Interstate Circuit and (Other) Antitrust Myths

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Interstate Circuit v. United States, 306 U.S. 208 (1939), one of the most known Supreme Court’s antitrust opinions, introduced an evidentiary framework for conspiracy inference under Section 1 of the Sherman Act: in the absence of direct evidence, proof of conspiracy requires evidence of conscious parallelism supplemented with “plus factors,” which are circumstantial evidence that is consistent with concerted action but largely inconsistent with independent conduct. Hundreds of judicial opinions, books, monographs, and articles summarize and interpret Interstate Circuit. With some minor variations, the summaries of the case are similar in their details, yet materially incomplete and erroneous. As commonly described in judicial opinions and the literature, Interstate Circuit is a myth.

This Article examines the Interstate Circuit myth. First, the Article presents the core elements of the myth and explains why courts and scholars should have been aware of its flaws. The Article then summarizes antitrust standards and concepts for which courts and scholars cite Interstate Circuit as a precedent and, in certain contexts, the leading and even paradigmatic precedent. Second, the Article studies the development of the contractual arrangements that Interstate Circuit found to be a conspiracy in violation of Section 1 of the Sherman Act. The Article shows that the challenged contractual arrangements were products of extensive coordination and negotiations among the defendants. More precisely, the Article shows that the alleged conspiracy concerned parallel compliance with a plan that resolved failed coordination efforts among competitors and that the company that developed the plan was a partially-owned subsidiary of one of the competitors. Third, the Article offers several doctrinal refinements for conspiracy inference standards arising from the study of the Interstate Circuit’s alleged conspiracy. The study illustrates that evidence of intricate relationships among competitors could and should serve as circumstantial evidence that may support the inference of antitrust conspiracy, although standing alone such evidence does not prove the existence of conspiracy.

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INTRODUCTION

*Interstate Circuit v. United States,*¹ one of the most known antitrust decisions of the U.S. Supreme Court, illustrates that an antitrust conspiracy is a legal conclusion that is drawn from factual findings. The leading antitrust treatise, *Areeda & Hovenkamp,* observes that *Interstate Circuit* “continues to fascinate the cognoscenti,” explaining that the “fascination lies in working one’s way through the conspiracy finding.”² Paradoxically, the fascination with the case has not resulted in adequate accounts of its factual findings. Hundreds of judicial opinions, books, monographs, and articles summarize the facts of *Interstate Circuit.*³ The summaries of the case are

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² Phillip E. Areeda & Herbert Hovenkamp, 6 Antitrust Law ¶ 1426, at 200 (3rd ed. 2010).

very similar in their details, yet are materially incomplete and erroneous. They established a myth, which may be called the “popular account of Interstate Circuit.” This Article seeks to dispel this myth.

Simplified summaries, stylized facts, and hypotheticals often offer useful representations of events, reality, and complex texts. The popular account of Interstate Circuit, this Article argues, does not have such qualities. Its extensive use in judicial opinions and the literature, the Article further argues, contributed to confusion about the essence of antitrust conspiracies and the legal standards that courts may use to infer conspiracy from circumstantial evidence. Of course, Interstate Circuit is not the only cause or even the primary cause for the disarray is antitrust conspiracy standards. But the use of a misleading account of Interstate Circuit sheds light on the ambiguities of these standards.

This Article presents three lines of inquiry. First, the Article presents the core elements of the popular account and explains why courts and scholars should have been aware of its flaws. The Article then summarizes antitrust standards and concepts for which courts and scholars cite Interstate Circuit as a precedent and, in certain contexts, the leading and even paradigmatic precedent. Second, the Article studies the development of the contractual arrangements that Interstate Circuit found to be a conspiracy in violation of Section 1 of the Sherman Act. The Article shows that the challenged contractual arrangements were products of extensive coordination and negotiations among the defendants. More precisely, the Article shows that the alleged conspiracy concerned parallel compliance with a plan that resolved failed coordination efforts among competitors and that the company that developed the plan was a partially-owned subsidiary of one of the competitors. Third, the Article offers several doctrinal refinements for conspiracy inference standards arising from the study of Interstate Circuit and its influence on the evolution of these standards.

I. THE POPULAR ACCOUNT: ITS LEGACY AND FLAWS

A. The Popular Account

The popular account of Interstate Circuit describes a dominant firm that weaponized its suppliers to undermine the competitiveness of its small rivals. Surfaced shortly after the Supreme Court handed down the opinion, the popular account consists of four key elements:

(1) A Letter. A powerful movie exhibitor in Texas sent a letter to eight film distributors. Copies of the letter named all addressees, so that each recipient knew that his seven competitors had received the same letter.

(2) A Demand to Adopt New Policies. The letter demanded each distributor to add to its exhibition agreements (contracts between film distributors and exhibitors concerning the licensing
of movies for exhibition) a restriction on minimum admission prices and a ban on double features (the offering of two movies for the price of one). The restrictions were beneficial to the distributors because they protected box office revenues and advantageous for the exhibitor because they were disadvantageous to its rivals.

(3) **Partial and Uniform Compliance.** The distributors partially complied with the demands. Their partial compliance was largely uniform, although not entirely simultaneous. The adopted restrictions involved “a radical departure from the previous business practices of the industry” and led to “a drastic increase in admission prices.”

(4) **A Finding of Unlawful Conspiracy.** The Supreme Court upheld the trial court’s finding that the adoption of the restrictions formed a conspiracy in violation of Section 1 of the Sherman Act.

![Diagram of the Popular Account of Interstate Circuit](image)

Stripped to its essentials, the popular account provides that the factfinder may infer the existence of an antitrust conspiracy from evidence of competitors’ compliance with an invitation to collude, when all were aware of the scheme. Courts and commentators often quote two

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6 *Interstate Circuit*, 306 U.S. at 222.

7 Herbert Hovenkamp, *The Antitrust Enterprise* 129 (2005) (“[I]n the famous *Interstate Circuit* case, . . . an express offer communicated simultaneously to eight firms plus their silent but factually clear acceptance was held to constitute a Sherman Act conspiracy among the firms.”); United Mine Workers of America v. Pennington, 381 U.S. 657, 673 (1965); United States v. Paramount Pictures, 334 U.S. 131, 142 (1948) (attributing to *Interstate Circuit* the proposition that, for conspiracy inference, it “is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.”); Kalanick, 174 F. Supp. 3d at 824 (interpreting *Interstate Circuit* to mean that competitors’ compliance with an invitation to collude may serve as evidence of unlawful conspiracy); Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 193 (3d Cir. 2017) (interpreting *Interstate Circuit* to permit inference of conspiracy “when Company A proposes a parallel price increase to Company B, and Company B does not explicitly
sentences from the Supreme Court’s opinion that express this idea: (1) “It was enough that, knowing that concerted action was contemplated and invited, the [defendants] gave their adherence to the scheme and participated in it.” 8 (2) “Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.” 9

B. The Opinion’s Factual Findings

Interstate Circuit was tried on stipulated facts, as well as additional evidence and testimonies not inconsistent with the stipulated facts. 10 The material factual findings listed in Interstate Circuit may be summarized as follows.

A powerful movie exhibitor faced competition from low-price exhibitors. The exhibitor, a partially-owned subsidiary of a large film distributor, sought to curb the competition by persuading the eight largest movie distributors to amend their exhibition agreements.

The original plan required the distributors to add to the agreements a restriction on minimum admission prices for likely blockbusters. The exhibitor circulated the idea among its suppliers—its parent company and seven other film distributors—through an identical letter sent to the local branch managers of the distributors. The exhibitor managers then discussed the idea with the parent company’s executives, revised the plan, and sent the revised plan to the film distributors in a letter that named all addressees, local representatives of the eight distributors. 11 The exhibitor, then, proceeded with negotiations of the revised plan with the parent company’s competitors. It persuaded them to adopt new terms for their exhibition agreements. The case raised the question of whether the exhibitor orchestrated an unlawful conspiracy among the eight film distributors or entered into eight separate agreements.

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8 Interstate Circuit, 306 U.S. at 226.
9 Id. at 228.
11 For copies of the letters see Appendix.
C. The (Obvious) Flaws of the Popular Account

The popular account of Interstate Circuit suffers from three perplexing flaws: mischaracterization of factual findings, unsound economic logic, and disregard of basic antitrust knowledge.

(a) Mischaracterization of the Court’s Factual Findings. The popular account is consistent with a passage in the Supreme Court’s opinion, when this passage is read out of context. A fair reading of the opinion, however, should lead to the conclusion that the popular account omits material factual findings that the opinion presents.

First, the opinion describes the powerful exhibitor as an arm of one of the distributors. It describes a group of “corporations and individuals engaged in exhibiting motion pictures,” which consisted of “Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc., and Hoblitzelle and O’Donnell, who [were] respectively president and general manager of both [corporations] and in active charge of their business operations.” It states that “the two corporations [were] affiliated with each other and with Paramount Pictures . . ., one of the distributor defendants.” Summaries of the opinion sometimes stumble on the relationship between Interstate Circuit and Texas Consolidated Theatres but typically ignore the affiliation of the companies with one of the

12 Interstate Circuit, 306 U.S. at 222:
The O’Donnell letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others. Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions . . . there was risk of a substantial loss of the business . . ., but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action . . . [presented] to all in a single document.

13 Id. at 214.
14 Id.
15 Id.
distributors. As a result, the popular account neglects the fact that Interstate Circuit was a partially-owned subsidiary of one of the distributors.

Second, Interstate Circuit sent two letters, not one. The letters were sent about ten weeks apart, during which Interstate Circuit modified its demands. The opinion includes a copy of the second letter, which begins with a reference to the first letter. The opinion also describes “negotiations” leading to “modifications of the proposals [that] resulted in substantially unanimous action of the distributors.”

The differences between the popular account’s offer-and-acceptance formula and the stated factual findings are striking. The popular account portrays (1) demands that an important customer delivered to its suppliers through a single act of communication (a letter), and (2) a parallel compliance of the suppliers. By contrast, the stated factual findings describe a partially-owned subsidiary that negotiated an arrangement with its parent company and competitors of the parent company.

(b) Unsound Economic Logic. The formation, operation, and enforcement of cartels are challenging tasks. D.K. Osborne summarized the challenges, writing that cartels face “one external and four internal problems. The external problem . . . is to predict (and if possible, discourage) production by nonmembers. The internal problems are, first, to locate the contract surface; second, to choose a point on that surface (the sharing problem); third, to detect, and fourth, to deter, cheating.” The popular account suggests that a single act of communication may form a viable cartel. This scenario is not compatible with the economic understanding of cartels.

The popular account serves two lines of economic intuitions. First, it inspired several economic theories related to cartel facilitation by third parties. Second, it focuses the attention on the possibility of cartel formation with limited coordination.

Courts and scholars often use Interstate Circuit to illustrate cartel facilitation by third parties. The centralization of collusive functions, such as formation and enforcement may reduce coordination costs. Cartels, therefore, sometimes rely on third parties that provide them with centralized collusive functions. The popular account describes how cartel members may pay a third party for the facilitation of the cartel by adopting policies that raise its rivals’ costs. It is, however, unclear why the film distributors were interested in such a cartel. In a market for highly-differentiated products, such as movies, with eight distributors that differ in size and portfolio of products, a substantial increase in retail prices may not necessarily result in increased revenues for

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16 Several summaries refer to the affiliation. See, e.g., Schad, 136 F.2d, at 996; Butz & Kleit, supra note 3, at 138; Michael Conant, Antitrust in the Motion Picture Industry 87 (1960); Bertrand et al., A Pattern of Control, supra note 5, at 45; Giuliana Muscio, Hollywood’s New Deal 153 (1997) (“Another suit against an affiliated chain was United States v. Interstate Circuit, filed in Texas in 1936.”).

17 Interstate Circuit, 306 U.S. at 216.

18 For a copy of the letter see Appendix.

19 Interstate Circuit, 306 U.S. at 222.


all distributors. Similarly, a ban on double feature may serve some distributors but adversely affect distributors whose movies typically served as the “second feature.”

The idea that limited coordination may suffice to persuade competitors to change distribution policies is even more dubious. The popular account suggests that a single act of communication without any additional coordination could form mutual understanding among a diverse group of suppliers, leading all to modify their distribution policies in a similar fashion. But, under such conditions, a uniform compliance of all competitors is very unlikely.

(c) Disregard of Rudimentary Antitrust Knowledge. The popular account suggests that collaborations among competitors were unlawful during the relevant period. The events leading to Interstate Circuit took place in a peculiar phase in the evolution of antitrust law. During that period, national economic policies, antitrust policies included, were influenced by theories of “new competition” that rested on the belief that civic associations, such as trade associations, were effective mechanisms to combat the illnesses of industrialization and protect democracy. The federal government, thus, encouraged collaborations among competitors to promote “fair trade” and avoid “ruinous competition.” The National Industrial Recovery Act (“NIRA”), which was in effect when the alleged Interstate Circuit conspiracy formed, was a product of the period. NIRA required industries to negotiate “codes of fair competition,” exempted the codes from antitrust law, and provided that violations of codes would be deemed “an unfair method of competition” within the meaning of Section 5 of the Federal Trade Commission Act. In the motion picture industry, for more than a decade before Congress passed NIRA, the eight largest distributors standardized their exhibition agreements. The legality of this standardization under antitrust law was litigated and even reached the Supreme Court. NIRA’s Code of Fair Competition for the Motion Picture Industry (the “Motion Picture Code”) adopted such a standardized agreement. Thus, during the relevant period, the motion picture industry operated under a government-sponsored industrywide agreement, NIRA’s Motion Picture Code.

Further, many antitrust cases and vast literature examine various vertical practices of the eight film distributors and, specifically, their vertical integration with powerful exhibitors. It is virtually impossible to gain expertise in antitrust law without acquiring appreciation of the


27 Code of Fair Competition for the Motion Picture Industry (Code No. 124, Approved by President Roosevelt on Nov. 27, 1933) (the “Motion Picture Code”).

significance of the vertical practices in the motion picture industry during the second quarter of the twentieth century. Notwithstanding, the popular account ignores the existence of vertical arrangements in the motion picture industry.

D. Interstate Circuit As an Antitrust Precedent

*Interstate Circuit* has served three threads of antitrust precedents. First, the case introduced an evidentiary framework for conspiracy inference under Section 1 of the Sherman Act. Second, the case inspired the development of several antitrust concepts concerning the architecture and functioning of cartels. Third, *Interstate Circuit* addressed the thorny relationship between antitrust and intellectual property, holding that intellectual property rights do not afford immunity to horizontal restraints of trade. *Interstate Circuit* is also credited for formulating a general evidentiary standard providing that the "production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."

Conspiracy Inference. An antitrust conspiracy in violation of Section 1 of the Sherman Act is a "conscious commitment to a common scheme designed to achieve an unlawful objective."

