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The Moving Picture Anti-Trust Cases

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an article of wearing apparel, had created an *actual* belief in the minds of the consuming public that it was made by or had the editorial approval of the plaintiff, the trial judge's finding as to what was *likely* can only be considered as nothing more than conjecture. Hence, he asserted that "we can guess as well as the trial judge", since the instant court was not bound by such a finding. See *U. S. v. U. S. Gypsum Co.*, ...U. S....., 68 S. Ct. 525 (1948); *Best & Co., Inc. v. Miller, supra.*

The dissenting judge's colleagues had stressed the trial judge's statement that the defendants took the same name as plaintiff "because they saw some advantage to it, brought to their atention by plaintiff's use of it." (But in this regard it is noteworthy that defendants had chosen and used this name after plaintiff had published his magazine for only five months.) However, Judge Frank believed that his colleagues, in doing so, had misapplied a correct doctrine:

> (a) It has been held that, in a case relating to competitive articles, where there is room for a reasonable belief that confusion of buyers might occur (i. e., where that fact on the face of things is within the realm of the plausible), then evidence that defendants knowingly selected plaintiff's trade-name, with the deliberate intention of benefiting by plaintiff's public exploitation of it, is enough to prove that confusion is likely.
>
> (b) But such rulings have never been made—in truth they have been rejected—when, as here, the probability of confusion of source is so slight as to be virtually incredible.

Hence, Judge Frank concluded that the Supreme Court of the United States should review this decision on the grounds that in this same circuit the instant court had *denied* relief in a similar case, stating that "a plaintiff must make out an unusually strong case when his trade-name relates to a business and not to any particular product."

Since the present-day rationale of trade name protection is such actual or probable confusion of source that will injure or threaten injury to plaintiff's good will, it would seem only fair that a plaintiff seeking such protection should at all times be compelled to *prove* that defendant's merchandise is so inferior that, if that merchandise in any way deceives the public into associating it with the plaintiff, injury to plaintiff's good reputation would follow. As the instant case illustrates, no limitation of that nature has yet been imposed upon the courts.

The old "limitation" on the trade name doctrine, which makes the courts decline to let the supposed borrower feel its restraining hand when he puts another's mark on goods which are very remote from any that the owner would be likely to make or sell, is not enough. The instant case dramatically indicates that the time has long since arrived when trade name unfair competition law is in need of another limitation—one which would require the courts to look more critically to plaintiff's proof of "misled buyers", "confusion of sponsorship", and "injured reputation", and in the absence thereof, in all fairness to give the defendant the benefit of the doubt.

Walter B. Bieschke

MONOPOLIES—THE MOVING PICTURE ANTI-TRUST CASES.—*United States v. Paramount Pictures, Inc., et al.*, 333 U. S. ...., 68 S. Ct. 915, (1948). This case involves a consideration by the Supreme Court of The United States of the guilt of a vast segment of the nation-wide movie industry of a district court conviction of restraining and monopolizing interstate trade in the distribution and exhibition of

films. Not only were the violations of the Sherman Act by the largest moving picture film distributors of the country in issue, but a more difficult problem, that of what to do about the violations, was presented to the Supreme Court for its consideration.

From a reading of the majority opinion in this case written by Mr. Justice Douglas, it is apparent that the Court had little difficulty in upholding the district court's finding of many Sherman Act violations then existent in the routine procedures necessary eventually to bring films from the producer's stage to the local cinema. Mr. Justice Frankfurter, dissenting in this case, agreed completely with the majority that the district court should be affirmed in its findings of Sherman Act violations but could not agree with the majority's view as to what should or should not be done about these violations.

At the outset, it seems well to point out that Government charges of restraining and monopolizing trade in the production of films were unconvincing to the District court and were dropped completely by the Government in this appeal. It was in the delivery of the film from the producer to the local movie house, the distribution and exhibition field, that an illegal but exceedingly powerful non-competitive empire had been erected by the defendants contrary to Sections One and Two of the Sherman Act. 26 STAT. 209 (1890), as amended, 15 U. S. C. §§ 1, 2 (1946).

