals in Cincinnati. This appeal began in late October 1980.[15] Because of this appeal much materials in Allied Artists, et. al., versus James Rhodes are not available for examination. However, Judge Robert Duncan's opinion and the trial briefs are at hand for review and analysis. The Duncan opinion is the first

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[14] Variety, July 19, 1978, p. 3, and Variety, June 28, 1978, p. 5.

[15] Letter from Harry Wright to author, September 15, 1980.

definitive court ruling solely directed toward blind-bidding and its characteristics since the Paramount decisions. For the remainder of this chapter Duncan's opinion and the arguments espoused by both the exhibitors and distributors concerning blind-bidding will be placed under careful historical analysis.

Certainly one of the earliest and loudest of the M.P.A.A. attacks against anti-blind-bidding legislation was the delay factor. Numerous M.P.A.A. lobbyist literature items forewarned state legislators that film releases would be delayed to their states anywhere from three to six months because of the trade screening requirement. Yet at the Ohio case subsequent evidence was introduced to convince Judge Robert Duncan that the enactment of trade-screening as a prerequisite to motion picture licensing would not cause such lengthy delays.

Duncan concluded that there " . . . was little direct evidence of delays caused by the Act." Results up to the commencement of the trial in the Summer of 1979 bore out this statement. At that time only two films were delayed, neither longer than four weeks, in Ohio past their national release date.[16] In dismissing the delay claim Duncan also countered other M.P.A.A. arguments

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[16]Duncan, p. 20. The two films were Paramount's Players (where one of the stars contracted hepatitis and the director broke an ankle forcing the delay) and Bloodline. Yet Paramount still met the national release date in the major Ohio markets.

closely related to the delay argument, including the long standing dogma among the M.P.A.A., that because of their inability to exercise sufficient control over their production schedules, which is in the hands of creative producers and directors, blind-bidding is essential in order to get the film quickly to the theatres. Duncan discovered just the opposite as he learned that the distributors do in fact " . . . often hold a completed picture for months before releasing it."[17] Thus Duncan concluded that the distributor's control over their production schedules is " . . . a matter over which the plaintiffs [distributors] have primary control."[18] Additionally Duncan dismissed the M.P.A.A. contention that compliance to the law would also contribute to the delay factor. On this point Duncan accurately stated that through blind-bidding the distributors had been under little if any pressure to complete their licensing agreements. Consequently, Duncan asserted that it was " . . . a poor measure of time that the Act will actually delay a motion picture."[19]

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[17] Ibid., p. 17.

[18] Ibid., p. 18.

[19] Ibid., p. 20. A close examination of the history of the M.P.A.A.'s delay argument reveals that since 1976 the length of their suggested delays has dwindled to the point that in a September 1980 interview,

When Duncan dismissed the delay argument he also struck down much of the basis for the M.P.A.A.'s position towards increased costs. The M.P.A.A. argued that prolonged interest charges as a result of the delay of the film because of trade-screening would cause production costs to soar contributing to the film shortage. Duncan asserted that if delays did occur, which would be no longer than four weeks, the extra interest cost experienced by the distributor would be minimal when compared to the total production cost of over a year or more. The Columbus District Court Judge did admit that the Ohio statute did reallocate much of the risk of a box-office failure away from the exhibitors and onto the distributors. Even though this may result in a decrease in some of the distributor's potential revenues, Duncan felt this would be offset somewhat by higher terms from exhibitors following trade-screening.[20] Maurice Silverman, the retired Anti-Trust Division attorney who was involved so long with the blind-bidding saga, was well aware of this possibility years earlier. Based on his experience with exhibitors Silverman

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Jack Valenti failed to mention the delay potentials in his presentation against blind-bidding. According to N.A.T.O.'s records, as of September 1980, only Superman and Star Trek missed their national release dates in states with trade screening requirements. See N.A.T.O. Memorandum, September 12, 1980.

[20]Duncan, pp. 21-22.

concluded in 1974 that exhibitors who submitted bids following a trade-screening almost always entered bids higher than those who had licensed the film through blind-bidding. In many of these cases, Silverman continued, the exhibitor would submit a bid so high that realizing a profit became an exercise in futility.[21]

If this is the case then increased costs at the box-office will likely result from anti-blind-bidding legislation as the M.P.A.A. has contended. Not only has this not been the case it appears that it will not occur in the foreseeable future as well. Offsetting the increases in rental terms, if any, is a decrease in the guarantees and advances submitted by the exhibitors. By being afforded the opportunity of first trade-screening the films, exhibitors can place a check on the high guarantees and advances suggested by the distributors.[22]

Increased costs as a result of the inability to coordinate a national network television advertising campaign with the films national release was another main argument put forth by the M.P.A.A. in opposition to the anti-blind-bidding laws. Previously, this has been the soundest argument espoused by the opponents of

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[21] JDF - Silverman to Hollander, October 23, 1974.

[22] N.A.T.O. publication "Anti-Blind-Bidding Legislation Is Working Well," by Jerome Gordon, pp. 1-17. See Letter by Larry R. Moyer, President of N.A.T.O. of Oregon, February 6, 1980, p. 11.

blind-bidding. This was recognized early in 1979 by Harvey Jay Rosenfield, a Georgetown University law student, in his anti-trust analysis of blind-bidding.[23] However, a year later the foundations to this argument began to crumble when the major studios came face to face with the reality that they must find sufficient and acceptable alternatives to prime-time network buys. Columbia, with Close Encounters, United Artists with Apocalypse Now, turned to ninety second spots on late night television to promote these films. In these instances the producers purchased from local television stations the exact corresponding air time all across the television dial, so in effect the message would get across to the viewer regardless of what channel they were viewing. This method is called "roadblocking" in the marketing world. These purchases, which are considerably less than network buys, proved to be highly successful.[24]

Even though there is evidence to support that some of the studios did have to abandon some of their national network campaigns because of the anti-blind-bidding laws, the major distributors admit that the effect of the statutes on advertising campaigns has been

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[23] Rosenfield, p. 35.

[24] Variety, September 19, 1979, p. 5.

rare. In 1979 Paramount with Star Trek and Columbia with Skatetown U.S.A. dropped their national campaigns. Still others like Universal, with More American Graffiti, just re-allocated parts of their budget to purchase local television spots. However, the most important aspect to the disintegration of the M.P.A.A.'s advertising argument has been the ability of the distributors to substitute advertising campaigns during the course of the television season. In other words the distributors continue to purchase network air-time in advance based on their anticipated production schedules for the year. If a film is not ready for release by the time its network campaign is due to begin, then the distributor can merely substitute one that is complete. This method of circumnavigating the advertising dilemma poised by the state laws has created a "Catch-22" for the distributors. Found within this "catch" is the key to the disintegration of the advertising argument. The substitution of advertising campaigns by the distributors is only effective if the distributor is producing a sufficient number of films. Thus if the distributors continue to oppose the anti-blind-bidding statutes based on the advertising theory, then they become suspect of holding back production, a claim they do not like to recognize.[25]

Although the studios admitted in 1979 that the effects of the anti-blind-bidding laws have been rare

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[25] Variety, November 21, 1979, p. 1.

on advertising this was not the case a year earlier. One studio chief, Warner Brothers' Terry Semel, stated in 1978 that because of these statutes spending large amounts on media would be financially infeasible. Also at that time Semel issued a strong denunciation at the thought of further governmental interference into these matters. This statement is characteristic of another argument against the anti-blind-bidding laws by the distributors. The M.P.A.A. literature abounds with statements begging against further intrusion into their industry by government. Yet a close historical analysis will show that not only has the government contributed to the recent well-being of the distributors but the distributors themselves have requested governmental interference into this dispute and other industry practices as well.[26]