Direct evidence of an antitrust conspiracy proves the existence of such a scheme without inference. Direct evidence of conspiracy, however, is often not available, because secrecy and concealment are basic features of unlawful conspiracies. *Interstate Circuit* holds that no formal or express agreement is needed to constitute an antitrust conspiracy. It further holds that, in the absence of direct evidence, circumstantial evidence, which requires inference of the alleged facts, may prove the existence of an antitrust conspiracy. Courts had recognized that antitrust conspiracies may be inferred from circumstantial evidence long before *Interstate Circuit*, but did

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29 *Interstate Circuit*, 306 U.S. at 221 ("[I]n cases of alleged unlawful agreements to restrain commerce, the [plaintiff] is without the aid of direct [evidence] . . . and is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators."). See also KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 134 (2003) ("Modern inference doctrine more or less begins with *Interstate Circuit*."); Kovacic, The Identification and Proof of Horizontal Agreements under the Antitrust Laws, supra note 3, at 22 ("The foundation of modern judicial efforts to define the elements of a Section 1 agreement . . . [began] in 1939 with *Interstate Circuit*."); STANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESS: CASES AND MATERIALS 709 (9th ed. 2012) ("*Interstate Circuit* is a landmark in the law of conspiracy, not only for antitrust cases but also for the general problem of establishing the existence of conspiratorial relationship.").


31 Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984). See also Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) (defining an antitrust conspiracy "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.").

32 See In re Baby Food Antitrust Litigation, 166 F.3d 112 (3d Cir. 1999) (noting that direct evidence is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.")

33 *Interstate Circuit*, 306 U.S. at 221 ("[I]n cases of alleged unlawful agreements to restrain commerce, the [plaintiff] is without the aid of direct [evidence] . . . and is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators."). See also KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 134 (2003) ("Modern inference doctrine more or less begins with *Interstate Circuit*."); Kovacic, The Identification and Proof of Horizontal Agreements under the Antitrust Laws, supra note 3, at 22 ("The foundation of modern judicial efforts to define the elements of a Section 1 agreement . . . [began] in 1939 with *Interstate Circuit*."); STANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESS: CASES AND MATERIALS 709 (9th ed. 2012) ("*Interstate Circuit* is a landmark in the law of conspiracy, not only for antitrust cases but also for the general problem of establishing the existence of conspiratorial relationship.").
not explain what circumstantial evidence may show conspiracy.\textsuperscript{34} \textit{Interstate Circuit} reaffirmed the general principle and presented an evidentiary framework for conspiracy inference: in the absence of direct evidence, proof of conspiracy requires evidence of conscious parallelism supplemented with “plus factors,” which are circumstantial evidence that is consistent with concerted action but largely inconsistent with independent conduct. \textit{Interstate Circuit} articulated four types of plus factors: (1) communication,\textsuperscript{35} (2) an abrupt departure from past practices,\textsuperscript{36} (3) a motive to conspire,\textsuperscript{37} and (4) acts against self-interest (actions that would be unprofitable, unless all rivals take similar measures).\textsuperscript{38} The case has also served as a leading precedent for three core terms concerning conspiracy inference: “agreement requirement,” “conscious parallelism,” and “tacit agreement.” Additionally, courts and scholars credit \textit{Interstate Circuit} for establishing two additional inference standards: (1) conscious parallelism and the acceptance of an invitation to collude may establish conspiracy,\textsuperscript{39} and (2) simultaneous action is a not a requirement to demonstrate parallel conduct.\textsuperscript{40}

\textit{Antitrust Concepts.} \textit{Interstate Circuit} is the paradigmatic precedent for “hub-and-spoke conspiracies” and a leading precedent for the concepts of “raising rivals’ costs” and “cartel ringmaster.”\textsuperscript{41} Hub-and-spoke conspiracies are cartels in which a firm (the “hub”) organizes a cartel (the “rim”) among upstream or downstream firms through vertical restraints (the “spokes”).\textsuperscript{42} Most discussions of hub-and-spoke conspiracies refer to \textit{Interstate Circuit} as the paradigmatic hub-and-spoke conspiracy case.\textsuperscript{43} There is no shortage of examples of hub-and-

\textsuperscript{34} The key decision before \textit{Interstate Circuit} was E. States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914), where the Court wrote that “[i]t is elementary . . . that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done.” \textit{Id.} at 612. See also Maple Flooring Mfrs. Ass’n v. United States, 268 U.S. 563, 584-85 (1925); Frey & Son v. Cudahy Packing Co., 256 U.S. 208, 218-20 (1921); Thomsen v. Cayser, 243 U.S. 66, 84 (1917); Baush Mach. Tool Co. v. Aluminum Co. of Am., 72 F.2d 236, 241 (2d Cir. 1934).

\textsuperscript{35} \textit{Interstate Circuit}, 306 U.S. at 222.

\textsuperscript{36} \textit{Id.} at 218, 222.

\textsuperscript{37} \textit{Id.} at 222, 225.

\textsuperscript{38} \textit{Id.} at 222.

\textsuperscript{39} See \textit{infra} notes 7-9 and accompanied text.


\textsuperscript{41} In their seminal paper about exclusionary practices, Thomas Krattenmaker & Steven Salop used \textit{Interstate Circuit} to illustrate the terms “raising rivals’ costs” and “cartel ringmaster.” See Thomas G. Krattenmaker & Steven C. Salop, \textit{Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price}, 96 YALE L.J. 209, 238-40, 260-61 (1986).


\textsuperscript{43} See Edward R. Johnson & John Paul Stevens, \textit{Monopoly or Monopolization—A Reply to Professor Rostow}, 44 ILL. L. REV. 269, 295 (1949):

[The principle of . . . \textit{Interstate Circuit} [is] that individual participation, with knowledge that competitors are also participating, in a plan which necessarily results in a restraint of trade, is sufficient to establish an unlawful conspiracy. In \textit{Interstate Circuit},] the defendants joined a well-defined program to put an end to existing competition. Though each company negotiated independently, each made an express agreement to stifle competition; these express agreements, like
spoke conspiracies.\textsuperscript{44} \textit{Interstate Circuit} may illustrate a specific type of such cartels, but not the paradigmatic one: the partial vertical integration of the hub (\textit{Interstate Circuit}) and one of the upstream firms (Paramount) makes the case similar to a horizontal conspiracy in which one firm (the “ringmaster”) facilitates the conspiracy.

\textbf{Antitrust and Intellectual Property.} Throughout the history of antitrust law, intellectual property right holders have argued that the exclusionary scope of their rights immunizes agreements concerning such rights from antitrust scrutiny. The Supreme Court has persistently rejected the argument that horizontal agreements in restraint of trade were within the exclusionary scope of intellectual property rights.\textsuperscript{45} \textit{Interstate Circuit} is one of the first Supreme Court’s decisions to establish this point.

\section{Industry Structure and Practices}

\subsection{Modern Corporations vs. Independent Firms}

\textit{Interstate Circuit} took place in a period of growing tensions between “modern corporations” and “independent businesses.”\textsuperscript{46} These tensions were a significant force in the evolution of antitrust law.\textsuperscript{47} \textit{Interstate Circuit} is one of numerous antitrust cases that addressed the relationships between modern corporations and independent firms in the motion picture industry.

Modern corporations were, in essence, large businesses that emerged in the United States at the turn of the nineteenth century. They utilized economies of scale and scope, operated multiple business units, often vertically integrated production and distribution, and were operated by professional managers. Many modern corporations, though certainly not all, were publicly-traded companies. Their decentralized structures established “affiliations” among business units and

\begin{quote}
the spokes of a wheel, all had a common hub. The rim of the wheel was supplied by the desire to participate even with full knowledge of the scope of the enterprise.
\end{quote}

See also eBook, 791 F.3d at 319-20; Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc., 602 F.3d 237, 255 (3d Cir. 2010); Insurance Brokerage, 618 F.3d at 331-33; Nat’l ATM Council, 922 F. Supp. 2d at 94-95; Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc., 602 F.3d 237, 255 (3d Cir. 2010); Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 436 (6th Cir. 2008); TRU, 221 F.3d at 935-36; Kalanick, 174 F. Supp. 3d at 824.


\textsuperscript{46} See, e.g., Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) (an antitrust action that “independent gasoline dealers” brought against “large oil companies”); United States v. Philadelphia Nat. Bank, 374 U.S. 321 (1963) (reviewing potential effects of consolidation in the banking industry on “independent, local banks”); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (stating that the expansion of “large national chains” “is not rendered unlawful by the mere fact that small independent stores may be adversely affected” but emphasizing the “desire to promote competition within the protection of viable, small, locally owned business.”); United States v. Paramount Pictures, 334 U.S. 131 (1948) (examining tensions between the large film distributors and independent exhibitors) Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946) (same); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (reviewing a rivalry between “major oil companies” and “independent refiners”).

firms. For example, in 1932, Loew’s, Inc., the parent company of Metro-Goldwing-Mayer (“MGM”), was a large conglomerate. It vertically integrated production, distribution, and exhibition of films through 124 subsidiaries.\footnote{\textit{Metro-Goldwyn-Mayer,} \textit{Fortune}, Dec. 1932, at 51.}

The traditional businesses, which modern corporations replaced, were small businesses that did not utilize economies of scale and scope, and were typically managed by the owners. With the rise of the modern corporations, such small businesses became known as “independent firms” because they were not affiliated with large businesses. To illustrate, chain stores and department stores, which developed during the era, were modern corporations. They utilized economies of scale and scope and offered a large variety of products for low prices.\footnote{See, e.g., \textsc{Godfrey M. Lebhar}, \textit{Chain Stores in America}, 1859-1950 (1952); John T. Flynn, \textit{Chain Store Menace Or Promise?}, \textit{New Republic}, I (Apr. 15, 1931 at 223), II (Apr. 22, 1931 at 270), III (Apr. 29, 1931 at 298), IV (May 6, 1931 at 324), V (May 13, 1931 at 350); \textit{Chain Stores Have Grown Rapidly Since 1912}, \textit{Wall St. J.}, Feb. 5, 1923, at 3; \textsc{Marc Levinson}, \textit{The Great A&P and the Struggle for Small Business in America} (2011).} By contrast, the traditional mom-and-pop stores were independent businesses. Similarly, in the motion picture industry, there were large theater circuits and “independent exhibitors.” Interstate Circuit, an exhibition business that operated two theater chains, was one of the largest and most successful circuits in the United States.

Alfred Chandler’s seminal study of the rise of modern corporations summarizes the pattern that appeared in many industries:

The first entrepreneurs to create [modern business] enterprises acquired powerful competitive advantages. Their industries quickly became oligopolistic, that is, dominated by a small number of first movers. These firms, along with the few challengers that subsequently entered the industry, no longer competed primarily on the basis of price. Instead, they competed for market share and profits through functional and strategic effectiveness. They did so \textit{functionally} by improving their product, their processes of production, their marketing, their purchasing, and their labor relations, and strategically by moving into growing markets more rapidly, and out of declining ones more quickly and effectively, than did their competitors.\footnote{\textsc{Alfred D. Chandler, Jr.}, \textit{Scale and Scope: The Dynamism of Industrial Capitalism} 8 (1990).}

In the motion picture industry, eight film distributors established an oligopolistic control during the 1920s.\footnote{The eight large distributors were Paramount Pictures Distributing Co., Inc. (“Paramount Pictures”), Metro-Golden-Mayer, Inc. (“MGM”), RKO Distributing Corp. (“RKO”), Vitagraph Inc., the distribution arm of Warner Bros. Pictures, Inc. (“Warner Bros.”), Twentieth Century-Fox Film Corporation (“Twentieth Century”), Columbia Pictures Corp. (“Columbia”), Universal Film Exchanges, Inc. (“Universal”), and United Artists Corporation (“United Artists”).} Five distributors, known as the “majors,” vertically integrated production, distribution, and exhibition of motion pictures.\footnote{Paramount, MGM, RKO, Twentieth Century, and Warner Bros.} The other three distributors, known as the “minors,” vertically integrated production and distribution and had a limited presence in exhibition.\footnote{The minors were Columbia, United Artists, and Universal. United Artists and Universal vertically integrated a relatively small number of movie theaters. Columbia did not operate movie theaters.} In 1934, during the events leading to \textit{Interstate Circuit}, the eight distributors controlled the production and distribution of about 80\% of feature films in the United States.\footnote{\textsc{Daniel Bertrand}, \textit{The Motion Picture Industry Study} 11 (Office of the National Recovery
eight distributors competed among themselves over market shares and revenues, and cooperated on issues related to trade practices. From 1923 to 1932, the eight distributors used a standard exhibition agreement that their trade association developed.\(^{55}\) In 1932, after several legal defeats,\(^{56}\) the distributors abandoned the standard exhibition agreement for concerns regarding antitrust liabilities.\(^{57}\) Instead, they adopted a model for an exhibition agreement, the “Optional Standard License Agreement.”\(^{58}\)

_Interstate Circuit_ defendants, thus, were modern corporations: a powerful exhibitor and eight dominant distributors. The victims of the alleged conspiracy were independent exhibitors that operated in the territories of the powerful exhibitor.

### B. Affiliations, Classifications, and Trade Practices

The eight film distributors developed a business model that consisted of three core elements: (1) feature films for (2) shared consumption in (3) convenient physical facilities. Feature films were high quality movies that last 85 minutes or more, which were produced on expensive sets with creative and technical crews, used professional actors who were promoted as “movie stars,” were shown in movie theaters, and were heavily advertised.\(^{59}\) They replaced the one-reel films that were short (about 10 minutes), relatively homogeneous, primarily targeted working-class audiences, and kept the identity of the creative team anonymous.\(^{60}\) One-reel films were typically produced, distributed, and exhibited by small firms. It was the introduction of feature films that drove the development of movie theaters.

To advance the business model of feature films, the distributors developed several practices that defined the operation and organization of the industry during the relevant period. An appreciation of these practices is essential to the understanding of _Interstate Circuit_ and many other antitrust cases in the motion picture industry.

1. **Affiliations.** By 1934, the motion picture industry consisted of three categories of firms: (1) the eight large distributors and their production companies, (2) “affiliated exhibitors” that were

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57 See _Attorneys for Major Firms Reject 5-5-5_, VARIETY, May 17, 1932, at 5.

58 _Optional Standard License Agreement_, VARIETY, Nov. 22, 1932, at 34; _Lewis_, supra note 56, at 294-98.


exhibition businesses wholly-owned or partially-owned by the large distributors, and (3) “independent companies” in which the eight distributors did not hold equity.\textsuperscript{61} Interstate Circuit was an affiliated exhibitor of one of the large distributors.

2. Movie Classifications: (a) “Runs.” “First run” pictures were movies that were shown for the first time after their release. “Subsequent run” pictures were movies that previously had been exhibited elsewhere, and were typically classified as second- or third-run movies.