As a result of the consideration of a vast amount of evidence, both written and oral, the United States District Court for the Southern District of New York found that the five major national distributors of films and many other distributors and nation-wide exhibitors (movie house heads) of films had been boldly guilty of conspiracies to restrain and monopolize trade in movie films. *United States v. Paramount Pictures, Inc., et al.*, 66 F. Supp. 323 (S. D. N. Y. 1946) and a statement of facts and conclusions of law for this same case, 70 F. Supp. 53 (S. D. N. Y. 1947). Because those distributors had a practical monopoly on the distribution of all good films necessary to the existence of any theater, they had a strangle hold on the movie industry. These distributor-defendants had acted in concert to reduce movie distribution to a collective rather than a competitive enterprise. By agreements among themselves and with nation wide theaters dependent upon them, they were able veritably to dictate the terms upon which a movie would be licensed for public showings.

A film is never sold to a movie house. The right to exhibit under copyright is licensed. Through concerted action these defendants incorporated, in all their licensing agreements with the exhibitors, covenants which fixed minimum prices for the showing of movies all over the country, an obvious restraint of trade.

It was found that in many instances the distributors had incorporated in their licenses agreements not to license the same picture to another exhibitor for a length of time beyond that which was necessary to protect the initial licensee in the profitable showing of his film. Clearance agreements not to re-license a film within a certain time in a competitive area, if reasonable, were upheld by the district court and the Supreme Court as valid. But if the length of time was beyond the scope and motive of protection of the initial licensee, they were unreasonable restraints of trade and violative of the public interest in the viewing of a film.

It was found that exhibitor-defendants as well as distributors were guilty of Sherman Act violations, not only in being parties to the above designated conspiracies in restraint and monopolization of trade but also by operating their theaters on a collective basis by pooling agreements and joint ownership, thus removing competition from this field. This nullification of competition in the exhibition field received severe reproof from the Supreme Court: "Clearer restraints of trade are difficult to imagine." To add to this collective alliance the distributors had financial and managerial interests in movie house chains and other exhibitors through-

out the nation, bringing about complete destruction even of the possibility of successful independent competitive film showing in America. All of these findings were upheld by the Supreme Court..

Further, the Supreme Court affirmed the district court's findings that formula deals, master agreements and franchises which gave to one licensee or an interlocking few licensees complete control over the showing of all good films in large geographical areas were restraints of trade and monopolistic practises. These specific charges were also considered in two other cases decided by the Supreme Court on the same day. *United States v. Griffith,* 333 U. S. ...., 68 S. Ct. 941 (1948) and *Schine Chain Theatres, Inc., v. United States,* 333 U. S. ...., 68 S. Ct. 947 (1948). In these cases monopolistic domination of the exhibition field by the defendants, Griffith and Schine, in their particular geographical area was found to exist. These two cases were local attempts to correct a segment of the nation-wide empire of corruption and the destruction of such local monopolies evidences the determination of the Supreme Court completely to destroy the nation-wide monopoly now in existence.

In the principal case it was also found that distributors were licensing films only on the contingency that other films were also accepted (block-booking); that in some cases double features were mandatory if licenses to films were to be obtained; that films were licensed before they were viewed by the licensee and that discrimination existed against certain unfavored licensees.

