

# ANTITRUST LAWS AND THE RIGHT TO KNOW\*

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A right to know is a right to access to information and ideas. While this right has not yet achieved constitutional status, its importance in an operating democracy has been increasingly acknowledged by sources with which judicial decisions are not unacquainted.<sup>1</sup> It is the thesis of this article that a right to know, by whatever name it is called, is a legitimate concern of the antitrust laws.<sup>2</sup>

The media of communication of knowledge to be dealt with are magazines and books, the theatre, newspapers, radio, and motion pictures. Television is an increscent sixth. The more complex our society grows, the more important it becomes that these avenues of information are generally available. The right to receive opinions is as important as the right to utter them; the right to know facts is as important as the right to disseminate them.<sup>3</sup>

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\* This is part of a study of the application of the antitrust laws to civil rights which the writer hopes to develop in subsequent articles.

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1. "These rights of the people encompass both the right freely to transmit information and to express opinions and the right freely to receive both from others." Winant, *The Right of All People to Know*, 35 SURVEY GRAPHIC 431 (1946). The theme for the October 1948 National Newspaper Week was, "Your Right to Know is the Key to All Your Liberties." 81 EDIT. & PUB. 28 (Sept. 4, 1948). Article 19 of the Declaration of Human Rights adopted by the General Assembly of the United Nations appears to recognize a right to receive information. See The Universal Declaration of Human Rights, 27 CAN. B. REV. 203, 208 (1949).

2. This article does not deal with restraints and monopolies affecting the use of the equipment by which communications is effected. Some of the perpetrators of restraints in this field have played similar roles in other fields of communication. See *Lord v. Radio Corporation of America*, 35 F.2d 962 (D. Del. 1929), *aff'd*, 47 F.2d 606 (3d Cir. 1931), *cert. denied* 283 U. S. 847 (1931); *United States v. Central-West Publishing Co.*, 1 D. & J. 359 (N. D. Ill. 1912); *United States v. Motion Picture Patents Co.*, 225 Fed. 800 (E. D. Pa. 1915); *United States v. Radio Corporation of America* (D. Del. 1930); CCH, *THE FEDERAL ANTITRUST LAWS* 155 (1949); FEDERAL COMMUNICATIONS COMMISSION, REPORT ON CHAIN BROADCASTING, 5-20 (1941); ERNST, *THE FIRST FREEDOM*, 194, 195 (1946); WHITE, *THE AMERICAN RADIO*, 32-33 (1947). The Government has recently brought an antitrust action against the American Telephone and Telegraph Company in which the primary charge is monopolization and restraint of equipment, *United States v. Western Electric Co.* (Civ. Action No. 17-49, D. N. J. 1949).

3. See COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS*, 17 (1946); CHAFFEE, *GOVERNMENT AND MASS COMMUNICATIONS*, 546 (1947); WHITE, *op. cit. supra* note 2 at 248, quotes the following from a 1939 Code Manual: "Let it be remembered that American Radio is predicated upon the right of the listener to hear, not upon the right of an individual to be heard."

Deliberate distortion or suppression of facts and opinion may be the price we are willing to pay for a press which is free to accept or reject government handouts and free to criticize what it does not like. But that price is bearable only if access to multiple avenues of information permits an evaluation of truth or falsehoods, right or wrong. It has been said that, "In a free society there is faith in the ability of the people to make sound rational judgments. But such judgments are possible only where the people have access to all relevant facts and to all prevailing interpretations of the facts."<sup>4</sup> Elsewhere, it has been asserted:<sup>5</sup>

. . . often overlooked, is the threat to freedom inherent in combinations of private economic power that gain control over large segments of the press, the radio, or other media. Private monopoly or semimonopoly can restrict the right of the people to know just as surely as government monopoly.<sup>6</sup> The old saying that, 'all power corrupts; absolute power corrupts absolutely' applies here, too.

It is necessary that competition in the expression of ideas and in the transmittal of information be kept economically possible, as well as legally possible, if it is to exist.

One of the striking and disturbing factors about restraints and monopolies in media of communication is that the controlling hands of one medium continue to reach into other and newer media.<sup>7</sup> The pattern, generally, is to at-

4. THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, 8 (1947).

5. Winant, *supra* note 1, at 432.

6. Compare: "Last winter, the American Press Association representing 4,000 small dailies and weeklies, obtained from the strike bound steel industry a huge order of policy advertising. The A. P. A. followed up the orders with letters to 1,400 publishers:

We are counting on you to give us all the support that your judgment dictates. This is your chance to show the steel people what the rural press can do for them. Go to it, and pave the way for more national advertising.

Christman, *Nobly Save or Meanly Lose*, 35 SURVEY GRAPHIC 436, 440 (1946). COMMISSION ON FREEDOM OF THE PRESS, *op. cit. supra* note 2 at 62-63.

7. See ERNST, *op. cit. supra* note 2 at 170; Time, May 24, 1948, p. 72-77. Variety, April 7, 1948, p. 28, reported that, "Westinghouse Electric, which helped form the basis of NBC's radio web by linking its pioneer AM stations to the NBC network, is finally following through in the web's television plans. NBC has arranged to bring the outfit in on a pool arrangement with Philco in operation of WPTZ, Philco-owned station in Philadelphia. Working agreement, which has tied WPTZ to the NBC east coast video web for the last two years, expires next month. Westinghouse will be brought in at that time on the assumption of both NBC and Philco that it's better for a big-league AM Station, such as Westinghouse's KYW in Philly, to segue into

tempt to retard the development of the newer medium and when the medium shows signs of permanence, to become important factors in the ownership and operation of that medium. In 1949 the Federal Communications Commission created quite a stir by announcing it was considering the qualifications of motion picture companies as prospective television licensees in the light of their antitrust<sup>8</sup> background.

State antitrust acts will sometimes be applicable to these media,<sup>9</sup> and it is one purpose of this article to show that the Sherman Act can and should be applied in this field. The media we have mentioned [magazines and books, the theatre, newspapers, radio, motion pictures, and television] are all constant travelers across state and national lines. All of them and many of their individual components affect substantially interstate and inter-national commerce. They set into motion innumerable interstate and foreign transactions. Story, article, news, comment, advertisement, all parts of these media, undoubtedly occasion the majority of all interstate transactions. The incalculable influence of these media upon the public make it all the more important that competitive avenues of information not only between but within media exist, so that we may have the opportunity to formulate our opinions and guide our lives upon the basis of an informed selective knowledge.

### BOOKS AND MAGAZINES

We hear more of restraints in book selling via Fair

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video than for an outfit like Philco, with no AM experience, to try to go it alone." As to motion picture companies going into television, see *Variety*, April 28, 1948, pp. 1, 26, 61. *In Re Georgia School of Technology*, 10 F. C. C. 109 (1943).