(b) “A” and “B” Movies. Feature films were introduced with a classification of A, B, and C films, which was loosely related to the production budget of a film.\textsuperscript{62} Class A pictures featured “strictly famous players in famous plays,” Class B included “well known picture players,” and Class C were “made of odds and ends.”\textsuperscript{63} With the proliferation of double features in the early 1930s, the classification gained a new meaning. In the era of double features, “A movies” were high-budget films, whereas “B movies” were low-budget, low-quality movies that primarily supplemented A movies in double-feature programs.\textsuperscript{64}

3. Theater Classifications: First- vs. Subsequent-run Theaters; Downtown vs. Neighborhood Theaters. During the relevant period, first-run A movies played primarily in upscale theaters located in the downtowns of cities. These theaters were commonly known as “first-run” theaters. In the industry lingo, they were known as “Class A theaters.” Inexpensive theaters whose facilities were less glamorous typically were unable to secure first-run A movies. These theaters were known as “second-run” or “subsequent-run theaters.” The least expensive theaters were subsequent-run theaters that were located in residential neighborhood and, thus, were known as “neighborhood theaters.” Affiliated exhibitors operated the overwhelming majority of Class A theaters in the United States, as well as subsequent-run theaters. Independent exhibitors typically operated subsequent-run and neighborhood theaters. With the exception of one theater, Interstate Circuit operated all first-run theaters in Texas’ six largest cities.

4. Facilitating Vertical Restraints: To facilitate an effective system of runs and product differentiation, the distributors developed several types of vertical restraints. The three primary practices were “zones,” “clearances,” and “block booking.”

(a) Zones and Clearances. A “zone” was a territory that defined priorities for exclusivity rights of local exhibitors. Typically, a first-run theater in a zone had an exclusive right to show first an A movie, then a second-run theater had such exclusive right, and so forth. A “clearance” was a period between “runs” of a film during which no theater in a zone had the right to show the film.\textsuperscript{65} Disputes over zones and clearances between affiliated and independent theaters greatly contributed to the tensions among exhibitors.

(b) Block Booking. To finance the production of feature films, the distributors licensed annual

\begin{itemize}
\item \textsuperscript{61} See, e.g., W. Ray Johnston, \textit{Independents Are Necessary}, BILLBOARD, Apr. 14, 1934, at 41 (describing the struggle of independent film companies).
\item \textsuperscript{62} See, e.g., Famous Players Co. Angling for David Belasco’s Pieces, \textit{Variety}, Apr. 3, 1914, at 18; \textit{V-L-S-E Classification Approved}, \textit{Motion Picture World}, July 17, 1915, at 504; Legit Rod Booking System by Big Feature Film Firms, \textit{Variety}, June 26, 1914, at 16. See also Terry Ramsaye, \textit{The Rise and Place of the Motion Picture}, 254 ANN. AM. ACAD. POL & SOC. SCI. 1, 6 (1947).
\item \textsuperscript{63} TERRY RAMSEY, \textit{A Million and One Nights} 621 (1926).
\item \textsuperscript{65} HOWARD T. LEWIS, \textit{The Motion Picture Industry} 201-29 (1933).
\end{itemize}
programs of films before production. This practice was known as “block booking.” By 1927, seven of the eight large distributors licensed movies only through block booking.66 The eighth large distributor, United Artists, licensed each movie separately or used blocks of several movies but did not use annual contracts.67 The blocks that each of the seven distributors offered were so large that most exhibitors satisfied their annual needs with one or two contracts.

C. Decentralization

The essence of organizations is internal allocations of tasks, control, and oversight. When such allocations create efficiencies and expand productive possibilities, an organization could produce value and compete in the marketplace. The rise of large businesses at the turn of the nineteenth century required the delegation of control and oversight to subsidiaries and business units to attain such efficiencies. These organizational needs popularized methods of “management decentralization.”68 With the Great Depression, pressures to improve performance turned decentralization theories into a managerial fad. In the motion picture industry, “decentralization” had a particular meaning—a transition from centralized management of exhibition through national theater chains to regional circuits operated by local managers.

Pretty much from their formation until 1931, the large distributors competed over access to premium exhibition outlets.69 This competition led to excessive investments in extravagant movie palaces and acquisition of all significant independent chains across the United States.70 Throughout this period, even after the market crash of 1929, the majors invested in exhibition, although experts, including industry leaders, publicly acknowledged that the industry operated at overcapacity and that the operation costs of theaters were too high.71

There were many warning signs that the distributors’ investments in exhibition were excessive and that the vertical integration with exhibition was inefficient.72 In the race to acquire theaters,
the distributors entered into costly leases believing that they could increase revenues in local markets. They typically acquired theaters as operating businesses, leased the underlying properties, and managed all theaters from their New York headquarters (the “home offices”). This system of centralized management offered certain efficiencies, but its inefficiencies were greater. The home offices lacked the expertise needed to serve the preferences of local markets (“showmanship”).

Chain stores utilized scale, scope, and standardization to reduce costs and lower prices. Movie theater chains could not harness these advantages effectively. Their success built on charging high prices for glamour. Thus, already before the market crash of 1929, losses in exhibition persuaded Paramount to give away 150 theaters in small towns and persuaded one of the minors (Universal) to exit exhibition and sell its theaters to Paramount. Nonetheless, the five majors continued to acquire theaters until 1931, acquiring all significant chains around the country.

By the summer of 1931, the chains’ heavy losses forced the majors to reevaluate the profitability of vertical integration with exhibition. Many industry practitioners believed that decentralization of the national theater chains would improve operation and reduce the “chain stigma.” Three of the five majors, thus, adopted formal “decentralization” plans conceding that local control of theaters by regional companies might be superior to the centralized management of national chains.

Reports about decentralization plans initially created mistaken beliefs that the distributors were exiting exhibition. Decentralization, however, had the opposite meaning: the distributors adopted

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73 See, e.g., Division of All Territory and Local-Pooled Operation by Major Chains May Come About, id.; Film Salesmen Vanishing As Chains Absorb Independents, VARIETY, Jan. 23, 1929, at 4.

74 See 150 Theatres Given Away, VARIETY, Feb. 6, 1929, at 5; Universal Giving Up House Operation, VARIETY, Oct. 16, 1929, at 7.

75 See, e.g., Circuit Map Changing, VARIETY, May 7, 1930, at 11 (discussing the expansion of the “Big Four,” Paramount, Fox, Warner Bros., and RKO); Warner Acquire 7 Chains in Drive for 1,000 Theatres, VARIETY, Apr. 23, 1930, at 3.

76 Circuit Map Changing, id; Abram F. Myers, The Extermination of the Independent Picture Houses, BILLBOARD, June 29, 1929, at 21 (Myers served as the President and General Counsel of then the largest trade association of independent exhibitors, the Allied States Association of Motion Picture Exhibitors).

77 See, e.g., Cinema: State of the Industry, TIME, June 27, 1932, at 24 (“Fundamental difficulty in the cinema industry lies not in production, but in the cost of maintaining chains of theaters.”)


79 The three distributors were Paramount, Twentieth Century-Fox, and RKO. Fox Theatres, the exhibition unit of Twentieth Century, announced “decentralization” plan August 1931, but the five distributors were experimenting with decentralization initiatives since 1929. See Splitting Up Fox Chain, VARIETY, Aug. 11, 1931, at 5; Fox Theatre Chain to Run on Unit Plan, N.Y. TIMES, Aug. 12, 1931, at 21. Other distributors followed. See Fox Chain Break Up Effective Aug. 31, MOTION PICTURE DAILY, Aug. 13, 1931, at 1; Chain Decentralization May Reach Into Other Large Theatre Circuit If Fox-East Experiment Stands Up, VARIETY, Aug. 18, 1931, at 5; Don B. Reed, Home Control of Picture Houses Gains Momentum, WASH. POST, Aug. 23, 1931, at A3; Publix Chain Called Complete With Decentralization Finished, VARIETY, Jan. 1, 17, 1933, at 29; Ayer, 1,422 New Independent Accounts Are Created, supra note 91 (reviewing the decentralization programs).

80 See, e.g., Indies On Rise Throughout U.S., BILLBOARD, Apr. 29, 1933, at 7; See De-Chaining As a Windfall for All Indies, VARIETY, Apr. 25, 1933, at 7; Chains Not Giving Away Any Melons in Theatres, VARIETY, Feb. 21, 1933, at 31; Decentralization: A Business Boon, BILLBOARD, Dec. 3, 1932, at 28; Older Methods, N.Y. TIMES, Aug. 13, 1931, at 18; Martin Quigley, A Turn in the Road, MOTION PICTURE DAILY, Aug. 13, 1931, at 1; Independent Exhibs Speeding Comeback, MOTION PICTURE DAILY, Aug. 5, 1931, at 1; Decentralization Trend Is Spreading, FILM DAILY, July 8, 1931, at 1.
new managerial policies to enhance efficiencies. The majors broke up the national chains and formed partnerships with regional operators, in which the majors retained 15% to 75% ownership interest and transferred management responsibilities to the local partners. This reorganization allowed the distributors to reduce debt and liabilities by divesting less profitable assets and renegotiating long-term leases. The three majors that adopted formal decentralization plans and threw their exhibition units into bankruptcy to renegotiate debt and reduce liabilities. In March 1933, the trade association of the large distributors adopted a plan calling for “the readjustment of much of the industry’s theatre structure in order that decentralization of ownership and management might result in greater economy and greater flexibility.”

Paramount, the distributor that operated the largest number of theaters, used bankruptcy proceedings to renegotiate liabilities for its “over-burdened chain operation.” The company formed partnerships with local theater operators, kept “a certain amount of supervision . . ., especially on the financial end and in film booking matters,” and used funds paid by the partners for their equity to pay creditors 30¢ on the dollar. Interstate Circuit was one of these partnerships. Like other partnerships, Interstate Circuit did not use the Paramount brands.

In many markets, thus, decentralization resulted in strong affiliated chains and further weakening of the local independent exhibitors. This was the situation in Texas, where Interstate Circuit formed and emerged as one of the strongest regional chains in the country.

III. THE GREAT DEPRESSION: ADMISSION PRICES, DOUBLE FEATURES, AND LEGAL UNCERTAINTY

The Great Depression devastated the U.S. economy from October 1929 to March 1933. The recovery was slow and continued throughout the 1930s. During the Depression years, theaters converted to sound and about one third of U.S. theaters closed. Facing dwindling demand, exhibitors experienced increased competition for patronage, resulting in a widespread reduction of admission prices and a growing use of various marketing schemes, such as giveaways, raffles, free ladies’ nights, and double features. From 1930 to 1933, the average admission price fell by 33%,

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81 See ROBERT T. SWAINE, 2 THE CRAVATH FIRM AND ITS PREDECESSORS 533-40 (1948) (discussing the reorganization of the distributors); Theatre Receiverships, VARIETY, Jan. 31, 1933, at 5 (“The involved companies [were] seeking mostly relief from too expensive theatres.”); Receiverships for P-P, RKO, BILLBOARD, Feb. 4, 1933, at 1 (“In all these receiverships and bankruptcies there has been a spirit of friendliness.”); Trustees Sue Paramount Board for $12,237,071, MOTION PICTURE DAILY, Apr. 26, 1934, at 1 (describing a lawsuit against Paramount’s board to recover investments in exhibition).

82 Hays Submit Rehabilitation Program, FILM DAILY, March 28, 1933, at 1.

83 Theatre Receiverships, id.

84 Famous Theatres’ $1,800,000 Bid for PE’s Assets Formally Approved, VARIETY, Dec. 26, 1933, at 4; About 30¢ on the $ By P.E., VARIETY, Dec. 12, 1933, at 9. Mae Huettig’s seminal study of the motion picture industry reports that, in the early 1940s, it was difficult to evaluate the relationships between the majors and their affiliated theaters. However,

85 Id.

86 See Ayer, 1,422 New Independent Accounts Are Created, supra note 81.


88 BERTRAND, THE MOTION PICTURE INDUSTRY STUDY, supra note 54, at 36.

89 See, e.g., 85 Different Games Now in Use in Theatres Cost Industry Millions, MOTION PICTURE HERALD, Nov.
exceeding the decline in the consumer price index by ten points.\textsuperscript{90} In the first year of the Depression, the average admission price dropped by 6.5\%, but box-office revenues did not decline because the introduction of sound films contributed to increased attendance.\textsuperscript{91} In 1931-33, however, the average admission price kept declining and attendance plummeted.\textsuperscript{92}

Of all practices adopted during the Depression, double features was “the exhibition scheme that made the greatest impact on the industry.”\textsuperscript{93} Double features were a marketing tool fashioned after the popular scheme of “two for the price of one,” which, notwithstanding the name, permits charging for a bundle of products a price that is higher than the price that could be charged for a single product.\textsuperscript{94} A double-feature program typically included a high-budget film and a low-budget film, a flop, or an old movie.\textsuperscript{95} Exhibitors began offering double features with the emergence of feature films.\textsuperscript{96} Throughout the 1910s and 1920s, the silent film era, theaters in competitive markets offered double features. The practice, however, became widespread only in the early 1930, with the collapse of the demand for films.\textsuperscript{97}

The rapid spread of double features reduced the demand for expensive productions and boosted the demand for low-budget films, which served as the “second feature.”\textsuperscript{98} There were

\begin{itemize}
    \item In the 1930s, large theaters used to have “lower floor” and “balconies.” When the balcony was open to the audience, tickets were offered at a lower price. The phrase “admission price” in this Article refers to the lower floor price or the general price in theaters that did not have balconies.
    \item See, e.g., Fred Ayer, 1,422 New Independent Accounts Are Created, MOTION PICTURE HERALD, June 17, 1933, at 9 (“The talking picture was . . . a . . . novelty to the public, and the film industry was enjoying one of its greatest booms. . . . [I]t was not until 1931 that this industry began to feel acutely the general business retrogression. Suddenly the public stopped spending and theatre closings started overnight.”)
    \item BERTRAND, THE MOTION PICTURE INDUSTRY STUDY, supra note 54, at 35.
    \item See generally Edward R. Beach, Double Features in Motion-Picture Exhibition, 10 HARV. BUS. REV. 505 (1932); Gary D. Rhodes, “The Double Feature Evil”: Efforts to Eliminate the American Dual Bill, 23 FILM HIST. 57 (2011).
    \item Beach, id.
    \item Beach, id. See also Anti-Dual Movement Reversed, MOTION PICTURE HERALD, Dec. 31, 1932, at 12; Spreading of Double Feature Alarm Leaders of Industry, MOTION PICTURE HERALD, Nov. 14, 1931, at 9; Double Featuring Discussed By All Sides, VARIETY, Apr. 22, 1931, at 5; 75\% of Chicago Theaters Playing Double Features, FILM DAILY, March 2, 1931, at 1; Double Feature Playing More Plentiful and Spreading, VARIETY, Oct. 8, 1930, at 4; Double Talkers on One Bill Back Strongly, VARIETY, Apr. 2, 1930, at 12; Double Feature Film Days Disappearing Generally, VARIETY, Oct. 30, 1929, at 20 (arguing that the practice, which was “nearly as old as the picture industry itself,” was “riding for a fall that may mean complete extinction.”); Double-Feature Plan Costly With Talkies, BILLBOARD, May 25, 1929, at 21 (explaining an anticipated “demise of the double-feature practice.”).
    \item BALIO, GRAND DESIGN, supra note 93, at 28-30; Beach, supra note 96; Robert W. Chambers, The Double Feature As a Sales Problem, 16 HARV. BUS. REV. 226 (1938); H’Wood’s ‘Forgotten Men,’ VARIETY, July 8, 1936, at 5; Need Twice As Many Pix, VARIETY, Aug. 14, 1934, at 5.
\end{itemize}
disagreements among exhibitors over the effects of double features on exhibition, 99 but exhibitors typically felt compelled to adopt the practice once their competitors did so. Six large distributors that specialized in high-quality films (the five majors and United Artists) strongly opposed double features, describing the practice as a “dangerous trade policy,” an “illness,” a “dangerous and malignant disease,” a “major problem,” “fallacious,” “unethical,” “evil,” and “cancer.” 100 Two minors, Columbia and Universal, produced mostly low-budget films and apparently benefitted from the increase in the demand for B films. 101 The primary beneficiaries of double features, however, were independent producers. 102 They had expertise in low-cost productions and until the Depression had a limited access to exhibition for the centralized booking practices of the national chains and the dominance of block booking.