In the early 1970's the Federal government created a favorable tax shelter law that stabilized and in some cases increased film production among the distributors. This law was particularly helpful for Columbia which used the shelter to ease out of a $200

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[26] Variety, November 8, 1978. At the Ohio trial witnesses for the distributors testified that decisions made to invest or finance a film is not primarily motivated by considerations regarding its marketing, such as whether it should be blind-bid or trade-screened. See Duncan, p. 43.

million debt from the late 1960's.[27] In 1976 portions of this law were repealed. Many industry sources and film specialists in the media wailed that production would decline drastically and Canada, because of its favorable tax laws, would become the new Hollywood as a result of the repeal. Neither of these prognostications have proven accurate. Not only did production from the independents increase following the 1976 tax shelter revisions, but production from the major distributors has not declined as a result of these revisions.[28] This resulted because the 1976 law did not outlaw shelters but merely limited deductions to what investors actually have invested in the deal or borrowed with an obligation to repay. Thus in the post-1976 period the movie deals do not call for investors to put up capital to produce the film, as was the case with most pre-1976 shelters. Rather today the studio pays for the film and then sells it to a group of investors in a limited partnership. Paramount's Urban Cowboy, Universal's Flash Gordon, and Orian Pictures' The Fiendish Plot of Doctor Fu Manchu are three recent examples of this.

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[27] New York Times, October 23, 1977, Section III, p. 1:4.

[28] Variety, June 15, 1977, p. 12.

In the Fu Manchu deal Orian sold the picture to some twenty-five investors for $13.8 million. Each investor agreed to pay $60,000 in 1980, the same again in 1981, and $53,000 in 1982 plus an obligation to pay about four percent of a $8.7 million loan. What is so attractive about this deal is the accelerated depreciation--150 percent or two hundred percent of the straight line figure--is used in the first years of the picture's life. The expenditures involved in the actual distribution and marketing are immediate deductions as well. Actually it seems nobody loses. The distributors recoup their production costs right away and then turn a profit by charging the partnership a fee for handling the distribution of the film. Meanwhile the investors gain immediate tax benefits and--perhaps--profits a few years down the line through the flux of secondary revenue sources films now have available.[29]

In addition to these tax benefits the movie distributors have enjoyed similar favors from governmental interference in the 1970's. In 1976 a tax-reform bill for movie production export earnings was passed, allowing a five-year grace period, which the industry

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[29] Business Week. "The New Breed of Movie and Cattle Tax Shelters." September 22, 1980, p. 115.

expected at that time to save $1.5 billion in taxes annually.[30] In the same year a Federal court overruled a 1975 Federal Communications Commission order barring the distribution of movies to pay-T.V. thus freeing another avenue for secondary income for the distributors.[31] Following the so-called tax repeal of 1976 the distributors were seemingly forced to find new means of producing their films. In this quest they created an organization called the Cinema Fund in order to seek financial resources from the Federal Government's Small Business Administration under the high-risk business section.[32]

In the Spring of 1979, while the M.P.A.A. was busy attacking the anti-blind-bidding statutes with pleas for no more governmental interference, Jack Valenti and other members of the M.P.A.A. hierarchy were in Washington, D. C. pleading for the Department of Justice to intervene in this dispute once again. On March 19, 1979 Valenti and the M.P.A.A. entourage met with Assistant Attorney-General Richard Fauretto to propose three solutions to the blind-bidding controversy. Today only two of these proposals are known. In the two known proposals there was little innovation or substance attached to

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[30] Wall Street Journal, May 20, 1976, p. 2:3.

[31] Wall Street Journal, April 15, 1976, p. 7:1.

[32] New York Times, October 23, 1977, Section III, p. 1:4.

the solutions. The first suggestion dealt with reverting back to the 1968 stipulation and operating under those provisions. The second dealt with minor modifications in either Paragraph II(7) or II(8) of the Paramount decree.

After offering these solutions the M.P.A.A. representatives then set forth four reasons on why the Federal Government should intervene into the blind-bidding problem. Among the justifications for this request the M.P.A.A. claimed that the anti-blind-bidding statutes also prohibited other licensing practices as well; that marginal exhibitors would be precluded from competition without the ability to offer guarantees in their bids; that some of the state laws require open-bidding which may result in price setting, plus the laws facilitate product splitting. Fauretto and the Department rejected the M.P.A.A.'s pleas for interference. This stand they have continued to maintain since that time.[33]

Also during the course of the Ohio case the court requested that the distributors provide less restrictive alternatives to the anti-blind-bidding statute. In the Spring of 1980 the M.P.A.A.'s team of lawyers presented a proposal that the state's attorneys termed "frivolous." According to this proposal the distributors would have

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[33] JDF - Memorandum by Richard Billik, Anti-Trust Division Attorney, April 13, 1979.

the state provide tax relief or business subsidies to the smaller exhibitors in order that they may bid more competitively with the larger chains. In this scheme the increased revenue directed to the distributors from the tax relief or subsidies would foster increased film production on their part.[34] This proposal was closely aligned with the argument Columbia's President Abe Schneider put to Maurice Silverman in 1967. At that time Schneider told Silverman that blind-bidding was necessary because the revenue generated as a result was reinvested back into increased film production.[35] However, it has been quite apparent that since Schneider's comments that the studios have not in fact reinvested to increase or even stabilize production. Thus Duncan was forced to dismiss the distributor's proposal and proceed with the case.[36]

The M.P.A.A., also during the course of the Ohio case, attempted to prove that the proposed statute was in violation of the Federal anti-trust laws. The distributors argued that the encouragement of product splitting, open bidding, and the limitation on the use of guarantees were in fact all violations of anti-trust

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[34] Brown, pp. 23-24.

[35] JDF - Silverman to Kilgore, May 3, 1967.

[36] Brown, Ibid.

laws. In his final opinion Duncan dismissed each of these charges. Concerning the use of guarantees as a competitive tool Duncan stated:

> under prior practice, it was normally only the large exhibitors who were able to pay large guarantees . . . the guarantee provision of the Act tends to put exhibitors on a more equal footing with each other . . .

On open-bidding Duncan stated: "The open disclosure . . . serves to remove the suspicion inherent earlier . . . and seems to eliminate the possibility deals would not be made in an open competitive market."[37]

Even while the case was being heard in Columbus subsequent events in other states proved other M.P.A.A. claims against the statutes false. Not only have there been no instances of films being withheld to states because of enactment of anti-blind-bidding laws, neither have production sites been denied to states with prohibitions towards blind-bidding. This latter strategy proved to be very hollow on the part of the M.P.A.A. because they do not exercise any control whatsoever over the scheduling of production sites. To illustrate this point, one has only to look at the state of Idaho's production results for 1980. In 1979 the state passed its statute, identical in content to Ohio's, yet Clint Eastwood's Bronco Billy and parts of United Artists'

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[37]Duncan, pp. 68-74.