8. On this basis the Federal Communications Commission, at the time of this writing, was holding up applications of Fox, Paramount, and Warner, adjudicated in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948) to have violated the antitrust laws, and the Schine Circuit, adjudicated in *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110 (1948) to have run afoul of the Sherman Act. See Federal Communication Commission Public Notice No. 32128, Feb. 10, 1949; *Film Daily*, Jan. 28, 1949, p. 1; and following issues of this and other trade magazines. As to congressional interest in this problem see *The Independent Film Journal*, March 26, 1949, pp. 8, 11.

9. In a number of states, antitrust statutes are as broad as the Sherman Act. *Hearings before Senate Subcommittee of Committee on Interstate Commerce, on S. 1973* 81st Cong. 1st Sess. (June 16, 17, 1949). Note, *A Collection and Survey of State Anti-trust Laws*, 32 COL. L. REV. 347 (1932); Note, 43 ILL. L. REV. 205 (1948).

Trade Act proceedings than along traditional antitrust lines.<sup>10</sup> But antitrust laws have been applied to book publishers from time to time. In the early days of this century, the publishers, through two associations, attempted to monopolize book publishing and book selling as well as to fix and maintain prices on books.<sup>11</sup> In more recent years, concert of action to use the Fair Trade Acts for the same purpose has been charged.<sup>12</sup> Law book publishers have been found guilty of violating the antitrust laws.<sup>13</sup>

There are many different magazines in this country, but it is said that there are five publishing companies which dominate the magazine field.<sup>14</sup> Restraints in this field sometimes crop up.<sup>15</sup> A Catholic group, known as the National Office for Decent Literature, is said not only to have black-listed a number of periodicals, but as a pressure group, to have driven a substantial number of magazines out of existence.<sup>16</sup> Regulations and restrictions of this sort by private groups, based upon subjective evaluations, not only of moral issues but of social and economic matters, would seem to be unlawful restraints of trade.

### THE THEATRE

Restraints within the ambit of the antitrust laws have

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10. It has been said that in most respects, at present, books are the least hampered of the accepted means of communication. Melcher, *Freedom to Read: Books*, 35 SURVEY GRAPHIC 457 (1946). As to private and government censorship of plays and books, see CHAFFEE, *FREE SPEECH IN THE UNITED STATES*, 537 *et seq.* (1941).

11. The Sherman Act was held applicable in *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155 (S. D. N. Y. 1905), *aff'd* on other grounds, 210 U. S. 339 (1908).

12. See *Schill v. Remington-Putnam*, 182 Md. 153, 31 A.2d 467, 32 A.2d 296 (1943). The complaint charged that since 1937 practically all current trade books were price fixed in New York under agreements for retailers to observe fixed prices and that a joint enforcement committee existed to carry out the price fixing agreements.

13. *Callaghan & Co. v. Federal Trade Commission*, 163 F.2d 359 (2d Cir. 1947).

14. See Miller, *Freedom to Read: Magazines*, 35 SURVEY GRAPHIC 462, 463 (1946).

15. As far back as 1911, the Government brought suit against an alleged magazine trust, but the complaint was dismissed in 1913. *United States v. Periodical Clearing House*, 1 D & J 287 (S. D. N. Y. 1913). The Saturday Evening Post has been charged with using its advertising power to restrict the placing of advertisements in other periodicals. *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S. 436 (1920).

16. *Blanshard, The Catholic Church as Censor*, 166 NATION 459, 462 (1948).

not been uncommon in the entertainment field.<sup>17</sup> Shakespeare followers have not always kept in mind that "the play is the thing." Sometimes, the antitrust stage has been occupied by the theatre operators, sometimes by the writers and dramatists, and sometimes by that most unusual player, the audience.<sup>18</sup>

In this country the courts, when first confronted with restraints and monopolies in this field, found it difficult to find commerce, trade or interstate commerce,<sup>19</sup> despite the obvious substantial interstate transactions in producing plays and stage acts in different parts of the country by the same or different actors. Agreements by theatre circuits not to produce attractions controlled by rival interests, and to play only attractions which were under agreement not to be shown in rival theatres, were alleged over forty years ago.<sup>20</sup>

Restrictions in this field probably would be found to come within the antitrust laws.<sup>21</sup> It has been thought that the production of a play could be interstate commerce under the Sherman Act so as to reach a broad plan by authors to

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17. *Finley v. Music Corporation of America*, 66 F. Supp. 569 (S. D. Cal. 1946) (name bands engaged in commercial ballroom dance halls. There has been a continuing, confusing series of antitrust battles with respect to the activities of the American Society of Composers, Authors and Publishers); *United States v. American Society of Composers, Authors and Publishers* (S. D. N. Y. Eq. No. 78-388 1934); *United States v. American Society of Composers, Authors & Publishers* (E. D. Wis. Cr. No. 444-Q 1941) (plea of *nolo contendere*, fine of \$35,250); *United States v. American Society of Composers, Authors & Publishers* (S. D. N. Y. Civil N. 13-95 1941) (consent decree); *United States v. American Society of Composers, Authors & Publishers* (S. D. N. Y. Civil No. 42-245 1946) (pending). *Alden-Rochelle, Inc. v. American Soc. of Composers*, 79 F. Supp. 315 (S. D. N. Y. 1948); *N. Whitmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948).

See also, *Hotel Edison Corp. v. Taylor*, 185 Misc. 681, 58 N. Y. Supp. 146 (1944), *aff'd*, 268 App. Div. 1029, 295 N. Y. 581 (1945).

18. In this field, there is an unofficial censorship organization known as the Catholic Theatre Movement, but it does not appear to have attained the significance of similar groups in the motion picture field, *Blanshard, Roman Catholic Censorship*, 166 NATION 499, 501-502 (1948).

19. See *Hart v. B. E. Keith Vaudeville Exchange*, 12 F.2d 341 (2d Cir. 1926), *cert. denied*, 273 U. S. 703, 704 (1926).

20. *People v. Klaw*, 55 Misc. 72, 106 N. Y. Supp. 341 (Ct. Gen. Sess. 1907). As to early restrictions to prevent actors from playing in motion pictures, see *Variety*, April 6, 1949, p. 20.

21. It has been reported that the Antitrust Division of the Department of Justice has been investigating booking of legitimate shows concentrating "on the United Booking Office-Shubert set-up." *Variety*, April 20, 1949, p. 50.

control dramatic productions of the country.<sup>22</sup> In fact, restrictions within this field have been held to be within the New York Antitrust Act.<sup>23</sup>

Theatre owners have sometimes reacted violently to criticism. The well known Alexander Woollcott criticized a play produced by the no less well known Mr. Shubert. Thereupon, Shubert and others excluded him from one theatre and threatened to exclude him from another. This same Mr. Shubert, some six years before the Woollcott affair, had been thrown out of a theatre by Ziegfeld and others causing him to "suffer great mortification of mind and feelings." Shubert's attempt to sue under the state's Civil Rights Statute<sup>24</sup> was as unsuccessful as the similar suit by Woollcott.<sup>25</sup> Anti-trust action might have been more rewarding.