Thus, with the exception of the independent producers, all industry groups engaged in efforts to eliminate double features. 103 Throughout the 1930s, the distributors and various groups of exhibitors negotiated various initiatives to ban the practice. 104 Attempts to eradicate the practice,

99 See, e.g., Double Feature Trouble, N.Y. TIMES, July 14, 1940, at 86; Double Trouble, TIME, Feb. 21, 1938, at 55; Indie Exheds Favor Flexible Pic Policy, VARIETY, Apr. 17, 1934, at 29.

100 See, e.g., Samuel Goldwyn, Hollywood Is Sick, SAT. EVE. POST, July 13, 1940, at 18; Most Trade Leaders Denounce Double Featuring As a Menace, MOTION PICTURE HERALD, Nov. 21, 1931, at 13; Spreading of Double Feature Alarm Leaders of Industry, id.; Double Bill Situations, VARIETY, Apr. 15, 1931, at 9; Double Feature Dangers, VARIETY, Apr. 8, 1931, at 1; Chicago Exhibitors to Curb Double Features, BILLBOARD, Nov. 29, 1930, at 33.

101 Taves, supra note 64, at 319.

102 See, e.g., Walter Greene, The Indies and Duals, VARIETY, Jan. 6, 1937, at 12; “B” Films Become Issue of Studio and Theatre, MOTION PICTURE HERALD, Feb. 13, 1937, at 13; Major Up Prod. to Keep Indies Out of Ist Runs, VARIETY, Apr. 24, 1934, at 5 (noting that double features undermined efforts to “hal[ ]” indies from getting into first and second runs.”); Double Bills, BILLBOARD, Apr. 7, 1934, at 19; Independents Planning Larger Feature Output, MOTION PICTURE HERALD, Apr. 7, 1934, at 9; Notice Given Indie Studio Staffs in Hollywood, Pending Outcome of Double Features’ Future Via Codes, VARIETY, Sept. 5, 1933, at 7; Indies Puzzled By Uncertainty On Double Bills, VARIETY, May 16, 1933, at 4; Dual Bills Indies’ Hope, VARIETY, Dec. 13, 1932, at 7; Indie Producers Set for Unusual Opportunities, July 5, 1932, at 5; Indies and Twin Bills Out, VARIETY, June 14, 1932, at 5; Dual Film Tenacity Insures Them, VARIETY, Apr. 26, 1932, at 5; 250 Features From Indies, VARIETY, March 1, 1932, at 5; Curtailment By Larger Studios Prompts Independents to Expand, MOTION PICTURE HERALD, Jan. 9, 1932, at 9; Spreading of Double Feature Alarm Leaders of Industry, MOTION PICTURE HERALD, Nov. 14, 1931, at 9; 100 Features From Independents in New Season As Market Opens, MOTION PICTURE HERALD, May 2, 1931, at 12; Seven New Indie Producers Start on Coast in One Week; Double Features Responsible, VARIETY, Apr. 15, 1931, at 11; McCall, The Quickie Film Producer, id.; Double Talkers on One Bill Coming Back Strongly, supra note 97 (“[D]ouble feature houses are using an indie . . . to go along with a [film] from a national distributor.”); Small Neighborhood House Better Off Than Big Ones, VARIETY, Jan. 4, 1928, at 11.

103 Chambers, supra note 98; Beach, supra note 96; Rhodes, supra note 96; Strong Stand for Duals, VARIETY, Sept. 5, 1933, at 7; Public Protests Double Features, id., Producers’ Poll on Double Bills, VARIETY, Feb. 28, 1933, at 6; Most Trade Leaders Denounce Double Featuring As a Menace, supra note 100; Jack Alicote, Double Feature?—Depression Dynamite, FILM DAILY, Apr. 28, 1931, at 1.

104 See, e.g., Chicago Film Deals Await Filing of Suit, MOTION PICTURE HERALD, Oct. 10, 1936, at 80; New War Brewing Over Dual Features, Sept. 1, 1934, at 29; Detroit Ends Double Bills, BILLBOARD, Sept. 9, 1933, at 22; Double Feature May Be Ended, MOTION PICTURE HERALD, July 8, 1933, at 9; Ousting Double Features, VARIETY, Feb. 23, 1932, at 7; Suburbs Drop Doubling By Agreement, VARIETY, Jan. 5, 1932, at 7; Double Features Losing On Coast, MOTION PICTURE HERALD, Nov. 26, 1932, at 20; Chicago Follows Kansas City, Detroit in Banning Double Bills, MOTION PICTURE HERALD, Oct. 8, 1932, at 31; Denver Exhibs Vote Against Twin Bills, VARIETY, June 14, 1932, at 23; Independents Act to End Twin Bills in New York Area, MOTION PICTURE HERALD, June 11, 1932, at 22; Oppose Twin Bills, VARIETY, May 17, 1932, at 6; Double Bills Code Is Adopted By Exhibitors At Kansas City, MOTION PICTURE HERALD, Feb. 27, 1932, at 72 (“The motion picture industry succeeded . . . in laying a foundation for a
however, failed. Among other reasons, the legality of agreements to ban double features was questionable. For example, in December 1931, the distributors agreed that each would unilaterally punish exhibitors for offering double features, after receiving a legal opinion advising them that “any collective effort . . . to regulate the practice could be construed as conspiracy and would stand little chance if contested in the courts.”

Congress passed NIRA in June 1933 responding to a “national emergency . . . of widespread unemployment and disorganization of industry, which burden[ed] interstate commerce . . . affect[ed] the public welfare, and undermine[d] the standards of living of the American people.” NIRA intended to reinvigorate the economy, among other ways, by inviting industries to adopt “codes of fair competition.” To facilitate such collaborations among competitors, NIRA exempted industry codes and any other agreements approved under the statute from the antitrust laws. NIRA, thus, did not suspend the antitrust ban on horizontal restraints of trade. Rather, it created an exemption for government-sponsored industry arrangements. Nonetheless, the statute’s spirit instilled beliefs that it would suspend antitrust enforcement. These beliefs proved correct in part. When NIRA was in effect, the government invested little in antitrust enforcement and courts were reluctant to hold that private arrangements violated the antitrust laws. But with the repeal of NIRA, the government and courts adopted aggressive approaches to alleged antitrust violations.

In the motion picture industry, NIRA created hopes that the industry’s code would eliminate “cut-throat competition” and end the decline in box-office revenues. Variety called NIRA the “moratorium on antitrust law” and reported that all industry groups believed that the statute would

solution to double featuring in towns where it is considered to be an ‘evil.’ Exhibitors at Kansas City agreed to a ‘Code of Ethics’ regulating the practice.”); Suburbs Drop Doubling By Agreement, Variety, Jan. 5, 1932, at 7 (describing the “first concerted step on the part of the exhibitors themselves to . . . [address] the double-feature disease.”); Considering a Wide Campaign to Discourage Double Bills, Film Daily, May 21, 1931, at; Chicago Fights to Halt Double Bills, Motion Picture Herald, Apr. 4, 1931, at 24; Double Featuring Discussed By All Sides, supra note 97 See generally Rhodes, supra note 96.


106 See Distributors May Direct Theatre Policy, Is Ruling, Motion Picture Herald, Feb. 15, 1936, at 13 (“Thousands of exhibitors the country over, for many years privately or otherwise, have challenged the right of distributing companies to control theatre policy in the manner at issue.


108 NIRA, § 1.

109 Id. § 3.

110 Id. § 5.


112 See, e.g., That Code Authority Board, Variety, Jan. 2, 1934, at 4 (arguing that the implementation of the Code will prohibit competition among exhibitors); Unfair Competition Out, Billboard, Dec. 16, 1933, at 20 (describing the expectations from the Motion Picture Code); Exhibitors Prepare to Raise Prices to Cover NRA Burden, Billboard, Oct. 7, 1933, at 24 (describing an anticipation for price increases); Gait of Industry Is Quicken By Improvement of Business, Motion Picture Herald, May 13, 1933, at 9, 10 (discussing anticipated effects on the cutthroat competition).
allow them “to fix prices and enter into other compacts considered necessary.” President Roosevelt approved the Motion Picture Code in November 1933. It was the longest and most complex NIRA code. Double features and price restrictions were two of the most contested topics in the negotiations over the code. For a lack of resolutions, the Motion Picture Code avoided both issues.

Interstate Circuit, thus, advanced policies addressing two of the most pressing issues in the industry in 1934: admission prices and double features. At the time, there was some uncertainty concerning the legality of contractual arrangements that regulated prices and double features. More precisely, there was some uncertainty concerning the possibility that the government would prosecute such arrangements or that courts would hold that such arrangements violated the antitrust laws.

IV. THE ALLEGED CONSPIRACY

Interstate Circuit raised the question of whether a decentralized theater chain orchestrated an unlawful conspiracy among the distributors. The events took place during the negotiations for the 1934-35 season, when NIRA was still in effect.

A. Interstate Circuit, Inc.

1. The Hoblitzelle-Paramount Partnership

In the entertainment world, “Interstate Circuit” used to mean the theater business that was owned and operated by Karl Hoblitzelle with partnership of R.J. O’Donnell. Hoblitzelle was known as the “most influential man in commercial theatre of Dallas and the Southwest” and “the number one citizen” of Dallas. In Interstate Circuit, the district court described Hoblitzelle as one of Dallas’ “finest characters.” In 1904, Hoblitzelle entered the exhibition business by forming a vaudeville company, Interstate Theaters Circuit. His business model focused on building large premium theaters in large cities in the south and offering the best show in town. O’Donnell, joined Hoblitzelle in 1925, served as his right hand, held the title “general manager,” and was known as the “Boss Man.” The large film distributors often used O’Donnell’s endorsement of

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113 Moratorium on Anti-Trust Law Proceedings Welcomed All Around, VARIETY, May 9, 1933, at 25.
114 See Code of Fair Competition for the Motion Picture Industry (Code No. 124, Approved by President Roosevelt on Nov. 27, 1933).
115 LOUIS NIZER, NEW COURTS OF INDUSTRY: SELF-REGULATION UNDER THE MOTION PICTURE CODE xvii-xviii (1935) (arguing that the Motion Picture Code was the most longest and most complex code).
116 Right to Buy, Scores, Duals Out of NRA Code, id.
119 See Jane Lenz Elder, Karl Hoblitzelle and the Inauguration of Interstate Theaters, HIST. J. DALLAS & N. CENTRAL TEXAS 4 (fall 1994).
120 Elder, id.; ROGERS, supra note 117, at 221-28; Hoblitzelle Outstanding Figure in History of the Theater in Texas, WICHITA DAILY TIMES, Aug. 19, 1941, at 8.
films in advertisements that targeted exhibitors. Together, Hoblitzelle and O’Donnell managed first-run “vaudefilm” theaters, which showed programs of movies and vaudeville shows, were located in premium locations, and had a vast seat capacity (over 1,000 seats per theater).

By 1929, Hoblitzelle operated one of the largest independent theater chains in the South that included seven deluxe theaters in Texas, Alabama, and Arkansas. In May 1930, when the majors still acquired theater chains, Hoblitzelle sold his exhibition business to RKO, one of five majors, and retired. Under the terms of the transaction, RKO bought Interstate Circuit as an operating business and leased the theaters from Hoblitzelle. O’Donnell moved to Publix, Paramount’s exhibition arm. The economics of the deal is illustrative. During the Great Depression, Hoblitzelle exited the industry while securing himself a flow of income from costly leases, whereas a large distributor, RKO, expanded and entered into costly financial commitments.

In early 1933, three of the large majors—Paramount, RKO, and Twentieth Century-Fox—threw their theaters into bankruptcy to restructure their debt and advanced decentralization plans. Hoblitzelle returned from retirement, agreed to relieve RKO of certain liabilities under the lease agreements, and took control of three theaters in Texas that he had sold three years earlier. With the return of Hoblitzelle, O’Donnell moved back to Interstate Circuit. Together, Hoblitzelle and O’Donnell turned the business around and reported profits within a few months.

During the years of expansion, Publix, Paramount’s exhibition arm, acquired in Texas two large theater chains, Southern Enterprises and Dent. Southern Enterprises had about 20 theaters in Texas’ six largest cities and Dent had about 70 theaters in smaller cities in Texas and a few in Albuquerque, New Mexico. After Hoblitzelle returned to exhibition in 1933, Paramount began negotiating with him a partnership to set up a new Interstate Circuit company that would operate the theaters of Southern Enterprises, Dent, and Interstate Circuit. Before the deal was finalized, the trade press described Hoblitzelle as “generalissimo of Interstate Circuit, Inc. and Consolidated

122 Interstate May Go to RKO, BILLBOARD, May 17, 1930, at 9.
125 Theatre Receiverships, VARIETY, Jan. 31, 1933, at 5; Receiverships for P-P, RKO, BILLBOARD, Feb. 4, 1933, at 1.
126 See RKO’s Grief, Houses Stick, BILLBOARD, Dec. 31, 1932, at 12; Interstate Back to Hoblitzelle, BILLBOARD, Jan. 7, 1933, at 7; RKO to Turn Back 3 to Hoblitzelle, VARIETY, March 21, 1933, at 25.
127 Hoblitzell’s Circuit Plans, BILLBOARD, Apr. 1, 1933, at 7.
128 Interstate Circuit Shaping Up Well, BILLBOARD, May 6, 1933, at 6; Interstate Units Jump Grosses 300%, VARIETY, Jan. 6, 1934, at 49. See also Dropping Early Bird Matinees, VARIETY, Apr. 18, 1933, at 39 (describing Hoblitzelle’s campaign professional men back to the theaters and increase admission prices).
129 South Theatre Deal in Sight, VARIETY, Feb. 7, 1933, at 31. Dent theaters were decentralized in 1932, but the local partner died in a car accident in July 1933. See Pascall Buys Half of Publix-Dent Circuit, FILM DAILY, July 1, 1932, at 1 (reporting the details of the decentralization partnership in Dent theaters); Paschall’s 50-50 Pulix-Dent Deal May Chop Losses, VARIETY, July 5, 1932, at 4 (reporting that Dent theaters were losing $6,000 a week under Publix management); Par’s Texas Houses to Hoblitzelle and O’Donnell Gives ‘Em 80 Spots, VARIETY, Aug. 1, 1933, at 31 (reporting about the transfer of Dent theaters to Hoblitzelle and O’Donnell).
The successful recovery of the chains allowed Hoblitzelle to acquire and build additional theaters. In December 1933, Terry Ramsay, a legendary film reporter, described the transformation of the exhibition business in Texas:

As all the motion picture world knows, there was the typical chain theatre invasion of Texas along with the wave of distributor ownership of theatres that swept the nation. Now what we have euphemistically called “decentralization” . . . has largely turned the amusement business of Texas back to Texas.