With all the foregoing instances of corruption apparent to the Supreme Court, it faced the difficult problem of what to do about them. The district court, in its decree, enjoined the many aforesaid illegal practices, but to enjoin an industry which exhibited such a propensity for unlawful activities was obviously little protection for the public against recurring similar violations to say nothing of new, future illegal adventures. However, powerful control of the industry remained and the tendency to exercise this power in an unlawful manner was already proved. To defeat the possibility of recurring violations the district court decreed that a procedure be installed whereby all films should be offered for licensing by the distributors to the exhibitors devoid of illegal covenants and in such a manner that each, whether he be a favored member of a chain or an independent exhibitor, would have an opportunity to bid competitively for the right to license. The film should then be granted to the highest responsible bidder. To facilitate compliance with the competitive bidding decree, the district court *recommended*—not an order, but a recommendation—that arbitration boards be set up to insure compliance with the bidding standards issued by the court. Rejecting this method of remedy chosen by the district court, Mr. Justice Douglas said, ". . . the provisions for competitive bidding in these cases promises little in the way of relief against the real evils of the conspiracy. They implicate the judiciary heavily in the details of business management if supervision is to be effective." By this alteration of the district court's decision, the remedial decree's central arch of correction was removed, necessitating a remanding of the case to the district court for further curative action. Herein was the point of departure from the majority for Mr. Justice Frankfurter. In his opinion, the discretionary power of the district court in its choice of remedies could not be shown to be grossly unsatisfactory and, not being arbitrary or capricious, he felt it should stand. He would have then upheld the competitive bidding decree with but one minor exception and affirm the district court's decision.

Mr. Justice Douglas, in remanding this case to the district court, issued no positive pattern for the lower court to follow in devising a proper remedy for the movie distributor-exhibitors' violations. Yet, the underlying current of his opinion concerning problems which should be reconsidered by the district court in the reframing of its decree flows in only one direction and reveals the Supreme Court's notion of the proper method of correction: The divestiture of the distributor and

exhibitor interests between each other and among themselves. It was this exact remedy which the Supreme Court directed to be incorporated in the decrees settling the *Griffith* and *Schine* cases. It was this remedy which the Supreme Court directed to cure the exhibitor chain monopoly situation revealed in *United States v. Crescent Amusement Co.*, 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160 (1944), another conviction on a local scale of the evils aimed at on a national scale in the principal case. In the *Crescent* case Mr. Justice Douglas said that "proclivity in the past to use that (chain) affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future." The *Crescent, Griffith* and *Schine* cases were cited in the instant case by Mr. Justice Douglas to exemplify remedies which have been used to correct the same corruption present in the case under discussion. Is it not probable, then, that only such complete divesture of monopolistic interests tending to restrain trade is the only adequate remedy in the eyes of the Supreme Court? A decree of such nation-wide divestiture may well be ordered by the district court at the conclusion of its consideration of this remanded case.

Thomas Broden

BILLS AND NOTES—CONTRACTS RELEASING BANK FROM LIABILITY FOR PAYMENT OF CHECK IN SPITE OF THE STOP PAYMENT ORDER.—*Speroff v. First Central Trust Company*, ...Ohio St....., 79 N. E. (2d) 119 (1948). In this case it was held that a stipulation purporting to release the bank from liability for negligence in the observance of the stop payment order is without consideration and void as against public policy.

The facts are as follows: Action by the plaintiff against the defendant bank to recover the amount of a check which the plaintiff had drawn on the defendant, but which the plaintiff later notified the defendant not to pay. However, the defendant later, through inadvertence or oversight, paid the check, and debited the plaintiff's account. The defendant admitted the drawing of the check and the notice not to pay, but as a defense alleged that the plaintiff had signed a statement agreeing not to hold the defendant liable if it should pay the check through inadvertence or oversight.

The question in the case was whether the releasing of the bank from liability for paying as a result of inadvertence or accident in spite of the stop payment order, constitutes a valid contract, which is not void as being against public policy. It was held that the purported release was void for want of consideration and as being against public policy. The court said:

> The defendant bank was aware that a check is simply an order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted and that an order to stop payment may be oral or in writing so long as it conveys to the bank a definite instruction to that effect. Under the reciprocal rights and obligations inherent in the relationship existing between a bank and its depositors, it was the duty of the defendant not to pay the check after receiving such an order from the plaintiff depositor. Hence, when the plaintiff was asked to sign a statement or release to the effect that the bank would not be held responsible if it should pay the check through inadvertency, or oversight; this was something new—an element that concededly had not previously existed in their relationship. What benefit or consideration was received by the plaintiff as the promisor and what detriment was suffered by the defendant bank as promisee as a result of the new statement or re-