Heaven's Gate were filmed there in 1980.[38]

From the legal scrutinization of Judge Robert Duncan and the historical analysis, many of the M.P.A.A. arguments against anti-blind-bidding statutes failed. Arguments such as the increase in production costs, the potential for film delays, the anti-trust violations, pleas for no more governmental interference, and the inability to coordinate national advertising with national release schedules have all been proven unfounded or historically inaccurate. Yet on the other side of the issue the exhibitors, in their arguments for the legislation, and N.A.T.O. both have been just as guilty in their interpretations of blind-bidding's past.

The most glaring historical inaccuracy on the part of N.A.T.O. is seen in their effort to convince state legislators and the media that blind-bidding is a recent phenomenon that became widespread in the early 1970's. This is best illustrated in the inconsistency of the exhibitors trade organization's own statistics on the practice. According to one N.A.T.O. memorandum in January 1980, blind-bidding began to proliferate in 1973. To substantiate this N.A.T.O. states that both Paramount and Columbia were blind-bidding seventeen percent and fifteen percent respectively of their

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[38] N.A.T.O. publication "Anti-Blind-Bidding Legislation is Working Well," p. 3. See letter by Roger Davenport, President of N.A.T.O. of Idaho.

products in 1974 but by 1977 the frequency increased to 100 percent and eighty-five percent respectively. These figures are in obvious conflict with those Peter Fishbein, N.A.T.O.'s counsel, presented to Maurice Silverman in July 1973 and to Judge Palmieri in November 1974. Based on these statistics the major distributors were blind-bidding almost ninety percent of their product between 1970-1973. Thus it is difficult to accept the contention of the January 1980 memorandum that blind-bidding began to proliferate in 1973, when the Fishbein report is taken into consideration.[39]

The inconsistency in interpretation of the frequency of blind-bidding by N.A.T.O. has not been detected by either the state legislators or the media largely because the Fishbein figures have never been published until now. This is not to say that either of the two sets of statistics are invalid; instead it serves better to illustrate N.A.T.O.'s misleading of the state legislators in this area. During the course of the various state battles, N.A.T.O. and its state chapters continuously misled state legislators on how old the practice actually is within the industry. This is best seen in one of the N.A.T.O. lobbyist's

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[39] N.A.T.O. Memorandum on "Methods of Distributing Motion Pictures to Motion Picture Theatres," January 10, 1980, p. 1.

publications in Tennessee. The booklet stated that: "Historically, blind-bidding had not been necessary in the motion picture industry. Prior to 1968, there was practically no blind-bidding. . . ." This is characteristic of similar literature distributed by N.A.T.O. sponsored lobbyists since 1976. Not only did this ignore Silverman's 1966 study, which found over forty percent of film products being blind-bid, but tended to create an image that the practice was relatively young rather than being a part of the industry born out of the Paramount decisions thirty years ago. On this matter the M.P.A.A. lobbyists have been historically accurate in stating that blind-bidding has been in existence for a considerable period of time.[40]

Found within the core of the basic N.A.T.O. lobbying strategy, the in-staters versus the out-of-staters or the big guys versus the little guys, is their most flagrant example of misrepresentation on the issue of blind-bidding. This strategy evoked by N.A.T.O. is similar to the interpretative approach used by a school of historians known as the progressives. In this approach the emphasis is on economic causation and the

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[40]Memorandum "Needed in Tennessee: A Motion Picture Fair Competition Act to Eliminate Gross Restraints of Trade in the Motion Picture Theatre Business," by Dennis Clinard, N.A.T.O. Lobbyist to Tennessee, p. 3.

issue or story is presented as a two-way conflict. The shortcomings of this approach are that they ignore the other elements and parties involved in the story. Consequently N.A.T.O. has presented their case as exhibitor versus distributor with the emphasis on the pig-in-the-poke aspect of the practice. Although this strategy has paid off handsomely for N.A.T.O. in nineteen states and a constitutional challenge, it beclouds the issue and ignores the real detrimental effects of blind-bidding. Independent distributors and exhibitors are slighted and somewhat overlooked, yet will be deeply affected by the outcome of the issue in the N.A.T.O. presentation. Labor in the American film industry, in which the vast amount of employed talent will be deeply affected by its outcome as well, is totally ignored in N.A.T.O.'s progressive interpretation of blind-bidding. Thus N.A.T.O.'s two-way interpretation has successfully beclouded the issue by ignoring other vital elements involved in the saga, and with its emphasis on the pig-in-the-poke argument attention has been drawn away from the real detrimental effects of the practice. These are: the degree of discrimination inherent in the practice, such as the commitment of playtime so far in advance and its ramifications towards independent distributors and exhibitors, and the threat of pull-outs from release schedules without substitution

or redress for exhibitors.[41]

Interestingly the M.P.A.A. does not attack this strategy by N.A.T.O. Rather they relish it and in so doing they contribute equally to the misleading of legislators, media, and the public on what is actually at stake with the blind-bidding controversy. The reasons why the M.P.A.A. condones and participates in the N.A.T.O. presentation are clear. First, the M.P.A.A. does not want the other elements involved in the story to be heard or analyzed. If the ramifications toward the independent distributors and exhibitors and labor were given their true attention at the state battles the status quo within the M.P.A.A.'s distribution ranks and N.A.T.O.'s exhibition ranks would be threatened. Between the two, almost $3 billion annually is divided among seven distributors and fifteen percent of the total exhibitors in the country.[42] Secondly, because of the N.A.T.O. emphasis on the pig-in-the-poke argument the M.P.A.A. has been afforded one effective means in combating the anti-blind-bidding bandwagon. This strategy lends itself to similar pig-in-the-poke analogies the M.P.A.A.

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[41]"Nightcap," A Canadian Broadcasting Company Radio Show, Part IV - "The Arts and the Profit Motive: Trouble in Hollywood."

[42]These ramifications, long ignored, are now being analyzed independently from the industry. One of these analysis and the distributor's reactions towards it, is discussed in detail in the conclusion.

likes to introduce in the state battles to prove that the exhibitors are not the only ones who blind-bid in our society today. Most of the M.P.A.A.'s analogies are weak. Those analogies dealing with ordering items from Sears or Wards ignore the fact that these people can command substitutions or redress when not satisfied. The most effective analogies are those involving comparisons to a publishing company contracting a writer for a book or a record company contracting an artist for an album.

In summation there are still a few points that merit attention in this analysis. During the course of the state battles, N.A.T.O., in one of their reasons for urging for trade-screening, argued that it was needed to prevent the unchecked amount of obscene films from entering some communities. This argument is only valid to a point. It is true that exhibitors for the most part have been consistently misled about a film's content from the story lines in the blind-bidding process; however, the distributors have not licensed a flux of obscene products through blind-bidding over the years. In fact of the 233 X-rated films produced in the last decade, the M.P.A.A. member companies made only nineteen of them. And these, for the most part, were trade-screened prior to licensing.[43]

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[43] Variety, November 6, 1979, p. 24.