### THE PRESS

To allow the press to be "fettered is to fetter ourselves."<sup>26</sup> While we may take pride in the freedom of our press from government shackles, it is hardly the emotion to be evoked by the fetters imposed upon the press by its own members.

Monopoly by newspapers has been steadily on the rise.<sup>27</sup> It has been noted by many and has been the occasion for

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22. *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1944) (basic agreement of the Dramatists Guild of the Authors League of America, Inc., contained provisions for price fixing and compulsory arbitration, also forbade outright sale of television, radio, and other subsidiary rights except with Guild's permission). The court thought this was *prima facie* bad. Recently, it was announced that the Dramatists Guild Council had fixed minimum play royalties for the 1948 season. See *Variety*, April 7, 1948, p. 56. It is difficult to see how this form of price fixing can escape the antitrust laws. The Minimum Basic Agreement of the Guild has recently been held illegal and its enforcement enjoined. *Ring v. Spina*, 84 F. Supp. 403 (S.D.N.Y. 1949).

23. *Dunkel v. McDonald*, 57 N. Y. S.2d 211 (N. Y. Sup. Ct., 1945), *modif.*, 270 App. Div. 757, 59 N. Y. S.2d 921 (1946). See also same case on question of damages, 272 App. Div. 267, 70 N. Y. S.2d 653 (1947) (association in theatrical industry provided members should work only with other members, and required that contracts made by members with producers provide that all work in the specified arts and trades required by the producer be performed only by their members).

24. *Shubert v. Nixon Amusement Co.*, 83 N. J. 101, 83 Atl. 369 (1912).

25. *Woollcott v. Shubert*, 217 N. Y. 212, 111 N. E. 829 (1916).

26. *Grosjean v. American Press*, 297 U. S. 233, 250 (1936).

27. See ERNST, *op. cit. supra* note 2, Ch. IV, and pp. 279-280 (1946). It has been asserted that 1,000 dailies and 3,000 weeklies have been lost here in the last few decades. Ernst, *Why Not a First Freedom Treaty*, 35 SURVEY GRAPHIC 445, 446 (1946).

expression of concern by some.<sup>28</sup> It has been said that six chains account for one fourth of the total newspaper circulation in this country.<sup>29</sup> Monopoly of the press in terms of a single management exists in ninety per cent of the communities where newspapers are published; in the United States only one city out of twelve has a competing newspaper. Almost 1300 cities have no competitive newspapers, and this is true in approximately one half of cities of 100,000 or greater population.<sup>30</sup> In ten states there are no cities which have newspaper competition;<sup>31</sup> in twenty-two states there is no Sunday newspaper competition;<sup>32</sup> and in this country of many cities, only some 117 continue to have competing newspaper ownership.<sup>33</sup> Monopolies of this sort have a volcanic base from which are wont to come disquieting eruptions.

The Associated Press has an unenviable history of monopoly and restraint.<sup>34</sup> Due to Illinois' condemnation of its monopolistic activities,<sup>35</sup> the Associated Press moved to be incorporated in New York. When its monopolistic practices were subsequently condemned by the Supreme Court,<sup>36</sup> a number of its members endeavored to have a bill passed which would exempt the Association from the Sherman Act.

Freedom of the press, a shibboleth invoked by the Associated Press in an unsuccessful attempt to avoid the application of the Sherman Act, has itself been protected by that Act. Strangely enough, in a striking instance it was that

28. See Winant, *The Right of All People to Know*, 35 SURVEY GRAPHIC 431, 432 (1946).

29. Stewart, *Freedom to Read: Newspapers*, 35 SURVEY GRAPHIC 452, 453 (1946). 14 newspaper owners are said to control 25 per cent of the daily circulation. THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS, 47 (1947). The percentage has been estimated to be one-third. ERNST, *THE FIRST FREEDOM*, 74 (1946). As to mass block booking of contents and advertisements of weeklies, see ERNST, *supra*, pp. 108-109.

30. Nixon, *Concentration and Absenteeism in Daily Newspaper Ownership*, 22 *Journalism Q.* 97, 100 (1945). Editor and Publisher Yearbook 103 (1945). See also Editor and Publisher International Yearbook 18 (1948).

31. ERNST, *op. cit. supra* note 2, at 69.

32. Nixon, *supra* note 30, at 117.

33. ERNST, *op. cit. supra* note 2, at 446.

34. See ERNST, *op. cit. supra* note 2, at 81-89.

35. *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822 (1900).

36. *Associated Press v. United States*, 326 U. S. 1 (1945).

none too valiant a supporter of civil liberties, the Hearst Press, which invoked the Sherman Act. During the first world war there was created under state law the Council of Defense of the State of New Mexico. This Council was, to put it mildly, not an admirer of Hearst. It caused to be printed and circulated, among other things, the following statements in the New Mexico War News:

The Council of Defense calls upon every loyal, patriotic citizen of New Mexico not only to quit asking for the Hearst publication at the newsdealers, but to stop taking them on subscription, and to stop reading them. In other words, to say to Herr Wilhelm von Hearst, the Hearst publications, and Hearstism in general: "Good Night" . . . Governor Lindsey and Attorney General Patton approve and indorse this move to rid the state of Hearst publications and Hearstism.

The Council thought so well of their idea that they advised other State Defense Councils of what they were doing. Hearst's New Mexican hair shirt was made more irritating by publication in the New Mexico War News of an Honor Roll consisting of names of concerns which had ceased to sell Hearst publications. Hearst's corporation brought an injunctive action under the Sherman Act and the New Mexican Antitrust statute. Among the defenses raised was that the Council's action was state action, and that they were within their federal and constitutional rights as to freedom of speech. The court found their actions were not authorized by the statutes creating them or by the informal approval of the governor. The court said that their second contention was answered by *Gompers v. Buck Stove Co.*,<sup>37</sup> and that the Sherman Act applied. The court was impressed by the effect of defendant's activities on Hearst magazines in which nothing offensive was shown to have appeared.<sup>38</sup>

In other instances, also, the press has received aid from the Sherman Act.<sup>39</sup> However, the right of an individual

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37. 221 U. S. 418 (1911).

38. *Council of Defense v. International Magazine Co.*, 267 Fed. 391 (8th Cir. 1920)—plaintiff's publications were magazines. This same court some three years later found no Sherman Act violation in the boycott of and defamation campaign of another newspaper, after stating the Act was aimed at large accumulations of capital. *Konecky v. Jewish Press*, 288 Fed. 179 (8th Cir. 1923).