Conspicuous in the Texas scene stands . . . Karl Hoblitzelle . . and at his right hand, R. J. O’Donnell . . A while back Mr. Hoblitzelle sold his theatres . . . to RKO. . . . Now [Hoblitzelle and O’Donnell] are busy sorting out the fruits of “decentralization” and the turn-back into two divisions, both of them Hoblitzelle organizations under a single management. . . . This means a total of some ninety-six houses. . . . Mr. Hoblitzelle is very much a home-ruler for the amusement business in Texas.131

Finalized in April 1934, the Paramount-Hoblitzelle partnership positioned Hoblitzelle as one of the nation’s largest affiliated exhibitors with a chain of almost 100 theaters. The parties formed a holding company, Interstate Circuit, Inc. (“IC”) that held several subsidiaries, including two newly formed corporations: Texas Consolidated Theatres, Inc. (“TC”) and Interstate Circuit Theatre Operating Corporation (“ICTO”).132 Paramount transferred to IC the ownership of Southern Enterprises theaters and assigned the leases of the chain’s theaters to ICTO. This reorganization of debt gave Hoblitzelle leverage for renegotiation of the leases. Hoblitzelle transferred to IC his three theaters. Additionally, Paramount transferred the ownership of Dent theaters to TC. As a result, the partnership agreement formed a theater operating business: a holding company (IC) that operated two theaters chains, one was also known as “Interstate Circuit” and the other was TC.

IC issued two classes of stocks that gave each party a right to 50% of the company’s profit: Class A stocks, which were held by Hoblitzelle and his associates, and Class B stocks, which were held by Paramount. The Class B stocks were preferred. Paramount had a buyback option to acquire Hoblitzelle’s Class A stocks. Each party had two seats on the company’s board of directors. Hoblitzelle committed to operate the theaters for salary and to pay Paramount $1,500,000 over a period of 20 years.133 When the bankruptcy trustees approved the partnership agreement, Hoblitzelle and O’Donnell had already “managed to achieve more than $1,000,000 savings in the operation of the theaters” and Paramount considered “the improvement . . . as the best comparative score achieved by any of its partners.”134 In January 1936, Paramount announced that it would relinquish its buyback option and, instead, formalized a permanent partnership agreement with

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130 Decentralization Is Hoblitzelle’s Theme at Dallas, BILLBOARD, Jan. 20, 1934, at 19.
131 Terry Ramsay, Texas Rolls Her Own; That Goes in the Theatre Too, Says Ramsaye, MOTION PICTURE HERALD, Dec. 23, 1933, at 11.
132 Incorporations, VARIETY, Sept. 25, 1934, at 31; Windup of RKO-Par’s Bankruptcy and Rcvshp in Southern Houses, VARIETY, May 1, 1934, at 4; Reorg. of Par. Theatre Links Soon, VARIETY, March 27, 1934, at 6; Balaban-Trendle Status Quo, VARIETY, Oct. 10, 1933, at 4.
133 Reorg. of Par. Theatre Links Soon, id.; Balaban-Trendle Status Que, But Par Sets 3 New Partnerships Incl. 50 Houses to Hoblitzelle, VARIETY, Oct. 10, 1933, at 4.
134 Windup of RKO-Par’s Bankruptcy and Rcvshp in Southern Houses, supra note 132.
Hoblitzelle. By that time, IC was “one of the largest and most important of Paramount theatre units.”

Figure 3
Interstate Circuit, Inc.: The Hoblitzelle-Paramount Partnership (April 1934)

Thus, when the events leading to Interstate Circuit took place, Paramount held 50% of the equity of Interstate Circuit with an option to acquire the other 50%. When the government filed its complaint in December 1936, Interstate Circuit operated 109 theaters.

2. The Integration With Paramount

Hoblitzelle’s partnership with Paramount was organic, not limited to Paramount’s ownership of equity in Interstate Circuit. While the partnership agreement was negotiated, Hoblitzelle joined Paramount’s leadership team. In January 1934, Paramount announced that it would form a “National Theater Advisory Committee” to support the operation of its decentralized theaters. Hoblitzelle was one of the six Committee members, who headed large decentralized chains.

135 See Partner Stays, MOTION PICTURE HERALD, Jan. 4, 1936, at 9; Paramount, Hoblitzelle in New Pact, MOTION PICTURE DAILY, Dec. 11, 1936, at 1; Hoblitzelle to Pay Para. $600,000 to Kill Buy Back, MOTION PICTURE DAILY, Dec. 16, 1936, at 1; Par Drops Buy-Back Right, VARIETY, Dec. 16, 1936, at 7.
136 Hoblitzelle’s Deal Extended to Year’s End, MOTION PICTURE DAILY, Nov. 20, 1935, at 1.
137 Nat’l Theater Advisory Board Is Being Formed By Paramount, FILM DAILY, Jan. 12, 1934, at 1.
138 Hoblitzelle Is Named for Post at Para., MOTION PICTURE DAILY, Jan. 24, 1934, at 1; Advisory Group to Contact
Paramount created the Committee “for the purposes of exchanging information, confirming policies and maintaining closer contact between Paramount theater partners and associates and the home office.” Specifically, consistent with the logic of decentralization, Paramount declared that the Committee members would be “in constant communication with one another and with the home office.” In December 1934, Hoblitzelle was also appointed to the board of directors of Paramount.

In February 1934, after NIRA’s Motion Picture Code was signed, the Code Authority created “Clearance and Zoning Boards” and “Grievance Boards” in major cities. Hoblitzelle and O’Donnell were appointed to these boards for their relationships with Paramount. Hoblitzelle represented affiliated exhibitors on the Grievance Board in Texas and O’Donnell represented affiliated first-run exhibitors on the Board of Clearance and Zoning in Texas. Further, as affiliated exhibitors, Hoblitzelle and O’Donnell participated in corporate events of Paramount. For example, in June 1934, they participated in Paramount’s International Sales Convention, which focused on self-censorship and the problem of double features.

In sum, when Hoblitzelle and O’Donnell advanced the idea of persuading the distributors to adopt new contractual restrictions, Interstate Circuit was an important subsidiary of Paramount that was operated by strategic partners of the company. Interstate Circuit’s top managers, Hoblitzelle and O’Donnell, had direct relationships with Paramount’s executives and access to executives of the other distributors.

B. Rising Tensions Toward the 1934-35 Season

When block booking governed movie distribution, the industry negotiated annual deals every summer. The negotiations for the seasons of 1933-34 and 1934-35 were delayed because of the reorganization of the theater chains and complications caused by NIRA. Price wars among exhibitors in various cities and the growing use of double features intensified tensions between the
vertically integrated and independent firms.\(^{146}\)

In late March 1934, examining an arrangement in the dry-cleaning industry, the Southern District of New York held that fixing minimum prices by contract or other means was lawful under NIRA.\(^{147}\) The major national newspapers reported that the decision broadly applied to all industries.\(^{148}\) In the motion picture industry, the trade press wrote that the decision gave a green light to fix minimum admission prices.\(^{149}\)

Encouraged by the belief that concerted action was lawful, the distributors and the trade association of the affiliated exhibitors negotiated plans to ban double feature and raise admission prices.\(^{150}\) In prior negotiations, the distributors and their affiliated exhibitors were unable to agree on a policy for minimum admission prices because of considerable quality differences across movies.\(^{151}\) The negotiations, therefore, primarily focused on double features.\(^{152}\) But, in mid-June 1934, the discussions collapsed.\(^{153}\) There were fears of “losing sales to competitors not enforcing a double featuring ban.”\(^{154}\) Thus, some distributors “declared that they were unwilling to incorporate a ban on double featuring in their contracts unless all distributors did the same.”\(^{155}\) As noted, two minors—Columbia and Universal—benefitted from double features. They specialized in low-budget production and their A movies were equivalent to B movies of the other studios.\(^{156}\)

Two additional factors apparently contributed to the failure of the negotiations. First, the independent firms—producers, distributors, and exhibitors—declared that the plan to ban double features was “conspiracy in restraint of trade” and prepared for a legal battle.\(^{157}\) Second, in May

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\(^{146}\) See, e.g., Triple Bills Concern Industry Heads, VARIETY, March 13, 1934, at 4; What Executives Say on Price Cuts, MOTION PICTURE HERALD, Jan. 21, 1933, at 10; Demands for Admissions Above Dime Likely from 5 Companies, MOTION PICTURE HERALD, Aug. 20, 1932, at 19; Indies and Twin Bills Out, VARIETY, June 14, 1932, at 5.


\(^{148}\) See, e.g., Federal Judge Says U.S. Can Fix Minimum Price, CHI. DAILY TRIB., Apr. 1, 1934, at 7; NRA Price-Fixing Upheld By Court, N.Y. TIMES, Apr. 1, 1934, at 1; U.S. Court Backs NRA Price Fixing, WASH. POST, Apr. 1, 1934, at 6; U.S. Court Rules Price Cutting Illegal, ATLANTA CONST., Apr. 1, 1934, at 1A.

\(^{149}\) See, e.g., Hold Decision Legalizes 20¢ Minimum Scale, MOTION PICTURE DAILY, Apr. 3, 1934, at 1; Independent Planning Larger Feature Output, MOTION PICTURE HERALD, Apr. 7, 1934, at 9.

\(^{150}\) See, e.g., ‘Restricted’ Anti-Duals, VARIETY, June 5, 1934, at 25; Several Distributors May Bar Double Bills, MOTION PICTURE HERALD, June 2, 1934, at 12; Majors Settling Dual Policy Now, MOTION PICTURE DAILY, May 4, 1934, at 1; MPTOA Moves Against Duals to Start Soon, MOTION PICTURE DAILY, May 1, 1934, at 1; Red Kann, Chance Seen in Contracts to Kill Duals, MOTION PICTURE DAILY, Apr. 19, 1934, at 1; Pros.—Exhibs Agree, HOLLYWOOD RPRTR., Apr. 17, 1934, at 1.

\(^{151}\) See, e.g., Flexible Admission Prices Take Place of Exclusives As Practice, MOTION PICTURE HERALD, Jan. 28, 1933, at 9.

\(^{152}\) See, e.g., Majors Will Force Exhibs to Single-Feature Policy, HOLLYWOOD RPRTR., June 12, 1934, at 1; Majors Settling Dual Policy Now, supra note 150.

\(^{153}\) Major Pacts Not to Have Ban on Duals, MOTION PICTURE DAILY, June 15, 1934, at 1; No General Ban on Double Bills, MOTION PICTURE HERALD, June 23, 1934, at 74.

\(^{154}\) Major Pacts Not to Have Ban on Duals, id., at 22.

\(^{155}\) Id.

\(^{156}\) See supra note 101 and accompanied text.

\(^{157}\) Double Bill Users May Appeal to Government, MOTION PICTURE HERALD, May 12, 1934, at 9; Independents Plan Fight to Protect Duals, MOTION PICTURE DAILY, May 10, 1934, at 1; Allied Sees Plot to Kill 10-15¢ Spots, MOTION PICTURE DAILY, May 16, 1934, at 1.
1934, the National Recovery Review Board (the “Darrow Board”) issued a report charging the National Recovery Administration with fostering cartels, favoring large businesses, and disregarding the interests of small business owners. The Board used the motion picture industry as a prime example. It found that the Motion Picture Code was “designed to eliminate and oppress small businesses” and empowered the “Big Eight” that “cruelly oppressed” small firms.

With the Darrow Report stirring a national debate, the distributors’ use of the Motion Picture Code to collude would have been unwise.

Hoblitzelle and O’Donnell first approached the distributors in April 1934, while the industry was negotiating ideas to impose restrictions on double features and minimum admission prices. They improved the proposed scheme shortly after the collapse of the negotiations. In effect, Hoblitzelle and O’Donnell successfully negotiated for their territories contractual restrictions that the distributors had considered but were unable to formulate.

C. The Arrangement

In April 1934, Interstate Circuit circulated among the distributors a plan for minimum admission prices for likely box-office hits (A movies playing in deluxe downtown theaters). In July 1934, after discussions with Paramount, Interstate Circuit improved the plan by adding a ban on double features and a commitment to comply with this ban. Subsequently, over a period of a few months, Interstate Circuit negotiated with each distributor separately. It persuaded the eight distributors to adopt restrictions on minimum admission prices and double features.

1. The Letters

On April 25, 1934, shortly after the Hoblitzelle-Paramount partnership was finalized, O’Donnell sent an identical letter to the branch managers of the eight distributors, declaring a new policy toward the negotiations of the 1934-35 season.

The letter stated that Interstate Circuit would book films for its Class A theaters, only if these films would not play at any subsequent-run theater in the same city for an admission price lower than 25¢. This price restriction protected high-quality movies—first run movies that played in Class A theaters for an admission price of 40¢ or more. Unlike general minimum price restrictions, this restriction did not protect low-quality movies.

The branch managers, who received the letter, had no authority to approve such agreements and forwarded the letters to the home offices. At least three branch managers expressed strong objections to the plan. The objections were hardly surprising. The branches had worked primarily with the independent exhibitors. Paramount’s branch manager was an exception. He understood that “anything that work[ed] for the benefit of Interstate [Circuit] . . . work[ed] to the

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158 See generally Lowell B. Mason, Darrow v. Johnson, 238 N. Am. Rev. 524 (1934)
159 Darrow Report On Film, MOTION PICTURE HERALD, May 26, 1934, at 34 (printing the relevant section of the report).
160 See, e.g., Investigation of the National Recovery Administration, Hearings on S. Res. 79 Before the S. Comm. on Finance, 74th Cong. 298 (1935) (a statement of Clarence Darrow).
161 See Appendix A.
benefit of Paramount.”

Three days after sending the letter, Hoblitzelle and O’Donnell started negotiating the proposal with Paramount executives. The discussions with Paramount continued through the company’s sales convention in late June that addressed the “problem of double features.” At the convention, O’Donnell and Hoblitzelle talked about the proposal with Paramount’s general sales manager, who was second to Adolph Zukor, the company’s founding president. After the convention, Paramount’s Eastern Sales Manager came from the home office to Dallas to close the deal.