Closely aligned to the N.A.T.O. claim that blind-bidding is a recent development is a point made that blind-bidding was a "moot question" in the early 1970's. A past N.A.T.O. President, A. Alan Friedberg, commenting on why the 1968 stipulation was not renewed in 1975 stated that " . . . the whole question was moot, since in effect there was little or no blind-bidding." Not only has this thesis demonstrated that wholesale blind-bidding was in effect during that period, but it has also documented the intense lobbying efforts on the part of N.A.T.O. between July 1973 and February 1975 to alter and modify the stipulation because of its widespread practice.[44]

During the early stages of the anti-blind-bidding campaign the M.P.A.A. argued it would be faced with a maze of varied legislation from state to state compounding the distributor's production problems. The early history of N.A.T.O.'s decision to seek relief at the state level dispells this claim. From the original model bill developed by Fishbein nineteen state laws originated. Now the M.P.A.A. argues that the legislation is too similar rather than too diverse. A close examination of the laws reveals that three states (Ohio, Pennsylvania, and Idaho) contain restrictions towards

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[44] See Supplemental on the Premeire magazine article to the September 12, 1980 N.A.T.O. Memorandum.

guarantees and advances plus open bidding procedures. Four more states contain open-bidding laws but no applications toward guarantees and advances. The remaining twelve states simply prohibit blind-bidding, as they all do, and provide specific bidding procedures as do the other seven.[45]

It has now become apparent from this analysis that after almost four years of public debate on this issue both the M.P.A.A. and N.A.T.O. have made gross errors in their historical presentations of the blind-bidding problem. By doing this both these interdependent arms of the industry successfully misled the legislators, media, and the public on the true ramifications involved with the practice. In accomplishing this both distribution and exhibition may have contributed negatively to the future health of the industry.

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[45] See N.A.T.O.'s Anti-Blind-Bidding Legislation Packet, October 1979 edition, all the state laws are reprinted in their entirety. This point was also brought up in the Ohio case. Judge Duncan, after reviewing various inter-office directives from the distributors on how to deal with the laws, concluded there was very little variance in the laws. One Paramount executive admitted during the trial that the legislation was "basically similar in their problem aspect . . . prohibit blind-bidding." See Duncan, p. 47.

EPILOGUE

The reasons why blind-bidding must be terminated lie in parts of the whole. The fact that the nation's exhibitors have had to license films since 1954 sight unseen is only one small justification for the abandoning of this practice. The irony of the situation is that the exhibitors contributed significantly to the plight that they now seek to correct. The nation's exhibitors became willing participants to the practice from the start because of "greed and apathy" according to one past N.A.T.O. president.[1] By becoming participants in the practice they also endorsed the other more far reaching elements of the practice, e.g., the granting of long playdates or runs so far in advance, guarantees and advances. With this endorsement the exhibitors, unbeknowingly to them, became partners with the distributors in creating significant barriers of entry to new film makers, new artists, new exhibitors, and new distributors. In essence the exhibitors, which have now criticized the distributors for over twenty-five

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[1]Canadian Broadcasting Company - Radio Show Nightcap - Part IV. - "The Arts of the Profit Motive: Trouble in Hollywood." Hereinafter referred to as Nightcap-CBC.

years for creating a film shortage, contributed to the successful retardation of many possible avenues to increased film production.

As the distributor's divorcement from cooperative theatre management proceeded under the direction of the Paramount decisions in the late 1950's, the nation's exhibitors became more aware of the economic imbalance the practice had created. Unable to convince the distributors of this situation the exhibitors turned to the Department of Justice beginning in the 1950's for assistance. At first complaints towards blind-bidding were few because at that time the first-run houses in the large metropolitan markets were the only ones affected by the practice. Those exhibitors who were in the outlying markets or sub-run outlets were allowed to trade-screen their products in effect from the results experienced by the first-run exhibitors. However, by the early 1960's with divorcement complete the Justice Department noticed a sharp increase in the number of complaints directed against the practice. A subsequent investigation uncovered in 1966 that over half the films exhibited in the nation's first-run markets had been licensed through blind-bidding. More importantly the Departmental officials discovered a degree of discrimination involved in its procedures which ran counter to the Paramount decisions. Following these investigations the Department

became sufficiently convinced of the need to reduce the frequency of the practice that they entered into a series of court ordered stipulations in 1968 with the defendant-distributors to accomplish this goal. By 1973 the Department became aware that as a direct result of its interference the practice had actually increased dramatically rather than being reduced. The wholesale introduction of the 48-hour cancellation clause, at the Department's insistence, caused the reduction effort to backfire. The effort failed so miserably that by 1975 the Department decided to wash its hands of the whole matter by instituting a hands-off policy that it has maintained to date.

In the meantime the nation's exhibition industry was experiencing major transformations in its structure. The transformation began in the late 1960's and was complete by 1972. The cause of this transformation is attributed to a decision made by the motion picture producer-distributors to address one of the most fundamental public criticisms of its distribution policies. This dealt with the long delay between the time a film was shown in the first-run markets and the time it reached the sub-runs markets where a large segment of the movie-going public resides. To correct this predicament the motion picture companies gradually promoted many of these sub-run exhibitors to first-run status. Thus

more and more Americans were granted first-run status in their movie-going experience.[2]

Naturally as these sub-run exhibitors began to enjoy the benefits of first-run status they also began to participate in the prevalent licensing procedure that goes hand-in-hand with first-run status. This procedure was blind-bidding. This transformation coincided with the Department's unintentional wholesale approval of blind-bidding with the stipulation and its 48-hour cancellation clause. Suddenly more and more communities became affected by the blind-bidding practice, and it caused the first great wave of publicity generated by the phenomenon in the mid-1970's. Consequently, blind-bidding has been presented as either a recent development or a resurrection of a long ago discarded practice. Neither is correct.

The movie distributors realized some time ago that blind-bidding its films into the nation's theatres was advantageous to their interests both practically and economically. In reality all films since the very beginnings of the industry were licensed blind to the exhibitor. In the pre-Paramount decisions days films were licensed blind, known as blind-selling, to exhibitors in large blocks, or block-booking. Following the Paramount decisions the Department of Justice outlawed

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[2] Variety, August 9, 1978, p. 3.

block-booking and replaced it with competitive licensing on a picture-by-picture to theatre-by-theatre basis. Forced to adapt to these directions the distributors adopted and maintained the principles of blind-selling and together with the Paramount decision's mandate for competitive licensing the two together conceived and fathered the practice known as blind-bidding today.

Contributing to the growth and the seemingly acceptance of the practice was the absence of a strong unified voice for all exhibitors. Because of the monopolistic cooperative theatre management prevalent in the pre-Paramount days no strong exhibitor organizations developed. As a result it was not until 1966 that the National Association of Theatre Owners (N.A.T.O.) felt representative enough to speak out in opposition of the practice. Behind the efforts of N.A.T.O. and other exhibitor organizations the battle to prohibit blind-bidding grew to where in 1976, with little alternative, they turned to the state legislatures for relief. Because of the Department's hands off policy rapprochement between the two giant arms of the industry is non-existent. Consequently the state battles will continue, at least until the Ohio case reaches the U.S. Supreme Court. In the meantime the status quo within the industry and the movie-going public will remain unchanged. That is to say that the situation will be

"Heads they win; tails we lose." Distribution and exhibition will continue to win as they divide up an almost $3 billion in receipts annually, and the movie-going public will continue to lose out as they experience a lessening in their freedom of choice on what movies they can view.[3]

In order to avoid this plight there must be either an increase in film production on the part of the M.P.A.A. companies or the total elimination of blind-bidding. By striking down blind-bidding and instituting trade-screening in its place the doors of entry will be left somewhat ajar for independent producers and distributors to compete for playdates more equally with the M.P.A.A. companies. There are noticeable signs today to suggest that a modest increase in film production is already in the development. In 1979, for the first time since the late 1940's, the major distributors produced more films than the previous year. This feat will be repeated in 1980 as well.[4]

There are several possible explanations for this sudden turn in increased production on the part of the

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[3]Columbus (Ohio) Citizen-Journal, March 15, 1978, 6:1. In this editorial in support of blind-bidding legislation the Citizen-Journal portrayed the fight between the Ohio exhibitors and the Hollywood studios as "Heads I win; tails you lose."