39. In *United States v. Retail Dry Goods Ass'n* (S. D. N. Y. 1943), *Antitrust Blue Book*, No. 772 (1947), the defendant and 15 New York City department stores were charged with agreeing to withdraw advertising from the New York Times unless an announced increase in



newsdealer, who did not like Hearst's newspapers during World War I, to refuse to carry Hearst papers, was protected against a concert of action by the other newspapers in New York City through their association and a newspaper distributor, to refuse to sell him other New York papers unless he carried those of Hearst.<sup>40</sup>

An advertising practice which kills off many small papers is that of a large newspaper declining to take a smaller advertisement from an advertiser than that given to the smaller paper.<sup>41</sup> The Chattanooga News-Free Press Co. was found guilty of conspiring to restrain and attempting to monopolize interstate commerce by preventing the operation of competing afternoon newspapers in Chattanooga, one device being exclusive advertising contracts.<sup>42</sup> A newspaper publisher of the only daily newspaper in Lorain and Mansfield, Ohio, in the early part of last year was denied a radio franchise by the Federal Communications Commission, because of his using the power of his newspaper as a necessary advertising medium to restrict the competition of a radio station in Mansfield.<sup>43</sup> This practice by the Lorain publisher has subjected him to a suit under the Sherman Act.<sup>43a</sup> It is sometimes said that newspapers are dependent upon their advertisers. However, it is equally likely that businessmen are dependent upon their ability to advertise in newspapers. Restraints such as those involved in the Mansfield, Ohio case would clearly appear to be within the

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advertising rates was cancelled. The defendants pleaded *nolo contendere* and were fined \$80,000. In 1948, an antitrust suit was brought in the District of Columbia charging a merchants' association and several of the largest department stores in the city with boycotting and blacklisting a monthly newspaper. Apparently, there is considerable concert of action in placing advertising. See District of Columbia Citizen Publishing Co. v. Merchant & Mfgs. Ass'n. (D.C. 1949) CCH P. 62, 439.

40. *Sultan v. Star Co.*, 106 Misc. 43, 174 N. Y. Supp. 52 (Sup. Ct. N. Y. 1919). The court rejected the justification that newspapers could thus band together [to prevent discrimination against one of them].

41. ERNST, *op. cit. supra* note 2, at 102.

42. *United States v. Chattanooga News-Free Press Co.* (E. D. Tenn., Cr. No. 7978 1040).

43. *In re* Application of Fostoria Broadcasting Co., 3 PIKE & FISCHER (RADIO REGULATION) § 53:24 (1948): "The Newspaper does not carry the station's program logs and will not publish any news stories relating to the station or its personnel unless they are unfavorable." There was testimony that advertisers' contracts were cancelled when they began to advertise over station WMAN.

43a. *United States v. The Lorain Journal* (N. D. Ohio Sept. 22, 1949).

Sherman Act. Undoubtedly, advertising by national distributors and advertising by local merchants of products coming from without the state were restricted. The direct result of such restrictions is a restraint upon the free flow of such goods from outside the state and an unreasonable restriction on the right to do business within the state. With this background, an exclusive contract might fall within the Sherman Act,<sup>44</sup> as would conspiracy between the publisher and his two newspaper companies.<sup>45</sup>

Restrictions upon the right to read have been imposed upon the public by agreements between newspapers and between them and newsdealers.<sup>46</sup>

It has been said that the United Press probably would favor a government suit against it so that it could get out of existing contracts under which it is bound to refund part or all of the excess fee to original subscribers in various areas when other papers in the area subscribe to the U. P. service.<sup>47</sup> In the light of the adjudicated cases, it may be doubted that U. P. need wait for government intervention to repudiate these contracts.

These activities would seem to be within the Sherman Act and appropriate state acts;<sup>48</sup> the monopoly status may well be vulnerable to antitrust action. "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. . . . He is subject to the

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44. *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947). *But see United States v. Steel Co.*, 334 U. S. 495 (1948).

45. *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110 (1948).

46. *Langley v. Furman*, 132 Misc. 726, 230 N. Y. Supp. 538 (Sup. Ct. N. Y. 1928) (suit to enjoin defendants from refusing to sell newspapers, periodicals, etc. to plaintiff who had a newsstand); *Finnegan v. Butler*, 112 Misc. 280, 182 N. Y. Supp. 671 (Sup. Ct. N. Y. 1920) (Buffalo Publishers Association meetings discussed prices of newspapers: all except one newspaper increased their price to two cents). Newsdealers informed they would not be sold the other newspapers if they handled the recalcitrant Buffalo Commercial. Held, prima facie conspiracy. *See also Sultan v. Star Co.*, 106 Misc., 43, 174 N. Y. Supp. 52 (1919). As to restriction on access by the public to newspapers because of newsstand fights, see THE COMMISSION ON FREEDOM OF THE PRESS, *op. cit. supra* note 3, at 48-49.

47. ERNST, *op. cit. supra* note 2, at 88.

48. In Wisconsin, newspapers are expressly included within the state's antitrust laws. Wisc. Stats. § 133.01 (1947). In the Mansfield case, *supra* note 43, the effect on interstate commerce of the restraint imposed was emphasized by the inability of a Philco (a well known national firm) representative to place an ad in the paper.

antitrust laws."<sup>49</sup> Restricting access to a great newsgathering agency in order to protect a member from competition has been held to come within the Sherman Act.<sup>50</sup> It is well established that the newspaper industry is within the reach of the Sherman Act,<sup>51</sup> and that the Act reaches monopolies as well as trade restraints.<sup>52</sup>

Freedom of the press is not merely freedom to the owners of the press; of equal importance is the right of the public to be free to receive the news.<sup>53</sup> It is only by cross-lights from varying directions that full illumination can be secured.<sup>54</sup> However simple to follow is a single voice, a

49. *Associated Press v. N. L. R. B.*, 301 U. S. 103, 132 (1937).

50. *Associated Press v. United States*, 326 U. S. 1 (1945). But the court refused to condemn an exclusive contract between Associated Press and local newspapers under which news originating from the latter went to Associated Press. In *Chamber of Commerce v. Federal Trade Commission*, 13 F.2d 673, 687-688 (8th Cir. 1926), the court refused to make an antitrust violator cause its newspaper to throw open its daily market quotations to all. Cf. *United States v. New England Fish Exchange*, 258 Fed. 732, 748 (D. Mass. 1919) (court required Exchange to be thrown open to outside dealers under reasonable regulations).

51. See Note, *Press Associations and Restraint of Trade*, 55 YALE L. J. 428 (1946). Cf. Note, *Newsgathering Monopolies and the Antitrust Act*, 36 GEO. L. J. 66 (1947). In *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822 (1900), it appeared that the bylaws and contracts of the Association provided that the recipient of news should not receive news from any other corporation which the directors of Associated Press should declare antagonistic to it. Held, void as creating a monopoly.

52. 26 Stat. 109, 15 U. S. C. A. § 2 (1940). The acquisition by the Philadelphia Bulletin in 1947 of the only competing morning newspaper in Philadelphia led to an investigation by the Antitrust Division of the Department of Justice.