On July 11, 1934, after reaching an agreement with Paramount, O’Donnell sent a second letter. As noted, in June 1934, negotiations among the distributors over a ban on double features ended unsuccessfully. The July letter modified the policy stated in the April letter: (1) Interstate Circuit added a ban on double features; (2) the company committed that the Hoblitzelle’s theaters would comply with both restrictions; (3) the letter emphasized that Interstate Circuit would negotiate films for its Class A theaters only with distributors that comply with its “request”; and (4) Interstate Circuit introduced a demand to impose the 25¢ price restriction in the Rio Grande Valley, where Texas Consolidated operated first-run theaters.

2. The Negotiations

The branch managers forwarded the July letter to the home offices, expressing strong objections. For example, RKO district sales manager wrote that O’Donnell’s July letter “was sent to all distributors” and was “trying to set up a model arrangement for the United States without giving us anything to say about it.” MGM branch manager wrote that O’Donnell was “imposing conditions of which he [was] a flagrant violator” and that O’Donnell’s demands were “unfair” because Hoblitzelle’s theaters offered double features (MGM started banning double features in the 1933-34 season). Universal branch manager warned the home office that Hoblitzelle and O’Donnell were “tough” and their demands were “extremely dangerous.”

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165 Id. at 100-102.


167 O’Donnell’s Testimony, supra note 164, at 102 (referring to a discussion with George Shaefer, Paramount’s general sales manager). Hoblitzelle could not remember that double features were discussed at the convention or any discussion of the proposal with a Paramount person. Hoblitzelle’s Testimony, supra note 166, at 94-95. See also Schaeffer Virtually Paramount Head, MOTION PICTURE HERALD, May 12, 1934, at 11.

168 O’Donnell’s Testimony, supra note 164, at 102-103.

169 See Appendix A.

170 See infra Section III.B.

171 Interstate Circuit, Inc., In Equity No. 3736-992 78 (N.D. Tex. Dec. 20, 1937) (Testimony of Herbert MacIntyre, RKO southern district sales manager).

172 United States v. Interstate Circuit, Inc., In Equity No. 3736-992 5, 74, 74 (N.D. Tex. Dec. 11, 1937) (Testimony of Le Roy Bickle’s Testimony, MGM branch manager in Dallas) (“Bickle’s Testimony”).

173 United States v. Interstate Circuit, Inc., In Equity No. 3736-992 9, 71, 72 (N.D. Tex. Dec. 11, 1937) (Testimony
Immediately after sending the July letter, O’Donnell and Hoblitzelle commenced direct negotiations with the distributors. These negotiations continued until late October, mostly took place at Interstate Circuit’s offices in Dallas but also involved several trips, and included discussions with executives from the home offices, as well as branch managers. At trial and on appeal, the defendants emphasized that Hoblitzelle and O’Donnell negotiated the restrictions with each company separately and did not threaten any distributor. The record, however, shows that, at the very least, the distributors were mindful that Hoblitzelle and O’Donnell were negotiating with “all distributors.” More importantly, Paramount’s rivals negotiated with a Paramount company.

There was a practical reason for separate negotiations. With the exception of the early discussions with Paramount, Hoblitzelle and O’Donnell negotiated the restrictions while they were negotiating the contracts for the season of 1934-35. Hoblitzelle and O’Donnell negotiated with each distributor the number of movies for the season, in what theaters they will play, and other terms. These aspects of the contracts shaped the competition among the distributors in the territories of Interstate Circuit.

3. Compliance

The exhibition agreements for the season of 1934-35 were generally similar in substance, including the pattern of partial compliance with the letters. The letters demanded the restrictions in the six cities in which Interstate Circuit operated (Dallas, Fort Worth, Houston, San Antonio, Austin, and Galveston) and in Rio Grande Valley. The distributors adopted the restrictions in four cities: Dallas, Fort Worth, Houston, and San Antonio. In Houston, one of the majors, MGM, owned a first-run theater and did not adopt the restrictions. Instead, in Houston, MGM licensed subsequent runs only to Interstate Circuit. Paramount, Interstate Circuit’s parent company, adopted the restrictions in the Rio Grande Valley. In Galveston, Interstate Circuit owned all theaters and, thus, the demand had no practical purpose. It is unclear why the distributors did not adopt the restrictions in Austin. In any event, the partial compliance with the demands stated in the July letter emerged from the negotiations.

After adopting a ban on double features, Hoblitzelle became a strong opponent of the practice. Six Interstate Circuit employees arguably reviewed the company’s programs to assure that no theater was playing double features. Seventeen months after the Supreme Court handed down Interstate Circuit, Samuel Goldwyn, a legendary producer and industry executive, wrote that double features were “killing the industry,” but not in Texas:

Texas is immune because two brilliant showmen, Karl Hoblitzelle and Robert J. of E. S. Oldsmith’s Testimony, Universal branch manager in Dallas) (“Oldsmith’s Testimony”).

174 O’Donnell’s Testimony, supra note 164, at 123-123a.
175 Id., at 100-109.
176 Hoblitzelle’s Testimony, supra note 166, at 90; O’Donnell’s Testimony, supra note 164, at 109.
177 See, e.g., Bickle’s Testimony, supra note 172, at 75 (a letter to O’Donnell from MGM referring to his letter “addressing all Distributors”).
178 See, e.g., O’Donnell’s Testimony, supra note 164, at 104 (“By commitments I mean we agreed to play a certain number of their pictures in our preferred ‘A’ theatres at the highest admission price.”); Id. at 105-106 (discussing the negotiations with Universal).
179 ROGERS, supra note 117, at 224.
O’Donnell, have had sufficient wisdom and foresight to inoculate their theaters throughout Texas against the double-bill virus.\textsuperscript{181}

4. Why Letters?

While Interstate Circuit had regularly negotiated deals with the distributors’ home offices, O’Donnell sent the letters to branch managers who had no authority to approve the company’s demands. Why did O’Donnell send such letters?

The letters, which inspired the popular account, were apparently written for Hoblitzelle’s commitment to the idea of decentralization. Before decentralization, the branch managers negotiated deals exclusively with independent exhibitors and the home offices negotiated the deals for the national chains.\textsuperscript{182} Decentralization required delegation of additional responsibilities to the branches that began negotiating deals with the decentralized chains.\textsuperscript{183} Hoblitzelle was nationally known for his commitment to decentralization. For example, in January 1934, Hoblitzelle organized a “managerial conference” for the theater managers of the two Paramount chains that he operated.\textsuperscript{184} The conference theme was decentralization and it addressed the changes in booking practices.\textsuperscript{185} The guest speakers included representatives of the distributors: senior executives from the home offices and branch managers from Dallas.\textsuperscript{186}

The choice to send letters to the branch managers, therefore, appears to reflect an effort to build relationships with the distributors’ branches. Such relationships did not exist before the industry adopted decentralization plans.

V. ANTITRUST ACTIONS

A. Private Actions and the Hoblitzelle’s Rider

In November 1934, an independent exhibitor, Robert Glass, filed a class action lawsuit against Interstate Circuit and the distributors, arguing that they conspired in violation of Section 1 of the Sherman Act.\textsuperscript{187} Additionally, Glass argued that Hoblitzelle and O’Donnell controlled the local

\textsuperscript{181} \textit{Id.} at 19.
\textsuperscript{182} See, e.g., \textit{Film Salesmen Vanishing As Chains Absorb Independents}, \textit{Variety}, Jan. 23, 1929, at 4.
\textsuperscript{183} See, e.g., \textit{Film Selling Decentralized}, \textit{Motion Picture Herald}, May 6, 1933, at 15; \textit{Decentralization and Theatre Turnbacks Mean More Salesmen in the Field to Sell the Exhibs}, \textit{Variety}, May 2, 1933, at 4; \textit{550 Publix Theaters Being Booked Locally}, Feb. 4, 1933 (reporting that, for the season of 1932-33, Publix, Paramount’s exhibition arm, booked for about 600 theaters from the home office in New York and that, for the season of 1933-34, the company would book for about 50 theaters from the home office); \textit{Publicity Men See Wide Demand for Their Work in New Field Situations}, \textit{Variety}, Dec. 20, 1932, at 12.
\textsuperscript{185} \textit{Decentralizing Entire Industry Urged by Hoblitzelle, supra} note 184; \textit{Decentralization Is Hoblitzelle’s Theme at Dallas Theater Meeting, supra} note 184; \textit{Distrib—Exhibit Sales Meets Locally}, \textit{Variety}, Jan. 16, 1934, at 4.
\textsuperscript{186} \textit{New Yorkers Attend Hoblitzelle Session}, \textit{Motion Picture Daily}, Jan. 12, 1934, at 6.
NIRA institutions and abused that control.\(^{188}\) The lawsuit was filed in a state court and was dismissed. Both the trial and appellate court concluded that only NIRA tribunals had the jurisdiction to adjudicate the claims.\(^{189}\) The court of appeals also declared that exhibition agreements were outside the scope of the antitrust laws because movies were copyrighted.\(^{190}\) Independent exhibitors in other states filed lawsuits concerning similar arrangements in federal courts. They prevailed in some cases and lost in others.\(^{191}\)

In May 1935, a few weeks after the Glass appeal was decided, the Supreme Court held that NIRA was unconstitutional.\(^{192}\) The distributors and their affiliated exhibitors considered the possibility of adopting a “voluntary code,” to maintain the contract forms that were used under NIRA.\(^{193}\) There was a strong sentiment, especially among the affiliated exhibitors, that “unrestrained competition” was “ruinous.”\(^{194}\) Legal experts, however, advised the distributors and their affiliated exhibitors that the “[a]ntitrust laws and decisions in film cases” were “formidable obstacles to any new code.”\(^{195}\) Since the idea of a voluntary code appeared impractical, the trade association of the affiliated exhibitors, the Motion Picture Theatre Owners Association (“MPTOA”), changed course and developed a plan to protect “‘deluxe operations’ and ‘Class A’ theaters in competitive areas” that faced “cut-rate competition” from rivals who had “little or no investment to protect,” paid “peanuts for their film service,” had “a few low-wage employees,” and were “unscrupulous and irresponsible.”\(^{196}\) The plan introduced a “contract rider” to exhibition agreements, which was inspired by “the new wrinkle written into many . . . contracts at the insistence of Karl Hoblitzelle.”\(^{197}\) Under the provisions of the rider, the distributors committed to require rivals of affiliated exhibitors to charge minimum admission prices of 25¢, offer only single features, and not to engage in any price-cutting scheme. The sanction to distributors that failed to meet the requirements listed in the “rider” was to refund the affiliated exhibitor 25% of the contracted rental.\(^{198}\) It was estimated that the rider was used in about 50 major cities across the

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\(^{188}\) *Exhibitor Names Texas Circuit in Restraint Action*, id.


\(^{190}\) *Glass*, 83 S.W.2d at 797-799.

\(^{191}\) *See*, e.g., *Perelman*, 95 F.2d 142 (holding that the distributors conspired to ban double features in Philadelphia); *Shubert Theatre Players Co. v. Goldwyn-Mayer Distribution Corp.*, (D.Min. 1936) (unpublished opinion, printed in *Motion Picture Herald*, Feb. 15, 1936, at 59) (holding that the plaintiff did not prove conspiracy).

\(^{192}\) *Schechter Poultry*, 295 U.S. 495.

\(^{193}\) *See*, e.g., *Sales Heads for Keeping Present Code Contracts*, *Motion Picture Daily*, May 31, 1935, at 1; *Clarence Linz, Voluntary Use of Codes Seen As a Stop Gap*, *Motion Picture Daily*, May 31, 1935, at 1.


\(^{197}\) *The MPTOA Plan*, *Motion Picture Daily*, June 12, 1935, at 10.

\(^{198}\) *Id.*
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B. The Government Complaint

In September 1935, the Justice Department announced that it was investigating the contractual restrictions that Interstate Circuit promoted.200 The investigation and subsequent lawsuit came after the Antitrust Division received “masses of complaints” from independent exhibitors that led to pressures from Congress and the President to revive Section 1 enforcement and address perceived problems in the motion picture industry.201

Eight months earlier, in January 1935, the Justice Department launched the “most far-reaching antitrust action in many years,” which was approved by President Roosevelt, directed against an alleged conspiracy among several large distributors.202 The action was “an ‘anti-monopolistic’ campaign . . . to convince all American business that the antitrust laws had not been entirely suspended through the liberties granted by the National Industrial Recovery Act.”203

The charges concerned an alleged attempt of Warner Bros. to regain control over theaters in St. Louis that, a few years earlier, the majors had sold to independent exhibitors as part of their decentralization plans.204 A grand jury indicted three of the five majors and their senior executives on charges of conspiracy to exclude competition.205 The government produced evidence that independent exhibitors in St. Louis could not obtain first-run films from the distributors, but failed to prove conspiracy.206 The trade press reported that “[t]he verdict was a stunning blow to the Government which felt confident after the . . . trial, which attracted nation-wide attention.”207

In December 1936, about a year after the defeat in St. Louis, the federal government filed a complaint alleging that that Hoblitzelle and O’Donnell orchestrated a conspiracy with and among the distributors.208 By challenging the legality of the arrangement in Texas, the government sought

200 Texas Control of Admissions Being Probed, MOTION PICTURE DAILY, Sept. 9, 1935, at 1.
201 See, e.g., Washington Hears of Another Big Justice Dept. Suit vs. Pix, VARIETY, March 24, 1937, at 5; U.S. Marking Time But Admits Film Probes ‘Going On All the Time’, VARIETY, Dec. 4, 1935, at 4; Expect More Indictments, BILLBOARD, Jan. 26, 1935, at 19; ‘Trust Busting’ Suit Up, VARIETY, Jan. 8, 1935, at 5 (writing that the action was “virtually a complete duplicate” of the charges made against the industry in the Darrow Report and was “the government answer to repeated indie complaints that the major firms . . . ganged up on them.”)
202 U.S. Government Starts Anti-Trust Suits Against Producers in St. Louis, FILM BULL., Jan. 8, 1935, at 2. See also Jury Acquits Defendants in St. Louis Trust Case, MOTION PICTURE DAILY, Nov. 12, 1935, at 1 (noting that “[e]very resource of the Department of Justice has been brought to bear to prove conspiracy in restraint of trade.”); St. Louis Probe As Test if Trust Laws Live, MOTION PICTURE DAILY, Jan. 8, 1935, at 1 (“Fortified by President Roosevelt’s support, the Department of Justice is out to show industry and the nation at large that the anti-trust laws have survived the New Deal”); ‘Trust Busting’ Suit Up, VARIETY, Jan. 8, 1935, at 5 (“Case reported to have been approved by President Roosevelt after prominent industry officials . . . sought to apply political pressure to . . . block the probe.”)
203 St. Louis Grand Jury Quiz Based on “Freezing” Films, MOTION PICTURE HERALD, Jan. 12, 1935, at 11.
205 Text of Indictment Against Movie Concerns, N.Y. TIMES, Jan. 12, 1935, at 5; St. Louis Indicts Warners, Para., RKO, MOTION PICTURE DAILY, Jan. 12, 1935, at 1.
207 WB-RKO-Par Win in St. L., id.
208 Petition, United States v. Interstate Circuit, Inc., et al., In Equity No. 3736-992 (N.D. Tex., Dec. 15, 1936), ¶
to attack the legality of the “contract riders.”209 Motion Picture Daily wrote that the lawsuit was a “new test of the regulation of double featuring by means of contract provisions.”210 Variety reported that the “Hoblitzelle case” was part of a “crusade against the motion picture industry” and raised the question of whether first-run exhibitors and the distributors had the legal right to set terms for subsequent-run exhibitors.211 Learning from the loss in St. Louis, the government did not bring criminal charges. Instead, it sought to secure an “injunction restraining the distributor defendants from enforcing or attempting to enforce the provisions in their . . . license agreements.”212

C. The Interstate Circuit Opinions

Interstate Circuit was tried at the district court in Dallas and was appealed directly to the Supreme Court.213 Eight Justices served at the Court when the case was argued, after the death of Justice Cardozo and before Justice Frankfurter was sworn in. The Court affirmed the district court’s decision in a five-to-three decision. Justice Harlan Stone wrote the decision for the Court. Justice Owen Roberts wrote the dissent. Several points in the opinions deserve emphasis and clarification.