[4]Variety, January 2, 1980, p. 5, and Variety, December 5, 1979, p. 5.

major distributors. For one it serves to counter the N.A.T.O. claim that the distributors are involved in a cartel to hold down production. Also coinciding with the state battles since 1978 the distributors experienced a wave of adverse publicity which an increase in film production helps to counter as well. During this period the image of the distributors suffered through a Securities and Exchange Commission investigation into the studio's accounting figures, the David Begelman Affair with Columbia pictures, the blind-bidding problem, anti-trust accusations by the National Independent Theatre Exhibitors (a 5,000 unit organization) and the analysis and conclusions of the Washington Task Force on the Motion Picture Industry.[5]

The most important of these actions against the studios other than the blind-bidding problem was the publication of the results of the Washington Task Force on the Motion Picture Industry in June 1978. The Task Force, which began their study in January 1978, performed a standard structural analysis of the motion picture industry the same as do attorneys in anti-trust cases. The members of the Task Force using information from both the M.P.A.A. and trade journals such as Variety concluded that the industry fitted " . . . neatly into

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[5] Nightcap - CBC radio show.

the oligopolistic mold with discernable if latent monopolistic tendencies."[6] The eighteen page report was the first major work to recognize and properly identify the difficulty of entry into the current market for independent distributors. Acting as one of the barriers to this entry was blind-bidding. The report launched attacks on those various elements which are characteristic to oligopolistic industries, e.g., product differentiation, uniformity in terms, distribution of income, price stability/full employment, and entry.[7]

When the report was made public in June 1978 the Ohio bill was currently being considered in the Senate Committee. Copies of the report did become available to legislators in Ohio, as well as other states considering similar legislation. Undoubtedly the impact of the analysis contributed to the ultimate passage of the Ohio law and subsequent bills in other states. The findings of the Task Force substantiated many of the exhibitor claims against the distributors, and as a result it came to no one's surprise that the state's attorneys attempted to enter the Task Force's conclusions into evidence at the Ohio Constitutional test case.[8]

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[6]Letter from Frederic Schwartz, member of the Task Force, to author, November 28, 1980.

[7]Task Force, pp. 4-18.

[8]Brown, p. 47.

On the other hand the M.P.A.A. and other industry sources responded negatively towards the Task Force's conclusions. Variety devoted over one and one-half pages to its attack on the Report. The industry's leading journal called the Task Force " . . . in tone, style, and content, . . . sounds like a fluffed up, campus-flavored freshman term paper written by a child of an exhibitor."[9] Unknown until now is the fact that Variety, prior to its attack on the Report, was made aware by the Task Force that its conclusions were based largely on information directly from Variety, a fact Variety neglected to tell its readers in its criticisms of the Report.[10] In May 1980, William Nix, associate counsel to the M.P.A.A., in a letter to Richard Billik, an attorney in the Anti-Trust Division, wrote the following concerning the Task Force:

> . . . self-appointed private group of individuals issued an ex-parte "analysis" of the movie industry. It is riddled with misstatements and shaky data but has been given some credence by people unfamiliar with the industry. If this report is offered as proof of a product shortage, there are numerous areas it is vulnerable to attack . . .

In demonstrating the degree of concern the M.P.A.A. still possesses over the Report's findings, Nix also attempted to attribute the product shortage complaints

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[9] Variety, July 5, 1978, p. 13.

[10] Letter from Frederic Schwartz to author, November 28, 1980.

to the Report. In fact these complaints have been in existence as long as blind-bidding.[11]

The Task Force had been founded by Frederic Schwartz, an attorney in the United States Transportation Department and a counsel to a number of film artists and film organizations. There were five original members at the outset, each of whom had a direct interest in the film industry. In the final preparation of the Report only three members were in participation. They were Schwartz, John Larmett, a legislative aide to Senator Gaylord Nelson (D-Wisconsin) who had been involved in the theatre for eleven years, and Elias Savada, a former archivist at the American Film Institute and now the Director of the Motion Picture Information Service. The original five members began weekly meetings in January 1978 in order to " . . . crystalize and give focus to a number of disagreements within the motion picture industry with the hope that they could be resolved and the industry strengthened thereby." After several sessions it became clear to several of the members that there did indeed exist certain barriers to

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[11] JDF - William Nix, Associate Counsel to the M.P.A.A., to Richard Billik, Attorney, Anti-Trust Division, May 27, 1980. It is not known at this time if Nix did furnish Billik with any information that would discredit the conclusions of the Task Force. In over two years since its publication the M.P.A.A. has not publicly provided any evidence to suggest otherwise.

entry into the market for independently produced films. At this point Schwartz suggested the use of the anti-trust model to test the oligopolistic characteristics within the industry.[12] By March 1978 with the model completed the analysis was performed. The model followed a three step process: a study of the industry's structure, its conduct, and its performance.[13] On May 1, 1978 a final draft was completed and circulated to the original five members. With three members willing to place their signatures to the results of the Report it was released to the press through Congressman Edward Markey, member of the House Commerce Committee, who turned it over to the Federal Trade Commission.[14]

From recent developments in the motion picture industry the effects of the Task Force can be seen even today. Movie production began to increase immediately following the release of the Report, and even though the Report dealt with blind-bidding in passing it has been seized upon by exhibitors to give credence to their anti-blind-bidding battle, and more importantly it has convinced other conglomerates that a demand for film products exists and as a result some are now entering

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[12] Schwartz to author, November 28, 1980.

[13] Memorandum from Schwartz to Task Force members, March 5, 1978.

[14] Wall Street Journal, June 9, 1978, p. 5:4. See also Schwartz to author, November 28, 1980.

the market. This is seen by the recent decision of Time-Life to enter into film production.

It is because of this last point that the entailing of the Task Force's history merits so much attention. These conclusions, outlining the barriers of entry and the demand for product, represent a definite threat to the status quo within distribution. Not since the Paramount decisions has the oligopolistic aspects of distribution been so convincingly exposed. To distribution this meant a possible threat of competition. The intense competition already inherent in distribution became more acute as the publication of the Task Force's conclusions coincided with the blind-bidding battles at the state level. It became apparent to the distributors that if the anti-blind-bidding campaign gained in momentum and trade-screening became a prerequisite to film rentals, then others could compete equally with the majors for playdates. This is the reason why the industry attempts quietly to discredit the Task Force, because it alerted others to the need for more film production.

This fear of upsetting the status quo within the industry is apparent in recent developments following the publication of the Task Force. Earlier in this thesis the financial benefits to the distributors in distributing an independent film project was illustrated.

However, there are other justifications besides monetary for this action. By successfully picking up an independent production the distributor prevents another distributor from competing with him at a later date. This fear of competition can be illustrated by looking at Columbia's recent record at distributing independent projects. From 1967 to 1974 Columbia only distributed two independent films, but since then the number of films distributed has increased to twelve.[15]

Recent action by Warner Brothers further substantiates this fear of upsetting the status quo. In January 1978 the top five executives for United Artists broke away and formed their own film company called Orion. This divorcement was fostered by the frustrations experienced in dealing with a conglomerate and its policies plus the inability to produce the quantities of films they desired. The other distributors, aware that Orion with its expertise and experience would be able to acquire the talent and resources necessary to produce films, sought to prevent its entry into distribution.