53. See *Martin v. City of Struthers*, 319 U. S. 141, 143 (1943). In *U. S. v. Associated Press*, 52 F.2d 362, 372 (S. D. N. Y. 1943), *aff'd*, 326 U. S. 1 (1945), an antitrust case, Judge Learned Hand pointed out that ". . . However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests; the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

54. *U. S. v. Associated Press*, *supra* note 53. When this case reached the Supreme Court, Justice Frankfurter in a concurring opinion said: "But the freedom of enterprise protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of ordinary commercial pursuits. The interest of the public is to have the flow of news not trammelled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential

single voice is not the way in which a democracy expresses itself.<sup>55</sup> Whether the result is by design or natural economic forces, we cannot view with equanimity the compression of voices, whether of the press, air, or screen, into a narrowing number.<sup>56</sup> One effect of such concentration is an enforced ignorance of the public of the restraints and monopolies which exist in this medium of communication, because the press owners have generally avoided such a subject.

Some members of the press have been troubled over the growing monopoly status of newspaper operations in particular localities.<sup>57</sup> Others point out that many newspapers have been sold or ceased to exist because of lack of financial success. It has been urged that monopoly status creates an added sense of responsibility, but there is little doubt that such a status creates a real danger to the public.<sup>58</sup> While

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to the vitality of our democratic government may be defeated by private restraints no less than by public censorship." 326 U. S. 1, 28-29 (1945).

55. In *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 453, 56 N. E. 822, 826 (1900), the court said: "To enforce the provisions of the contract and this bylaw would enable the appellee to designate the character of the news that should be published, and, whether true or false, there could be no check on it by publishing from other sources. Appellee would be powerful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish, and could prejudice the interests of the public." Of the giants of the press, it has been said: "Their control over the various ways of reaching the ear of America is such that, if they do not publish ideas which differ from their own, those ideas will never reach the ear of America." COMMISSION ON FREEDOM OF THE PRESS, *op. cit. supra* note 3, at 24.

56. Monopoly may actually deprive a community of newspapers to read, as in Springfield, Mass., where the single publisher of all newspapers refused to enter into a contract with the printers. See *Time*, March 10, 1947, pp. 59-60. The presence of two differently owned newspapers in one city does not necessarily make for divergence of approach on basic issues, since the similarity in point of view of the publishers is more pronounced than dissimilarity. See Bergman, *Rivals in Conformity: A Study of Two Competing Dailies*, 25 JOURNALISM Q. 127 (1948).

57. See *Edit. and Pub.* March 26, 1949, pp. 5 *et seq.*

58. At a panel discussion attended by editors of several large newspapers and members of the Commission on Freedom of the Press, Dr. Niebuhr was of the opinion that, because of such status, competition was "no longer a genuine source of discipline in quality." *Id.* at 6. Admission by some of the members of the panel that many newspapers had gone overboard on a recent political event and had largely ignored another political problem, *id.* pp. 5 *et seq.*, illustrates the danger to the public in places where monopoly status exists.

It appears that in 1949 more successful theatrical productions were preferring to play in Minneapolis than in the neighboring city of St. Paul. It is said that, "in 'reprisal,' the two St. Paul newspapers, owned by B. H. Ridder and his family, continue to refuse to carry any advertising for those attractions which confine their Twin City engagements to Minneapolis. They also omit all mention of the shows in their news columns in the hope that St. Paul residents won't be aware of their

definitely not a complete answer, it would seem that before one newspaper in a city could acquire a competing newspaper, an opportunity should be afforded others to acquire the paper.

### RADIO

Newspaper publishers have not welcomed the advent of a rival means of communication. Radio has been and is being opposed by the press in ways to which the antitrust laws would seem applicable.<sup>59</sup> In 1922, the Associated Press warned its members that broadcasting of its news was against its bylaws; by 1933, the American Association of Newspaper Publishers had persuaded the three major news service agencies to suspend the service of news to broadcasters. When the Columbia Broadcasting System began to organize its own newsgathering staff, newspapers in the areas where the Columbia Broadcasting System had outlets withdrew program listings. Representatives of the two major networks, of the American Association of Newspaper Publishers, Associated Press, United Press, are said to have then met and entered into an agreement severely restricting the networks in the broadcasting of news.<sup>60</sup>

Many of these restrictions have disappeared, but others have taken their place. It has been alleged that Station WMRC, in Greenville, South Carolina, was kept by the local newspaper from securing any news service until it had sold a large interest in the station to Roger C. Peace of that paper.<sup>61</sup> Similarly, the Des Moines Register and Tribune and its three radio stations have been charged with using their influence to restrict the news supply of station WHO for a number of years.<sup>62</sup> Last year, it was reported that

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presence 10 miles or less distance or will refuse to attend them." *Variety*, April 6, 1949, p. 56. This example serves to illustrate how monopoly power can and does deny to the public news of current events.

59. See WHITE, *THE AMERICAN RADIO*, 44 *et seq.* (1947). ERNST, *op. cit. supra* note 2, at 152 (1946). As to opposition by the movies, see WHITE, *supra*, 43. Competition in the early days of broadcasting was retarded by A. T. & T.'s policy, "to decline to furnish telephone network service to broadcasting stations which were not licensed under the Telephone Co.'s patents and to limit in various ways wire service supplied to licensed stations." FEDERAL COMMUNICATIONS COMMISSION, *REPORT ON CHAIN BROADCASTING*, 7 (1941).

60. See ERNST, *op. cit. supra* note 2, at 152. This was the era of the exhortation: "See your local newspaper for further details."

61. See ERNST, *op. cit. supra* note 2, at 156-157.

62. ERNST, *op. cit. supra* note 2, at 155. Bergman, *Rivals in Con-*

"Editors of the three Cleveland dailies have advised the local newspaper guild that they propose to maintain the same common front against television they have always had against radio."<sup>63</sup> The power of newspapers to keep knowledge from the public sometimes evidences itself in small ways. It is not uncommon for newspapers, especially those with radio stations of their own, to omit or give incomplete listings of television and radio programs.<sup>64</sup> Approximately one third of all commercial radio stations in the United States have newspaper affiliation.<sup>65</sup> The percentage has remained almost constant over the last few years although radio outlets have rapidly gained in number.<sup>66</sup> In at least one hundred communities, the only newspaper also owns the only radio station.<sup>67</sup> The Federal Communications Commission has not been unconcerned over the rush of newspapers into the radio field.<sup>68</sup> While the charge has been made that the Commission has shown a vacillating policy with respect to applications for stations by newspapers,<sup>69</sup> two newspaper applicants for FM stations were turned down for the sake of diversity in

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*formity: A Study of Two Competing Dailies*, 25 JOURNALISM Q. 127, 129 (June 1948), states with respect to two newspapers in Pottsville, Pa.: "Both papers printed out-of-town radio programs free (Philadelphia, New York), but had an agreement not to oblige any local station similarly. One station was built and the agreement was kept. A second began operation, with alleged financial backing from the Journal's large department store advertiser; the Journal soon after began free publication of both stations' programs. The Republican stuck to its policy and printed none."