1. The Findings of Facts

   a. The Abbreviated Summaries. The trial court failed to issue a statement of facts. The Supreme Court’s first opinion, therefore, instructed the trial court to issue a formal statement of facts.214 The Court’s analysis of the case relied on this statement of facts that was not published.215 As a result, the discussion of facts in both opinions is very abbreviated and somewhat confusing.

   b. The Relationship Between Interstate Circuit and Paramount Pictures. The Supreme Court’s opinion states that Interstate Circuit and Texas Consolidated were “affiliated with each other and with Paramount.”216 It also recognizes that the distributors protected their affiliated exhibitors.217 When Interstate Circuit was litigated, the affiliation of Interstate Circuit with Paramount was common knowledge. For example, in September 1937, immediately after the district court delivered its decision, Film Bulletin described the alleged conspiracy in the spirit of the time—an exhibition unit of one of the distributors advanced a scheme to exclude from the market its small competitors:

   Paramount and its associated stooges have forced dozens of [independent

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20 (“Interstate Circuit Complaint”).
209 Texas Control of Admissions Being Probed, supra note 200.
212 Interstate Circuit Complaint, supra note 208, at ¶ 10.
213 Section 2 of the Antitrust Expediting Act provided for direct appeal to the Supreme Court in civil antitrust cases brought by the federal government.
216 Interstate Circuit, 306 U.S. at 214.
217 The Court believed that Paramount agreed to impose the restrictions in Rio Grande Valley because of its affiliation with TC. Id. at 219. The Court explained that MGM did not adopt the restrictions in Houston, where “its own affiliate,” “a subsidiary,” operated a theater. Id. at 218 n.5, 223.
exhibitors] into a position from which the only retreat was to sell out. Several years ago [the] situation was made intolerable by the introduction of a new independent-crushing scheme.

In brief, this plan compelled all independent exhibitors to sign film contracts which required them (1) to charge no less than 25 cents admission for any film which played a Paramount first run charging 40 cents or more, and (2) to show only single features.

Perhaps the Paramount chains used their buying power to force their scheme on the other distributors; perhaps they found the majors willing accomplices. Whatever the answer is, no justification can be found for the seven distributors who joined this conspiracy, for it amounted to a death sentence for many small independents.218

c. The Negotiations. Both courts emphasized that Interstate Circuit engaged in negotiations with the distributors.219 The district court’s description of the negotiations is more detailed than the discussion in the Supreme Court’s opinion. For example, the court concluded that “the months over which the 1934-35 contracts were incubated were, to some extent, occupied in the reconciliation of the differences between the eight distributors.”220

2. Conspiracy Inference

The trial judge firmly believed that the “facts” “conclusively” showed that the defendants “conspired together” and that “[t]o hold otherwise would be to ravish the power to reason [and] to overthrow and disregard syllogism.”221 The Supreme Court affirmed the trial court’s “inference of agreement” from the “substantial unanimity” of action taken by the distributors and additional factors.222 The additional factors that the Court listed were (1) communication, (2) an abrupt departure from past practices, (3) a motive to conspire, and (4) acts against self-interest.

Alongside with the described framework, the Supreme Court made two additional statements related to the standard of conspiracy inference. First, the Court declared twice that conspiracy may be inferred from competitors’ conscious compliance with an invitation to collude.223 Second, the Court wrote that an agreement is “not a prerequisite to an unlawful conspiracy.”224

3. Intellectual Property

Thurman Arnold, who headed the Justice Department’s Antitrust Division when Interstate Circuit was litigated, said that the case presented “a typical use of a legal privilege (the copyright) in such a way as to restrict the outlets for moving pictures and actually to destroy competition.”225

Hoblitzelle’s attorney had arguably advised him that, because movies were copyrighted, he

218 Texas Independents Win an Important Victory!, FILM BULL., Sept. 25, 1937, at 1.
220 Interstate Circuit (district court), 20 F.Supp. at 873.
221 Id.
222 Interstate Circuit, 306 U.S. at 221.
223 See supra notes 8-9 and accompanying text.
224 Interstate Circuit, 306 U.S. at 226.
225 Thurman Arnold, Fair and Effective Use of Present Antitrust Procedure, 47 YALE L.J. 1294, 1298 (1938); President Asks Congress to Probe Monopoly and Investment Trusts, MOTION PICTURE HERALD, May 7, 1938, at 28.
would not violate the antitrust laws by sending the letters. The eight distributors used this thesis in numerous antitrust cases. For the distributors, the battle over this theory was the key issue that the case presented.

Both courts rejected the industry’s attempt to use copyright as a shield. The district court ruled and the Supreme Court affirmed that copyright holders had the legal right to impose unilateral restrictions on licensees, but not restrictions that were developed with the intervention of a third party. The dissent was critical of the interpretation that barred manufacturers from agreeing with customers about restrictions that would be imposed on their rivals.

VI. IMPLICATIONS FOR ANTITRUST ANALYSIS

Properly understood, the analysis of Interstate Circuit presents a situation in which a large retailer devised a plan that resolved failed collusive negotiations, and negotiated the adoption of the plan with its suppliers. One of the suppliers was the retailer’s parent company. The plan was advantageous to the retailer and suppliers but detrimental to their competitors—small retailers and suppliers. This scenario is markedly different from the popular account of Interstate Circuit.

The analysis, thus, suggests, that evidence of parallel compliance with a plan that resolves failed coordination among competitors should permit inference of conspiracy, when other types of circumstantial evidence support such conclusion. Further, the flaws of the popular account invite a reexamination of the doctrines that the account inspired.

A. The Agreement Requirement

At the heart of all antitrust conspiracy cases lies the concept of “agreement.” Interstate Circuit upheld the trial court’s “inference of agreement” and declared an agreement is “not a prerequisite to an unlawful conspiracy.” The appeared discrepancy between the opinion’s ruling and language illustrates that the word “agreement” has a specific meaning in antitrust law. Courts and commentators often cite Interstate Circuit for the propositions that (1) proof of unlawful conspiracy under Section 1 of the Sherman Act requires evidence of “agreement” (“concerted action”); (2) a conspiracy agreement need not be formal, written, or even express, and (3) a conspiracy agreement may be inferred from circumstantial evidence. This set of evidentiary

226 Hoblitelle’s Testimony, supra note 166, at 95-96.
227 See, e.g., Paramount Pictures, 334 U.S. at 144; Westway Theatre, 30 F.Supp. 830; Paramount Famous-Lasky, 57 F.2d 152.
228 See, e.g., Brief for the Appellants, Interstate Circuit v. United States (filed with the U.S. Supreme Court, Dec. 5, 1938); Francis L. Burt, Dallas Case to U.S. Supreme Court, MOTION PICTURE HERALD, Feb. 5, 1938, at 57 (“The right of distributors of copyrighted films to dictate the admission prices and practices to be adopted by exhibitors, under the copyright laws, will be interpreted by the United States Supreme Court.”); Gov’t Sues Circuits & Major Distributors in Texas, FILM BULL. Dec. 23, 1938, at 3 (“The chief argument of the defense is expected to be the right of manufacturers of patented or copyrighted products to fix the sale price of their merchandise.”); Distributors Deny Anti-Trust Charge, MOTION PICTURE HERALD, Feb. 13, 1937, at 44 (summarizing the defendants’ answers to the government lawsuit, writing that the answers claimed that since motion pictures were copyrighted they had the legal right to require exhibitors show them at certain terms and that such requirements were “not in restraint of trade.”)
231 Id. at 221, 226.
232 See, e.g., Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and
standards is sometimes called the “agreement requirement.”

As noted, an unlawful conspiracy agreement in the meaning of Section 1 is “a conscious commitment to a common scheme designed to achieve an unlawful objective.” The facts of Interstate Circuit illustrate such an agreement.

The agreement requirement includes two additional elements: (1) the defendants must have the capacity to conspire, and (2) proof of unlawful conspiracy must include evidence that tends to exclude the possibility that the defendants acted independently. The first element generally means that a firm and its subsidiaries are not capable of conspiracy, but the law is somewhat unclear about situations of partial ownership, especially when partial ownership does not offer control. The popular account of Interstate Circuit neglects the fact that Interstate Circuit was a subsidiary of one of the distributors. The second element, evidence that tends to exclude the possibility of independent conduct, requires evidence beyond and above proof of parallel conduct. Courts interpret this element as the showing of “conscious parallelism” and “plus factors.” The analysis of Interstate Circuit has influenced the development of both concepts.

B. Conscious parallelism

“Conscious parallelism” means interdependence that results in parallel conduct. These are situations in which competitors develop a mutual understanding that they would benefit from lessened competition and act upon this understanding. To establish conscious parallelism, a plaintiff must show parallel conduct and that the defendants were conscious of each other’s conduct. Importantly, evidence of conscious parallelism, without more, is insufficient to prove an unlawful conspiracy agreement.

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See, e.g., Am. Needle, Inc. v. NFL, 560 U.S. 183 (2010); Copperweld, 467 U.S. 752; Capital Imaging Assoc., P.C. v. Mohawk Valley Med. Assoc., Inc., 996 F.2d 537 (2d Cir. 1993); Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125 (3d Cir. 1995). See also, PROOF OF CONSPIRACY, supra note 3, at 19 (“The touchstone of all Section 1 cases is an agreement between two or more separate entities.”)

See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); Monsanto, 465 U.S. at 752; Theatre Enterprises, 346 U.S. at 541; Insurance Brokerage, 618 F.3d at 331-32; Travel Agent, 583 F.3d at 906; TRU, 221 F.3d at 934 (“When circumstantial evidence is used, there must be some evidence that ‘tends to exclude the possibility’ that the alleged conspirators acted independently.”); ATM Council, 922 F. at 94-95 (“It is true that an agreement can be shown by either direct or circumstantial evidence. . . . But when the agreement is purely circumstantial, there must be some evidence that tends to exclude the possibility that the alleged conspirators acted independently.”)


See, e.g., Theatre Enterprises, 346 U.S. at 540-41; In re Chocolate Confectionary Antitrust Litig., 801 F.3d
Courts sometimes mistakenly treat legal term of “conscious parallelism” and the economic concept of “tacit collusion” as synonymous. In economics, “tacit collusion” means a diminished competition equilibrium that is formed and maintained without any communication. As interpreted by courts, however, conscious parallelism may be accompanied by communication and coordination.

*Interstate Circuit* is “the foundation and source” of the so-called conscious parallelism doctrine. The opinion articulates a paradigmatic conscious parallelism: “Each [distributor] was aware that all [distributors] were in active competition and that without substantially unanimous action . . . there was risk of a substantial loss . . . , but that with it there was the prospect of increased profits.” The Court inferred a conspiracy from evidence of conscious parallelism and additional types of circumstantial evidence. A misreading of *Interstate Circuit*, however, inspired a short-lived enforcement policy targeting conscious parallelism and a lengthy academic debate over the topic. The argument that in *Interstate Circuit* the Supreme Court was close to infer

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383, 398 (3d Cir. 2015); Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013); *White*, 635 F.3d at 577; *Flat Glass*, 385 F.3d at 360; Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003); *Baby Food*, 166 F.3d at 121; Merck-Medco Managed Care, LLC v. Rite Aid Corp., 201 F.3d 436 (4th Cir. 1999); *Harcros*, 158 F.3d at 571 (“The requirement of “plus factors” is necessary because evidence of consciously parallel behavior alone leaves the circumstantial evidence of collusion in equipoise”); *Todorov*, 921 F.2d at 1456 n. 30.


Tacit collusion, sometimes called . . . conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions. See also Twomby, 550 U.S. at 552; *Text Messaging II* 782 F.3d at 871 (“[C]onscious parallelism,’ as lawyers call it, ‘tacit collusion’ as economists prefer to call it.”); *Harcros*, 158 F.3d at 570 (“[C]onscious parallelism is the practice of interdependent pricing in an oligopolistic market by competitor firms that realize that attempts to cut prices usually reduce revenue without increasing any firm’s market share, but that simple price leadership in such a market can readily increase all competitors’ revenues.”). The source of this interpretation is Donald Turner’s seminal article: Turner, *The Definition of Agreement Under the Sherman Act*, supra note 232.


242 *Interstate Circuit*, 306 U.S. at 222.

243 See, e.g., REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 36-42 (1955) (1955 AG REPORT”) (describing the rise and decline of the conscious parallelism in antitrust law); Michael Conant, *Consciously Parallel Action in Restraint of Trade*, 38, MINN. L. REV. 797, 801-802 (1954) (arguing that *Interstate Circuit* contributed to the development of the “doctrine of conscious parallelism”); HYLTON, supra note 3, at 77, 134-38; LOUIS KAPLOW, *COMPETITION POLICY AND PRICE FIXING* 77-80 (2013) (arguing that *Interstate Circuit*
C. Plus Factors

“Plus factors” are circumstantial evidence that is consistent with concerted action but largely inconsistent with independent conduct.244 The defining characteristic of plus factors is that, standing alone, a plus factor is insufficient to prove conspiracy, but in context, together with evidence of conscious parallelism, plus factors may prove conspiracy. The term first appeared in a 1952 decision, C-O-Two Fire Equipment, in which the Ninth Circuit articulated the defining characteristic of plus factors, writing that such circumstantial evidence may prove the existence of unlawful conspiracy, “when viewed as a whole, in their proper setting,” but not “when standing alone and examined separately.”245

Interstate Circuit established four types of plus factors: (1) communication, (2) an abrupt departure from past practices, (3) a motive to conspire, and (4) acts against self-interest. Courts often refer to these plus factors, citing Interstate Circuit or other judicial opinions that cite Interstate Circuit.246

Courts and scholars frequently express dissatisfaction with the concept of plus factors because they are inherently inconclusive.247 To illustrate the plus factor of communication.

involved “interdependent oligopoly behavior, where words may be lacking but a meeting of the minds is central.”); John Purinton Dunn, Conscious Parallelism Reexamined, 38 B.U. L. REV. 225, 229-30 (1955)(arguing that Interstate Circuit relaxed “the tests for finding a conspiracy.”); James A. Rahl, Conspiracy and the Anti-Trust Laws, 44 ILL. L. REV. 743, 759 (1950) (noting that Interstate Circuit’s language suggests that “conspiracy formation may be ambulatory[,] . . . creep into existence from the merging of unilateral actions upon a common course.”); Bernard R. Sorkin, Conscious Parallelism, 2 ANTITRUST BULL. 281, 286 (1957) (“[T]o Interstate Circuit, . . . we are indebted for the most off-quotation language in support of the doctrine of conscious parallelism.”); CONANT, supra note 16, at 183 (arguing that Interstate Circuit relaxed “the evidence required for the inference of conspiracy in antitrust cases.”).