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[15] Nightcap - CBC Radio Show. This fact bears out the conclusion of the Task Force that film production and distribution will increase as a result of more competition. The market place has already demonstrated this by the upswing in films since 1979.

Before their first film was produced Warner Brothers acquired the distribution rights to their films. At the announcement of this decision Warner Brothers practically admitted their motivational factor was a fear of competition. In 1980 Twentieth-Century Fox duplicated Warner Brothers' actions by seizing the distribution rights of all of Time-Life's future productions, thus negating the potential entry and competition of another possible distributor.[16]

Blind-bidding is a long standing practice in the industry and its effects are widespread. Because of this practice the quality of art from American movies suffers. With trade-screening and the barriers of entry removed both the quality and quantity of films should increase.[17] Secondly, the practice restricts

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[16] Nightcap - CBC Radio Show; Schuyten, p. 130; Variety, August 9, 1978, p. 3. In 1979 Alan Ladd, Jr., broke away from Twentieth-Century Fox for much the same reasons as the former United Artists executives. The first Time-Life production, The Bronx, Fort Apache starring Paul Newman is due for a February 1981 release.

[17] Not only does trade-screening aid exhibitors but directors as well. Francis Ford Coppola trade-screened his film, Apocalypse Now, several times making editing changes along the way. As a result the final print proved to be a financial and artistic success. In November 1979 Steven Speilberg trade-screened 1941 in New York. Because of the wave of criticisms he made the necessary changes in the final print. Although by no means a financial or an artistic achievement the film in final form was a definite improvement quality-wise over the earlier version and it still made money. See Variety, December 12, 1979, p. 5.

the freedom of choice among the American movie-going public. Thirdly, because of the practice a creative pool of talent, almost eighty percent unemployed, in the industry, is being untapped. Finally, certain films with a limited audience appeal do not get produced as distributors continue to exploit fads of themes on the public.[18] Because of these effects and the discrimination inherent in the practice, the barriers of entry to independent production and distribution and exhibition,[19] and the potential for pull-outs the practice known as blind-bidding should be terminated.[20]

The practice will continue for the immediate future, at least until the Ohio case reaches the U. S. Supreme Court, because of the hands-off policy of the

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[18] Nightcap - CBC Radio Show.

[19] In 1979 many of the distributors realized just this point as they discovered that their policy of high rental terms and guarantees had successfully locked out many of the independent exhibitors from competition. Early in 1979 rental terms were lowered somewhat, at the time it was thought as a result of the anti-blind-bidding campaign, on some major films. As it turned out this was not the case at all. The distribution of Hurricane by Paramount and Moment by Moment by Universal on such favorable terms were due largely to the fact that these films were "bombs" or "stinkers," the industry terms for financial disasters, and the distributors were more interested in unloading these films through blind-bidding than making concessions to exhibitor demands. See Variety, February 7, 1979, p. 5.

[20] In December 1980 United Artists trade-screened Heaven's Gate for critical review. Because the reviews were so negative the film was pulled from release schedules in states with no blind-bidding laws, and the film's director was given more time to edit the film.

Government and the policy attitude that an intra-industry rapprochement is forbidden by the original Paramount decisions. The Department of Justice's hands-off policy was reaffirmed to the distributors in March 1979. A week earlier Anti-Trust officials spelled out their policy once again to exhibition. At that March 13, 1979 meeting Assistant Attorney-General Richard Faurette informed the exhibitors that he was " . . . skeptical that the Paramount decrees could be used to settle the dispute," and if they ever decided to intervene the Department would not sanction an informal industry-wide agreement. It would have to go to court.[21]

In the meantime certain industry sources and analysts predict that Americans will be "flickin' in rather than flickin' out" by 1985. Industry figures, both in distribution and exhibition, recognize this possibility as they urge the industry to end the blind-bidding problem and redirect its energies to the competition represented in video-cassettes, discs, cable, and pay T.V.[22] This thesis does not concur with these prognostications. The distribution of movies to the

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[21] JDF - Memorandum concerning Paramount Decrees with Industry Sources, March 20, 1979.

[22] New York Times, July 19, 1977, p. 34:2.

nation's theatres is too lucrative an enterprise to dispense with. In one weekend alone in 1978, between Grease and the re-release of Jaws, the industry took in over $18 million--a record in the entertainment field.[23] The modest increase in film production in the last two years by the major distributors, the easing of the barriers of entry by nineteen anti-blind-bidding laws, and the recognition by non-movie conglomerates that a market for more films does exist, offers a solid foundation for optimism for the future of American exhibition. The complete end to blind-bidding would only solidify this hope.

[23] Nightcap - CBC Radio Show.

TABLE 1

Allocation of Receipts
Rental calculated at "90/10"
(assuming $5,000 weekly house allowance)

Weekly gross	$ Above house allowance	90% to distributor	Balance to exhibitor
$ 5,000	—	—	$5,000
7,500	$2,500	$2,250	5,250
10,000	5,000	4,500	5,500
12,500	7,500	6,750	5,750

Note: This distribution only applies if the calculated film rental exceeds the minimum established by the descending percentages specified in the agreement.

Source: Motion Picture Licensing, p. 5.

TABLE 2

Film	Guarantee Requested	Minimum Run	Rental Terms
Looking for Mr. Goodbar* (Paramount 1977)	$75T	10 wks	90% after theatre expenses, or 70% of 1st weeks gross; 60% of 3rd and 4th weeks gross; 50% of the 5th and 6th weeks gross, 40% of 7th and 8th weeks' gross.
The Deep* (Columbia 1977)	$85T	9 wks	Same
Superman** (Warner Bros. 1978)	$50T-150	8-12 wks	Same, plus per capita royalty.
Star Wars*** (Fox 1977)	$50T	Indefin.	90% after expenses; 80% first 4 weeks; 50% weeks 5-6; 40% weeks 7-8; 35% remaining.
Close Encounters*** (Columbia 1977)	none specified	12 wks	Same as "Goodbar" above

* Source: Task Force, p. 9.

** Source: Rosenfield, p. 30.

*** Source: Rosenfield, p. 30.

TABLE 3

Movies	Warners' suggested	Exhibitors' bids
Exorcist II	$35,000	$125,000
All the President's Men	50,000	75,000
A Star is Born	35,000	106,000
The Enforcer	20,000	22,500
One On One	5,000	5,000
Oh God !	25,000	20,000

TABLE 4

Exhibitors' Guarantees
vs.
Film Rentals
(through 12/31/78)

Picture	Guarantees	Rentals**	Coverage*
The Deep	$12,116,000	$ 31,300,000	2.6
Close Encounters	22,976,400	76,300,000	3.3
Harry & Walter Go to New York	1,611,000	4,600,000	2.9
Murder By Death	3,130,150	22,000,000	7.0
Star Wars	4,400,000	164,800,000	37.5
The Cheap Detective	8,539,750	19,500,000	2.3
Midnight Express	572,550	10,000,000	17.5
Eyes of Laura Mars	1,900,565	8,900,000	4.7

*Rentals – Guarantees
**Through 12/31/78

TABLE 5

U.S. Total Guarantees
vs.
Pre-release production costs

Picture	U.S. guarantees	Pre-release production cost*
Harry & Walter Go to New York	$1,611,000	$ 7,732,000
Murder by Death	3,130,150	5,063,000
The Front	1,566,625	3,780,000
Star Wars	4,400,000	11,000,000
Midnight Express	572,550	4,988,000
Eyes of Laura Mars	1,900,565	8,554,000
Buddy Holly Story	612,200	3,584,000
California Suite	6,747,050	10,845,000

*Most major productions also include substantial post-release costs to the distributor such as prints, advertising, etc.