63. *Variety*, April 21, 1948, p. 26. The Cleveland Press has been reported to have refused FM listings. *Edit. & Pub.*, July 3, 1948, p. 18. As to Los Angeles and San Francisco, see WHITE, *op. cit. supra* note 59, at 123.

64. Until recently, the District of Columbia newspapers would not carry television program logs as a public service, and they were noting only highlights on local FM schedules. *Variety*, April 7, 1948. The programs of small local stations in Washington, D.C. meet the same fate. Two of the leading newspapers in the District have been major radio station owners and operators in the District.

65. *Edit. & Pub.*, March 20, 1948, p. 40. For a listing of newspaper interests in radio, see WHITE, *op. cit. supra* note 59, at 238.

66. *Edit. & Pub.*, March 20, 1948, p. 40. See Stewart, *Freedom to Read: Newspapers*, 35 SURVEY GRAPHIC 452 (1946).

67. See COMMISSION ON FREEDOM OF THE PRESS, *op. cit. supra* note 3, at 43.

68. Note, 96 U. OF PA. L. REV. 563, 564 (1948); Conrad, *Economic Aspects of Radio Regulation*, 34 VA. L. REV. 283, 291-292 (1948).

69. See WHITE, *op. cit. supra* note 59, at 158 *et. seq.*

ownership of media of communication and to ensure competition.<sup>70</sup>

Other substantial aspects of monopoly exist in radio. Before the war, four networks owned over ninety per cent of all radio nighttime power.<sup>71</sup> Today, the same four networks dominate the air. The National Broadcasting System and Columbia Broadcasting System, by setting up artists service booking agencies, have a substantial hold on available radio talent.<sup>72</sup> A few years ago, over three fourths of the authorized FM stations were owned by or affiliated with AM stations.<sup>73</sup> Even without attendant restraints, a monopoly status of this sort is a cause for concern.

However, radio has not been the home of "benevolent" monopoly.<sup>74</sup> Restraints have been many and widespread.<sup>75</sup> The Federal Communications Commission, after an extended investigation, issued a report in 1941 which catalogued many restraints, banned a number, curbed others and commented upon still more.<sup>76</sup> At the time of the Commission's report

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70. *In re* W. B. N. X. Broadcasting Co., Inc., 16 U. S. L. Week 2221, Oct. 21, 1947, noted, 96 U. OF PA. L. REV. 563 (1948). See Scripps Howard Radio, Inc., 4 PIKE & FISCHER (RADIO REGULATION) 525 (1948); Times Publishing Co., 4 PIKE & FISCHER (RADIO REGULATION) 603 (1948). In *Plains Radio Broadcasting Co. v. Federal Commun. Comm'n*, 175 F.2d 359, 363 (C. A. D. C. 1949), the Court held that the Commission could not give weight to the fact that the applicant for a license was the owner of the town's only newspaper and ignore the relationship of the other applicant to several newspapers and radio stations in the same general section of the country. The court said: "A concentration of news dissemination by a chain of stations over an area would seem to us to be a factor in a comparative evaluation from the standpoint of competition in news dissemination."

71. Ernst, *Why Not a First Freedom Treaty*, 35 SURVEY GRAPHIC 445, 446 (1946). In 1946, it was said that there were 730 radio stations gathered into four networks. Fly, *Freedom to Hear: Radio*, 35 SURVEY GRAPHIC 474, 475 (1946).

72. See WHITE, *op. cit. supra* note 59, at 40. The Federal Communications Commission has viewed this control with concern. See FEDERAL COMMUNICATIONS COMMISSION, *op. cit. supra* note 2, at 24-25.

73. ERNST, *op. cit.* note 2, at 131.

74. "We find that it is against the public interest for networks to operate stations in areas where the facilities are so few or so unequal that competition is substantially restricted." FEDERAL COMMUNICATIONS COMMISSION, REPORT ON CHAIN BROADCASTING, 68 (1941). See also, THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS, 86 (1947).

75. See ERNST, *op. cit. supra* note 2, Ch. V.

76. FEDERAL COMMUNICATIONS COMMISSION, *op. cit. supra* note 2. These included:

1. One-sided, long-term affiliation contracts.
2. Agreements by which local stations would make their facilities available to only one network: exclusively.

there were forty-five cities of more than 50,000 population to which Mutual could not obtain any access because of the major networks' exclusive contracts. (As a result, many persons were unable to hear the broadcast of the World Series of 1939.) It was not only of the World Series that John Q. Public was deprived. In addition the people of Buffalo were deprived of a public service program. The Mutual stations in Buffalo decided not to carry the program and because of the "territorial exclusivity" provision an independent station was unable to carry it.<sup>77</sup>

It has been asserted that the networks have restrained the expansion of FM facilities, and have permitted their affiliates to broadcast regular network programs over FM only on condition that they broadcast substantially all such programs. In addition, networks adopted a policy of giving away FM advertising time free to AM advertisers.<sup>78</sup> A broadcasters' Code, never an important force in radio broadcasting, has at times been used to restrict the access of various groups to radio broadcasting.<sup>79</sup>

The antitrust laws have been expressly made applicable to radio communication,<sup>80</sup> with power given the Commission to revoke licenses for violation of the clause. The Commission has given much attention to problems of restraint and monopoly,<sup>81</sup> stating in a report that it had the duty "to refuse

3. Options on time of local stations held by national networks.
4. Territorial exclusivity.
5. Contracts designed to discourage local commercial programs.
6. Network control over station rates.

77. *National Broadcasting Co. v. United States*, 319 U. S. 190, 200 (1943).

78. 13 Consumers Reports 140 (1948). The same article refers to delay on the part of AM stations in FM construction under permits granted them, and proposed rates of A. T. & T., closely aligned with AM networks, fixed so high as to discourage FM operation. And see *Variety*, June 2, 1948, p. 22.

79. See *WHITE*, *op. cit. supra* note 59 at 74 *et seq.*; *ERNST*, *op. cit. supra* note 2, at 142 *et seq.* As to a more current status of the Code, see *Variety*, Sept. 22, 1948, pp. 21, 34. Its tendency toward pre-censorship has been noted with concern. See *In Re United Broadcasting Co.*, 10 F. C. C. 515 (1945).

80. 48 Stat. 1087, 47 U. S. C. § 313 (1940).

81. As to restrictions on number of stations in single ownership or affiliation in particular areas, see *FEDERAL COMMUNICATIONS COMMISSION*, *op. cit. supra* note 2, at 92; *ERNST*, *op. cit. supra*, note 2, at 47, 125 *et seq.* The Commission has a rule that a license will not be granted or renewed to stations owning or controlling a site particularly suited for FM or television when such station has refused to make a portion of it available to other licensees who have no comparable site



licenses or renewals to any person who is engaged or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities."<sup>82</sup> Said the Commission: "The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purpose which the Sherman Act was designed to achieve."<sup>83</sup> The Supreme Court, when the Commission's action was challenged, rejected the contention that the Commission was attempting to administer the Sherman Act as well as the contention

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available and when exclusive use would unduly restrict competition in a given area. F. C. C. RULES AND REGULATIONS, §§ 3.239, 3.639. There has been a good deal of controversy over networks representing affiliates in the sale of national spot advertising. See *Variety*, March 9, 1949, p. 28.