244 See, e.g., Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 870 F.3d 1262, 1272 (11th Cir. 2017) (plus factors are circumstantial evidence that tends to exclude the possibility of independent action.”); In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015) (“Guitar Center”) (defining “plus factors” as “economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.”); Nexium, 842 F.3d 34 at 57; also United States v. Apple, Inc., 791 F.3d 290, 319-20 (2d Cir. 2015), cert. denied, 136 S. Ct. 1376 (2016) (“eBook”); White, 635 F.3d at 576; Insurance Brokerage, 618 F.3d at 331-32; In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004) (“Flat Glass”) (plus factors are “proxies for direct evidence of an agreement.”); Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 501 (5th Cir. 1982); Gainesville Utilities Dep’t v. Florida Power & Light Co., 573 F.2d 292, 301 (5th Cir. 1978); Mid-Atlantic, 560 F. Supp. at 772-74. See generally William E. Kovacic et al., Plus Factors and Agreement in Antitrust Law, 110 MICH. L. REV. 393 (2011).


246 See, e.g., Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 193 (3d Cir. 2017) (arguing that “in the case of oligopolies the . . . factors [of motive to conspire and acts against self-interest] are deemphasized because they largely restate the phenomenon of interdependence.”); Evergreen Partnering Group, Inc. v. Pactiv Corporation, 832 F.3d 1, 1-14 (1st Cir. 2016); Chocolate Confectionary, 801 F.3d 383 at 397; Guitar Center, 798 F.3d at 1194-96 (explaining why common motive, action against self-interest, and departure from past practices may be consistent with interdependence); Flat Glass, 385 F.3d at 360 (arguing that the factors motive to collude and acts against self-interest “largely restate the phenomenon of interdependence” and stating that these “factors are important to a court's analysis, because their existence tends to eliminate the possibility of mistaking the workings of a competitive market . . . with interdependent, supracompetitive pricing.”); In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 2008).
Evidence of communication is sometimes perceived as incomplete direct evidence of conspiracy, but evidence of communication often merely shows an opportunity to collude, not evidence of communication about collusion. For example, trade association activities are evidence of communication among competitors, but standing alone do not prove conspiracy. Similarly, information sharing among competitors is probably more suggestive than trade association meetings and, yet, standing alone, is insufficient to prove conspiracy. Interstate Circuit raises the question of whether vertical communication of a company with its suppliers may prove a horizontal agreement among the suppliers. A single letter from a retailer to its suppliers is probably insufficient to prove an agreement among the suppliers. Extensive vertical communication between a retailer and its suppliers is a more persuasive plus factor. In Toys R Us, supposedly the “modern equivalent of the old Interstate Circuit,” the Seventh Circuit concluded that an extensive record of communications between a powerful retailer and its suppliers made the case “more compelling . . . for inferring horizontal agreement than did Interstate Circuit.”

In the same fashion, each of the other factors is inconclusive without context. An abrupt departure from market practices may be a response to changing market conditions. A motive to conspire means a temptation to increase profits through an unlawful conspiracy, but does not show conspiracy. And the plus factor of acts against self-interest describes conscious parallelism.

The important point is that plus factors are inconclusive circumstantial evidence that, in context, may permit inference of an unlawful conspiracy agreement. Accordingly, the idea that a plus factor should present conclusive evidence of conspiracy is inconsistent with the essence of plus factors. Nonetheless, it would be fair to say that the plus factors of motive to conspire and acts against self-interest do not add much to evidence of conscious parallelism, which is required for proof of conspiracy with circumstantial evidence. Interstate Circuit inspired the use of these plus factors. By contrast, the analysis of Interstate Circuit suggests that courts should consider evidence of intricate relationships among competitors that produced collusive coordination and

1999) (“The concept of ‘action against self-interest’ is ambiguous and one of its meanings could merely constitute a restatement of interdependence.”); Barry v. Blue Cross of California, 805 F.2d 866, 869 (9th Cir. 1986). See generally Kovacic et al., Plus Factors, supra note 244.

248 See, e.g., Baby Food, 166 F.3d at 126 (“communications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.”).

249 See, e.g., Guitar Center, 798 F.3d at 1196-97; Travel Agent, 583 F.3d at 911.


251 TRU, 221 F.3d at 935.

252 Id.

253 See, e.g., Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 193 (3d Cir. 2017) (arguing that “in the case of oligopolies the . . . factors [of motive to conspire and acts against self-interest] are deemphasized because they largely restate the phenomenon of interdependence.”); Guitar Center, 798 F.3d at 1194-96 (explaining why common motive, action against self-interest, and departure from past practices may be consistent with interdependence); Flat Glass, 385 F.3d at 360 (arguing that the factors motive to collude and acts against self-interest “largely restate the phenomenon of interdependence” and stating that these “factors are important to a court’s analysis, because their existence tends to eliminate the possibility of mistaking the workings of a competitive market . . . with interdependent, supra competitive pricing.”); Baby Food, 166 F.3d at 122 (“The concept of ‘action against self-interest’ is ambiguous and one of its meanings could merely constitute a restatement of interdependence.”); Barry v. Blue Cross of California, 805 F.2d 866, 869 (9th Cir. 1986).

254 For an example of such approach see Guitar Center, 798 F.3d 1186.
conspiracies as a plus factor.

D. Intricate Relationships Among Competitors

Courts have been skeptical of plaintiffs’ assertions that defendants’ participation in one conspiracy permits an inference of another conspiracy, even though several courts have held that it may be probative. The analysis of Interstate Circuit suggests that intricate relationships among competitors that include failed coordination could and should serve as a plus factor. Specifically, when competitors consciously comply with a plan that they had tried to accomplish in the past, prior coordination related to such a plan may support the conclusion of conspiracy. Together with other contextual factors, such evidence may prove conspiracy.

A recap of the study may clarify the point. When the Great Depression hit the U.S. economy, eight large film distributors dominated the production and distribution of feature films in the United States. They were not equal in size and expertise. Five of the distributors vertically integrated a large number of theaters and two distributors produced mostly less expensive films. The eight distributors had a trade association through which they coordinated certain distribution practices and adopted a standardized exhibition agreement. The exhibition segment of the industry operated at overcapacity and generated losses for the vertically integrated distributors. In the aftermath of the Depression, the demand for films plummeted. Exhibitors, thus, cut admission prices and adopted aggressive sales practices to draw audiences. The most conspicuous strategy was “double features” that increased demand for inexpensive productions (B movies) at the expense of costly productions (A movies). Importantly, the practice increased the demand for movies that independent companies produced and distributed. Responding to the Depression, the distributors reorganized their exhibition units and created a new class of theater chains (“decentralized chains”) that were partnerships with established theater operators, frequently individuals from whom the distributors had bought the theaters. Interstate Circuit was one of the most successful decentralized chains in the United States.

For the vertical integration and decentralization, by 1934, there were three large trade groups in the industry: (1) the eight large distributors, (2) affiliated exhibitors, which were wholly-owned or partially-owned subsidiaries of the large distributors, and (3) independent exhibitors, in which no distributor owned equity. The affiliated exhibitors operated the majority of first-run theaters in major cities. The three trade groups negotiated among themselves and with each other measures to address the decline in admission prices and the spread of double features. They failed to reach any agreement. The negotiations, however, emphasized that the affiliated exhibitors were particularly interested in restrictions on minimum admission prices that would require the

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255 See, e.g., Matsushita, 475 U.S. at 596 (“a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another.”); In re Elevator Antitrust Litig., 502 F.3d 47, 52 (2d Cir. 2007) (holding that, “absent any evidence of linkage evidence of conspiracy in Europe is not enough to show that conspiracy in the United States is “plausible,” rather than “conceivable.”); Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1317–18 (11th Cir. 2003) (holding that an “industry’s history of antitrust violations” is not “indicative of a present antitrust violation.”)

256 See, e.g., United States v. Andreas, 216 F.3d 645, 665 (7th Cir. 2000) (holding that evidence one conspiracy may be used as support the inference of another conspiracy and its omission could “lead to confusion or leave an unexplainable gap in the narrative of the crime.”); In re Flash Memory Antitrust Litig., 643 F.Supp.2d 1133, 1149 (N.D.Cal. 2009) (holding that evidence of one conspiracy “may not prove the existence” of another conspiracy, but may be “for the purpose of establishing the plausibility that such a conspiracy existed.”)
independent exhibitors to raise prices. The large distributors were particularly interested in banning double features, as the practice empowered independent producers and distributors. Two of the eight distributors, however, had concerns that such a ban would harm their interests.

Through negotiations with the distributors, including its parent company, Interstate Circuit devised a solution to the failed negotiations: a price restriction on likely hits (A movies that played in deluxe theaters) and a ban on double features. The solution was beneficial for the large distributors and their affiliated theater chains and detrimental to independent exhibitors, producers, and distributors. The trade association of the affiliated chains recommended the solution to its members and many of them adopted it.

*Interstate Circuit*, thus, presents a group of competitors with intricate relationships, which included horizontal coordination and unlawful conspiracies, which complied with a plan that resolved failed coordination intending to fix prices and exclude competition.

**E. Tacit Agreement**

Courts infrequently use the term “tacit agreement” to describe a conspiracy agreement that is inferred from circumstantial evidence. The term captures *Interstate Circuit*’s holding that proof of express agreement is not necessary to establish the existence of an unlawful conspiracy. Courts, therefore, sometimes use the case to illustrate the meaning of tacit agreement. For example, in *White v. R.M. Packer Co.*, the First Circuit defined “tacit agreement” as an arrangement “in which only the conspirators’ actions, and not any express communications, indicate the existence of an agreement.” Similarly, several courts held that tacit agreement is conscious parallelism that is accompanied with plus factors.

**VII. CONCLUSION**

The popular account of *Interstate Circuit* presents a stylized scenario that strips the case off key material factual findings and context. As such, the account conflicts with the principal reason for which the case has served as an antitrust landmark: proof of antitrust conspiracy with circumstantial evidence, which is drawn from material facts and context.

No research is needed to conclude that the popular account of *Interstate Circuit* is misguided, implausible, and inconsistent with antitrust law and economics. Yet, during the past eight decades, courts and scholars have used this account extensively to develop, explain, and illustrate antitrust doctrines and concepts. Courts and scholars, thus, may continue to use the account after the publication of this Article. Old myths die hard.

*Interstate Circuit* could and should serve as a useful illustration of an alleged conspiracy in an

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257 See, e.g., *Twombly*, 550 U.S. at 553 (stating that in conspiracy cases “[t]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express.”). See generally Page, *T tacit Agreement Under Section 1 of the Sherman Act*, supra note 3.

258 See, e.g., United States v. Citizens & S. Nat’l Bank, 422 U.S. 86, 112 (1975); *First National Bank*, 391 U.S. at 287-88; *Theatre Enterprises*, 346 U.S. at 540-41; *Nexium*, 842 F.3d at 57-58; *White*, 635 F.3d at 576; DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999); *Barry*, 805 F.2d at 869; E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 143 (2d Cir. 1984); *Betaseed*, 681 F.2d at 1234-35.

259 *White*, 635 F.3d at 576.

industry where rivals had a history of coordination efforts and conspiracies. Such settings are common in the economy and pose challenges to antitrust analysis. Thus, to conclude: an analysis of an alleged conspiracy that neglects “a maze of intricate relationships,” in which “no one aspect is intelligible except as part of the whole”\textsuperscript{261} is artificial and inconsistent with the purpose of antitrust law.

**APPENDIX: O’DONNELL’S LETTERS**

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<th>INTERSTATE CIRCUIT, INC.</th>
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<td>Majestic Theatre Building</td>
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<td>Dallas, Texas</td>
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April 25, 1934
Gentlemen:

As the present season is drawing to a close, we want to go on record with your organization in notifying you that we would like to discuss the purchase of subsequent runs in Dallas, Fort Worth, Houston, San Antonio, Austin, and Galveston, for your product.

We also want to go on record that we will expect certain clearance next season as regards our first run programs which are presented at a minimum price of 40¢ or more. In these situations, we are going to insist that subsequent run prices be held to a minimum scale of 25¢.

As an example, we feel that if we are to continue to pay outstanding first run film rentals for “A” houses such as the Palace Theatre, Dallas, these same pictures must not be exhibited in the subsequent runs at less than 25¢ at any future time. We also want you to bear in mind that we are operating second and subsequent run theatres in most of those towns and it is quite possible that we will have additional subsequent run theatres.

The writer would like to discuss this with you as soon as possible.

Very truly yours,
R. J. O’Donnell

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\textsuperscript{261} MAE D. HUETTIG, ECONOMIC CONTROL OF THE MOTION PICTURE INDUSTRY v (1944) (describing the motion picture industry during the second quarter of the twentieth century).
INTERSTATE CIRCUIT, INC.
Majestic Theatre Building
Dallas, Texas

July 11, 1934

Mssrs.:
J. B. Dugger [Paramount]
Herbert MacIntyre [RKO]
Sol Sachs [RKO]
C. E. Hilgers [Twentieth Century-Fox]

Leroy Bickel [MGM]
J. B. Underwood [Columbia]
E. S. Olsmyth [Oldsmith, Universal]
Doak Roberts [United Artists]

Gentlemen:

On April 25th, the writer notified you that in purchasing product for the coming season 34-35, it would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to purchase product to be exhibited in its ‘A’ theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this ‘A’ product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on ‘A’ pictures which are exhibited at a night admission price of 40¢ or more-they shall never be exhibited in conjunction with another feature picture under the so-called policy of double-features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our ‘A’ theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum [sic?] 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our ‘A’ theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the valley at 25¢. Regardless of the number of the days which may intervene, we feel that in exploiting and selling the distributors’ product, that subsequent runs should be restricted to at least 25¢ admission scale.

The writer will appreciate your acknowledging your complete understanding of this letter.

Sincerely,
R. J. O’Donnell

* In 1934, Herbert MacIntyre served as RKO district sales manager and Sol Sachs served as RKO branch manager in Texas. The Agreed Statement of Facts provides that a copy of the letter was also sent to W. E. Callaway, Warner Brothers’ branch manager in Dallas.