Source: Motion Picture Licensing, pp. 6-7.

TABLE 6

Concentration Ratio(how the market is divided).

	FILMS RELEASED BY MAJOR STUDIOS*	FILMS RELEASED BY MAJOR INDEPENDENTS**	TOTAL FILMS	NUMBER OF THEATRES	BOX OFFICE GROSSES
1946	262(66%)	138(34%)	400	19,019	$1,692.0
1948	274(61%)	199(39%)	448	18,395	1,506.0
1950	284(60%)	189(40%)	473	19,106	1,379.0
1951	321(73%)	118(27%)	439	18,980	1,332.0
1952	300(78%)	86(22%)	386	18,623	1,325.0
1953	334(81%)	80(19%)	414	17,965	1,339.0
1954	273(74%)	96(26%)	369	19,101	1,251.0
1955	241(76%)	78(24%)	319	19,200	1,204.0
1956	273(79%)	73(21%)	346	19,003	1,125.0
1957	279(73%)	103(27%)	382	19,003	1,078.0
1958	256(73%)	96(27%)	352	16,000	1,010.0
1959	208(82%)	46(18%)	254	16,103	1,006.0
1960	200(81%)	48(19%)	248	16,999	948.4
1961	193(80%)	47(20%)	240	21,000	945.5
1962	172(73%)	65(27%)	237	21,000	874.9
1963	156(70%)	67(30%)	223	12,800	925.0
1964	157(65%)	85(35%)	242	13,750	947.6
1965	187(67%)	92(33%)	279	14,000	1,041.8
1966	170(66%)	87(34%)	257	14,350	1,067.1
1967	190(72%)	74(28%)	264	13,000	1,110.0
1968	197(76%)	61(24%)	258	13,190	1,282.0
1969	168(67%)	83(33%)	251	13,480	1,294.0
1970	167(55%)	139(45%)	306	13,750	1,429.2
1971	169(54%)	144(46%)	313	14,070	1,354.0
1972	169(53%)	149(47%)	318	14,370	1,577.0
1973	149(52%)	138(48%)	287	14,650	1,527.0
1974	140(51%)	134(49%)	274	15,384	1,908.5
1975	108(47%)	122(53%)	230	15,969	2,100.0
1976	118(54%)	99(46%)	217	15,956	2,036.0
1977	98(53%)	88(47%)	186	15,900	2,372.0

*Columbia,Loew's/M-G-M,Paramount,20th Century-Fox,United Artists,Universal,Warner Bros.
**These companies vary from year to year, but generally include nationwide distributors not included above.

Source: Task Force, p. 4.

TABLE 7

Yr.	Box Office Grosses ($ millions)	U.S. Rentals Paramount Def's ($ millions)	Mkt Shares of U.S. Rentals Paramount Def's (%)	Total Film Releases To U.S. Market	Release By Paramou Def's
1946	1,692				
47	-			383	225
48	1,506	326	76	371	215
49	-			398	227
50	1,379			406	220
51	1,332			425	225
52	1,325			411	269
53	1,339			353	236
54	1,251	335	85	378	257
55	1,204			294	200
56	1,125			281	188
57	1,078			311	216
58	1,010	272	66	363	234
59	1,006			327	205
60	948			236	176
61	945			233	171
62	875			225	157
63	925	236	57	213	131
64	948			203	108
65	1,042			227	119
66	1,067	317	74	257	143
67	1,110	354	70	231	127
68	1,282			229	140
69	1,294			241	146
70	1,429			241	145
71	1,354			267	130
72	1,577		77	281	133
73	1,527	563	71	279	120
74	1,908	764	78	237	115
75	2,100	815	83	229	109
76	2,036	735	78	190	95
77	2,372	1,080	84	187	98
78	2,732	1,000 +	89	154	82

Source: Rosenfield, p. 17.

TABLE 8

1976 Income -Millions-

Company	Film $	Other $
MCA (Universal)	$220	$590
Warner Communications (W.B.)	250	590
Walt Disney (Buena Vista)	100	100
Columbia	180	200
MGM	70	170
Fox	210	160

*Source: Business Week, May 16, 1977

TABLE 9

	1977	1976	1975	1974	1973	1972
20th Cent.-Fox	19.5%	13.4%	14.0%	10.9%	18.8%	9.1%
United Artists	17.8%	16.2%	10.7%	8.5%	10.7%	15.0%
Warner Bros.	13.7%	18.0%	9.1%	23.2%	16.4%	17.6%
Universal	11.5%	13.0%	25.1%	18.6%	10.0%	5.0%
Columbia	11.5%	8.3%	13.1%	7.0%	7.0%	9.1%
Paramount	10.0%	9.6%	11.3%	10.0%	8.6%	21.6%
Buena Vista(Disney)	5.6%	6.7%	6.0%	7.0%	5.5%	5.0%
Amer. Int.	3.4%	3.8%	3.4%	3.8%	-	-
MGM	Distrib. by United Artists				4.6%	6.0%

Source: Task Force.

Files
Corres. Unit-Rm. 3218
[illegible]-Rm. 3222
[illegible]-Rm. 3217
[illegible]lander-Chrono-Rm. 3222

TABLE 10

August 17, 1973

MSilverman:jes

TEK:BMH:MS
60-6-86

Columbia Pictures
711 Fifth Avenue
New York, New York 10022

Re: United States v. Paramount Pictures Inc., et al.

Gentlemen:

As you know, the National Association of Theatre Owners has discussed with us the effectiveness of the Blind Bidding Stipulation of August 14, 1968. In view of certain information furnished us, we desire to evaluate such effectiveness.

To enable us to make such evaluation please furnish us with the following information:

1. The name of each picture which your company placed in domestic distribution from January 1, 1971 to date. Every picture which has been commercially exhibited for the first time during the period indicated is to be regarded as having been placed in domestic distribution during that period regardless of when licensing offers were solicited or licensing agreements entered into.

2. With respect to each such picture indicate:

   (a) The aggregate box office receipts to date, as nearly accurate as you can ascertain them, realized by theatres.

   (b) The aggregate film rental you have realized to date.

   (c) Whether the picture was sneak previewed in any theatre prior to the solicitation of licensing offers in any market or the due date of such licensing offers.

(d) If sneak previewed, the date of each sneak preview, the city in which it occurred, the theatre in which it occurred, and the operator of such theatre.

(e) The date on which there was first a final print of the picture, and the number of final prints in being on that date.

(f) The dates on which additional prints became available, and the number of additional prints that became available on each such date.

(g) The date and location (including the address) of any screening of the picture prior to its general release, whether by use of a finished or a work print, for any persons not directly employed in the production of the picture; and identify the persons invited to or who attended such a screening other than those directly employed in the production of the picture, and indicate their affiliation.

(h) The date when a print of the picture was delivered to the Code and Rating Administration of the Motion Picture Association of America to be rated.

(i) Each date when the picture prior to its general release was screened for critics or for the purpose of being reviewed in any publication or rated by any organization or group other than the Code and Rating Administration, and for each such date state the location (including the address) of the screening and identity and affiliation of the persons who attended it.