82. See *National Broadcasting Co. v. United States*, 319 U. S. 190, 224 (1943). When the Commission considered applying this yardstick to television applicants who had violated the antitrust laws in the motion picture field, Fox and Paramount, in March 1949 challenged the Commission's position. Paramount's Memorandum in Support of Applications to Renew Licenses of Subsidiaries of Paramount Pictures, Inc., argued that the Commission did not have power to consider antitrust violations in other fields. It was also urged that as a matter of discretion the licenses should not be withheld.

Aside from the question whether the Federal Communications Act gives the Commission this power, precedents are not lacking where a government agency, in administering the statute under which it acts, has taken into consideration violations of other laws by one seeking or opposing action by the agency. See 86 I. C. C. 796, 801-802. Agencies in charge of issuing building permits under wartime regulations took into consideration the antitrust history of motion picture theatre applicants. Antitrust consent judgments have been admitted in evidence in other cases as background material. *Perelman v. Warner Bros. Pictures*, 95 F.2d 142 (3d Cir. 1938), *cert. denied* 305 U. S. 610 (1938); *Tivoli Realty, Inc. v. Paramount Pictures, Inc.*, 80 F. Supp. 800 (D. Del. 1948). The proclivities of antitrust defendants are an important consideration in framing antitrust judgments. See *McComb v. Jacksonville Paper Co.*, 93 L. Ed. 457, 460 (1949). And in the trial of *United States v. Paramount*, 334 U. S. 131 (1948), frequent resort was had to other antitrust litigation in which the defendants had been involved, while one of the consent judgments finally entered in the case, has part of the relief conditioned upon the result of a private antitrust suit in Chicago. CCH TRADE REG. SERV. ¶ 62,337.

In *Hartford-Empire Co. v. United States*, 324 U. S. 570, 572 (1945), the Supreme Court remarked that certain of the disputed relief might depend upon Hartford's antitrust history since the date of the appealed trial court's judgment. By consent, the final judgment entered in that case contains provisions relating to plastics, a field not included in the complaint. On the other hand, it was held that OPA violations could not be used to revoke federal alcohol permits. *Trenton Beverage Co. v. Berkshire*, 151 F.2d 227 (3d Cir. 1945); *Billik v. Berkshire*, 154 F.2d 493 (2d Cir. 1946).

83. *National Broadcasting Co. v. United States*, 319 U. S. 190, 223 (1943).

that the First Amendment was violated. That court has stated that the "Act recognizes that the field of free broadcasting is one of free competition."<sup>84</sup>

In this field, as in that of the press, the right to know suffers from the concentration of voices.<sup>85</sup> Of restraints and monopoly within its own family radio is mute.

### TELEVISION

A comparative newcomer in the field of communications, television has already been charged with a wide variety of activities which, if true, would seem to be a matter of anti-trust concern.<sup>86</sup> One antitrust suit brought by the Federal Government involving patents<sup>87</sup> has resulted in a consent

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84. *Commission v. Sanders Radio Station*, 309 U. S. 470, 474 (1940). A less ready acceptance of this principle is found in *Federal Broadcasting System, Inc. v. American Broadcasting, Inc.*, 167 F.2d 349 (2d Cir. 1948), *cert. denied*, 69 Sup Ct. 43 (1948), where a temporary injunction against two networks was denied. They had refused to deal with WSAY in Rochester unless that station took an affiliation contract allowing them to fix rates to advertisers. No sufficient concert of action was found, but in addition, Judge Augustus Hand remarked that it was more practicable for a network to operate on a standard advertising rate.

85. "The mechanism of free speech can operate freely only when the control of public access to means for the dissemination of news and issues are in as many responsible ownerships as possible and each exercises its own independent judgment." In the *Matter of Radio Corp. of America*, 10 F. C. C. 212, 213 (1943). Different rules as to use of radio facilities may obtain where monopoly or dominance exist than where such status is absent. In *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U. S. 779 (1946), a complaint charged the defendant radio station had terminated contracts with a religious corporation and refused plaintiff the right to bid for radio time on a competitive basis, although defendant had entered into contracts with other religious broadcasters. The court held there was no cause of action under the antitrust laws in the absence of allegations that defendant was in a dominant position or a member of a chain so monopolizing broadcasting as to render it impossible for plaintiff to find other outlets, and where neither conspiracy nor concert of action was alleged.

86. For early restraints in this field, see ERNST, *op. cit. supra* note 2, at 167. In 1948 it was felt that shortage of available television channels might cause a concentration of television stations into a few networks. See *Variety*, April 14, 1948, p. 27. Some members of the television industry have been reported to have called for block booking of films by television stations, *The Film Daily*, April 22, 1948, p. 1, a practice recently condemned in the motion picture industry, see *infra* page 535. In 1948, the Authors League of America formed a television committee as the first step toward establishing a standard policy of licensing rather than selling material in all writing fields. It was said representatives from Dramatists, Authors, Radio Writers and Screen Writers Guilds probably would form an overall committee on censorship with the four affiliated Guilds of the Authors League. *Variety*, May 26, 1948, p. 26. As to a Television Production Code similar to that which exists in the motion picture industry, see, *Variety*, July 13, 1949.

87. *United States v. Scophony Corporation*, 333 U. S. 795 (1948).

judgment.<sup>88</sup> And the use of television facilities by baseball clubs has led to a holding that there was sufficient interstate commerce involved to give federal courts jurisdiction under the Sherman Act.<sup>89</sup> In the early part of this year, the Federal Communications Commission initiated an investigation into practices of American Telephone and Telegraph Company, upon a complaint that it was refusing to interconnect its facilities with non-owned microwave relay links.<sup>90</sup> That there has been pressure on customer as well as affiliated stations to use network television facilities seems probable.<sup>91</sup>

Members of the motion picture industry have shown considerable interest in becoming television operators, as have radio operators.<sup>92</sup> Since motion picture distributors are likely to become a major source of television entertainment,<sup>93</sup> some caution might well be exercised on the part of the Federal Communications Commission in considering applications from motion picture companies.<sup>94</sup> Major motion

88. *United States v. Scophony Corp.* CCH TRADE REG. SERV. ¶ 62,356 (S. D. N. Y. Civ. Action No. 34-184 1949).

89. *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

90. 14 FED. REG. 1068, March 9, 1949. And see *Variety*, March 2, 1949; *The Washington (D. C.) Post*, Feb. 13, 1949, p. 10 M.

91. Last year it was reported: "CBS radio affiliates that go television, it was also revealed, are bound to align themselves with the same network under the terms of their AM agreements. The network inserted in its standard affiliate contract about five years ago a clause covering that very contingency." *Variety*, March 31, 1948, p. 30.