3. With respect to each such picture list each market in which the picture has been licensed, or offered for licensing, pursuant to competitive bidding or competitive negotiations without:

(a) There having been a trade showing as defined in the August 14, 1968 Stipulation; or

(b) The picture having been otherwise screened or made available for screening for all exhibitors for whom licensing offers were solicited seven days before the due date of offers pursuant to the solicitation on seven days' notice to such exhibitors.

4. With respect to each market listed for each picture in response to 3., indicate:

(a) The date when bid solicitation letters were initially sent, or competitive offers were otherwise solicited.

(b) The date when the bids or other offers to license the picture were due.

(c) The availability date of the picture.

(d) Whether the solicitation or written request provided that the exhibitor, at his option, could cancel any license agreement for the picture at any time from the effective date of the license until 48 hours after the picture was either trade shown or the exhibitor was afforded a reasonable opportunity to attend a screening or other exhibition of the picture (commonly known as and hereinafter referred to as a "48-hour cancellation clause").

(e) The exhibitor who submitted the highest bid or offer and the name of the theatre for which it was submitted. In the case of multiple run offerings, indicate those exhibitors, corresponding to the number of runs offered, who submitted the highest bids or offers and the theatres for which they were submitted.

(f) Whether any bid or offer (or bids or offers in the case of multiple offers) submitted pursuant to the solicitation was (or were) accepted. If so, indicate the successful theatre (or theatres), the operators thereof and the date of acceptance.

(g) If not accepted, were there additional solicitations for bids or offers from exhibitors?

(h) If there were, furnish the information with respect thereto requested in subparagraphs (a) through (f) of this paragraph 4.

(i) The date (or dates) when the bid (or bids) were accepted, or the date (or dates) when any offer (or offers) solicited otherwise than through formal competitive bidding, were accepted. Also, list the date (or dates) when the license agreement (or agreements) for the picture was (or were) entered into.

(j) The theatre or theatres in which the picture in fact played and the exhibitor or exhibitors who owned such theatre or theatres.

(k) The date (or dates) on which the picture opened at such theatre (or theatres).

(l) Whether the license (or licenses) was (or were) subject to a 48-hour cancellation clause by virtue of a provision in the bid solicitation or in the licensing agreement, or both, or for any other reason.

(m) Whether the exhibitor, or any of the exhibitors in the case of a multiple offering, exercised a 48-hour cancellation clause by cancelling the license agreement and thereby refusing to play the picture.

5. List instances, identifying the markets and the pictures, in which all exhibitors in a market in which offers were solicited through bidding or competitive negotiations consented in writing that the picture involved be offered for licensing without screening. Give the date or dates of such consent and the names of the exhibitors who executed them.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: Maurice Silverman
Attorney, Department of Justice

Same letter sent to:
see attached list

TABLE 11

M E M O R A N D U M

TO: Members of the National Association of Theatre Owners, Inc.

FROM: Joseph G. Alterman

RE: Model State Legislation Regulating Trade Practices

Attached is a copy of the Motion Picture Fair Competition Act which has been approved by NATO's Board of Directors as a model statute prohibiting blind bidding and regulating bidding procedures for adoption by state legislatures. Also attached are three optional additions to the statute prohibiting guarantees, advances and solicitation of bids among non-competing theatres. One or more of these additional articles can be added to the model statute in any state where such provisions are desirable and can be enacted.

NATO has received an opinion letter from its counsel, Kaye, Scholer, Fierman, Hays & Handler, that the model statute would be valid and constitutional if enacted by a state, and this opinion letter is available upon request.

The Board of Directors has urged all state associations to make every effort to obtain adoption of the model statute in a form appropriate for each state as quickly as possible.

Attachments

THE MOTION PICTURE
FAIR COMPETITION ACT

Article I - Authority

This Act is adopted pursuant to the authority of . . . (to be completed by each state).

Article II - Purpose

The purpose of this Act is to establish fair and open procedures for the bidding and negotiation of motion pictures within the State in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the State; promote fair and effective competition in that business, and benefit the movie going public by holding down admission prices to motion picture theatres, expanding the choice of motion pictures available to the public, and preventing exposure of the public to objectionable or unsuitable motion pictures by ensuring that exhibitors have the opportunity to view a picture before committing themselves to exhibiting it.

Article III - Definitions

When used in this Act, and for the purposes of this Act:

1. The term "person" includes one or more individuals, partnerships, associations, societies, trusts, or corporations.

2. The term "theatre" means any establishment in which motion pictures are exhibited to the public regularly for a charge.

3. The term "distributor" means any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental, sale or licensing.

4. The term "exhibitor" means any person engaged in the business of operating one or more theatres.

5. The term "exhibit" or "exhibition" means showing a motion picture to the public for a charge.

6. The term "invitation to bid" means a written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a motion picture.

7. The term "bid" means a written or oral offer or proposal by an exhibitor to a distributor, in response to an invitation to bid or otherwise, stating the terms under which the exhibitor will agree to exhibit a motion picture.

8. The term "license agreement" means any contract, agreement, understanding or condition between a distributor and an exhibitor relating to the licensing or exhibition of a motion picture by the exhibitor.

9. The term "trade screening" means the showing of a motion picture by a distributor in one of the three largest cities within the State which is open to any exhibitor interested in exhibiting the motion picture.

10. The term "blind bidding" means the bidding for, negotiating for, or offering or agreeing to terms for the licensing or exhibition of, a motion picture if the motion picture has not been trade screened within the State before any such event has occurred.

11. The term "run" means the continuous exhibition of a motion picture in a defined geographic area for a specified period of time. A "first run" is the first exhibition of a picture in the designated area, a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run.

Article IV - Blind Bidding

1. Blind bidding is hereby prohibited within the State. No bids shall be returnable, no negotiations for the exhibition or licensing of a motion pfeture shall take place, and no license agreement or any of its terms shall be agreed to, for the exhibition of any motion pfeture within the State before the motion picture has been trade screened within the State.

2. A distributor shall include in each invitation to bid for a motion picture for exhibition within the State, if such motion picture has not already been trade screened within the State, the date, time and place of the trade screening of the motion picture within the State.

3. A distributor shall provide reasonable and uniform notice to exhibitors within the State of all trade screenings within the State of motion pictures he is distributing.

4. Any purported waiver of the requirements of this Article shall be void and unenforceable.

Article V. - Bidding Procedures

If bids are solicited from exhibitors for the licensing of a motion picture within the State, then:

1. The invitation to bid shall specify (a) the number and length of runs for which the bid is being solicited, whether it is a first, second or subsequent run, and the geographic area for each run; (b) the names of all exhibitors who are being solicited; (c) the date and hour the invitation to bid expires; and (d) the location, including the address, where the bids will be opened, which shall be within the State.

2. All bids shall be submitted in writing and shall be opened at the same time and in the presence of exhibitors, or their agents, who submitted bids and are present at such time.

3. After being opened, bids shall be subject to examination by exhibitors, or their agents, who submitted bids. Within seven (7) business days after a bid is accepted, the distributor shall notify in writing each exhibitor who submitted a bid of the terms of the accepted bid and the name of the winning bidder.

4. Once bids are solicited, the distributor shall license the picture only by bidding and may solicit re bids if he does not accept any of the submitted bids.

Article VI - Separability

If any Article, section, paragraph or clause of this Act shall be declared unconstitutional by a court of competent jurisdiction, such judgment shall not affect or invalidate the remainder hereof, but shall be limited to the Article, section, paragraph or clause of this Act that was so declared unconstitutional.

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