The pressure is on from both NBC and CBS for accounts that want to use or stay on their respective New York outlets, WNBT and WCBS-TV, to go network. NBC refuses to accept any new video business that hasn't immediate intentions of becoming a hookup customer, while the management of CBS' tele-operations is under express orders from William S. Paley to underscore the network pitch with all current or prospective WCBS-TV advertisers. . . . As a result of Paley's orders Gulf Oil, which carries a news show on WCBS-TV has been advised that it is expected to go network within the next four weeks. . . . An account which NBC recently turned down because of that advertiser's non-network disposition is now dickering with WCBS-TV.

*Variety*, April 28, 1948, p. 31. See *Variety*, June 2, 1948, p. 18, as to broadcasters' agreeing not to allow theatres to televise political conventions.

92. *Edit. & Pub.*, Feb. 26, 1949, p. 75. Some NBC affiliates have been said to be worried about R.C.A.'s control over the network, whereby, they believe, R.C.A.'s interest in television patents and equipment is translated into heightening NBC's interest in television to the detriment of radio. See *Variety*, March 2, 1949, pp. 25, 38.

93. See *The Film Daily*, April 5, 1949, pp. 1, 3.

94. Favoring of their own and other distributors' theatres to the detriment of other exhibitors was demonstrated in *United States v. Paramount Pictures*, 334 U. S. 131 (1948). It would seem that there would be a strong temptation to do likewise with respect to films offered

picture distributors who have been affiliated with large exhibitor circuits have shown a more marked reluctance to furnish films to television than those without such outlets.<sup>95</sup> Up to the date of this writing, motion picture distributors generally have preferred not to make available current feature films to television in order to protect theatre owners from the competition which might otherwise exist.<sup>96</sup> Motion picture exhibitors have exerted considerable pressure upon motion picture distributors to keep the latter from supplying television with film product of the kind they themselves wish to exhibit.<sup>97</sup> Although the fact that television cannot yet afford to provide motion picture distributors with revenues equivalent to what they receive from motion picture exhibitors may be a legitimate consideration, group action of the sort, designed to restrict television competition with motion picture exhibition, would seem to fall within the anti-trust laws.

About one-third of the Federal Communications Commission's television authorization and application have been originating from newspapers,<sup>98</sup> by far the largest group interested in television operation.<sup>99</sup> Newspaper ownership of television stations creates a situation of power and self interest likely to develop along antitrust lines.<sup>100</sup>

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for television where both were under single control. The converse might also be true where motion picture exhibitor and television station are under the same control. Competition for films in such a situation is likely to be attenuated. At least one Commissioner is said to have expressed his opinion that no stigma was attached to motion picture theatre applicants for television licenses. *The Independent Film Journal*, March 26, 1949, p. 11. Earlier remarks by the same Commissioner seem inconsistent. See *Motion Picture Herald*, Feb. 5, 1949.

95. See list of pictures made available to television for a two week period in March, 1949. *The Independent Film Journal*, March 26, 1949, p. 11.

In answer to a stockholder's query about making films for television, Metro-Goldwyn-Mayer's Vice President is reported to have said: "We make our living in presenting pictures in theatres. We own 131 houses and cater to about 15,000 others. If we encourage people to stay home, we won't have them in the theatres." *The Film Daily*, March 28, 1949, pp. 1, 10.

96. One distributor, when approached by television stations, is quoted as saying, "Our first concern is for 35 mm. theatrical release." *The Independent Film Journal*, March 26, 1949, p. 12.

97. While sometimes a matter of individual protest, quite frequently pressure is applied through local or national exhibitor associations. See *The Film Daily*, Jan. 31, 1949, pp. 1, 4; *The Film Daily*, April 6, 1949, pp. 1, 7.

98. See *Variety*, March 2, 1949.

99. See *Edit. & Pub.*, Feb. 26, 1949, p. 75.

100. It has been said that actors do not dare to refuse television interview programs on newspaper owned stations for fear of adverse or no notice of their act in news columns. See *Variety*, Aug. 25, 1948.

In order to avoid concentration of control, the Federal Communications Commission has restricted television ownership to five stations,<sup>101</sup> in line with a comparable ceiling on radio stations. A Commission ruling that two radio licenses and a television permit might be sold in one package, over the objection of an applicant who was interested only in television, would seem to have lessened the force of this regulation.<sup>102</sup>

### MOTION PICTURES

The motion picture industry in the United States is a fabulous empire of sound and sight. Millions are attracted to its magic. In other countries, it is an unofficial ambassador of the United States. In this country, it is the leading form of entertainment and an important medium for the conveyance of ideas.<sup>103</sup> Motion pictures have recently been placed in the preferred company of speech and press.<sup>104</sup> This empire has had a phenomenal growth. It has been an empire in which shoestrings were often mushroomed into substantial bank accounts, in which great power was an attainable ambition, and in which a common front against lesser members of the industry was recognized as a profitable method of doing business. The right to know is seriously hampered by a non-competitive screen.

Perhaps, because of its history, this industry has been rife with monopoly and restraints of unparalleled frequency and scope on the part of the major elements of the industry against those not within the limited hierarchy,<sup>105</sup> often under

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101. 47 CODE FED. REG. 3.640 (Supp. 1945). For other regulations designed to prevent monopoly and restraints in this field, see 47 CODE FED. REG. 3.631—3.640 (Supp. 1945).

102. *Re Dorothy S. Thackery*, F. C. C. Docket No. 2284, criticized, 97 U. OF PA. L. REV. 571 (1949).

103. "The motion picture industry, next to the church and school, touches our people most intimately." *Perelman v. Warner Bros. Pictures*, 9 F. Supp. 729, 730 (E. D. Pa. 1935), *aff'd*, 95 F.2d 142 (3d Cir. 1938), *cert. denied*, 305 U. S. 610 (1938).

104. *See United States v. Paramount Pictures*, 334 U. S. 131, 166 (1948).

105. The Federal government has been embroiled with the industry in over fifteen antitrust suits as well as in several Federal Trade Commission proceedings. In most of them, judgment has been entered against the defendants. For many years, the eight major companies have had an annual average of about forty private antitrust suits pending against them, and for the most part have regarded such suits as a normal expense of operation. See also Brady, *The Problems of Monopoly*, 254 ANNALS 125, 133-134 (1947). McDonough, Jr. and Winslow, *The Picture Industry: United States v. Oligopoly*, 1 STANF. L. REV. 385 (1949).

the guise of "self-regulation." The earliest antitrust suit brought by the Federal Government against the industry's leaders was against monopoly control in the form of a combination of patent holders.<sup>106</sup> The Government, in its brief in the *Paramount* case, referred to the adverse public effects of monopoly in a medium of expression and education of importance in controlling the thought and action of the American people.<sup>107</sup> It was asserted that the First Amendment furnished an argument for the application of the Sherman Act.<sup>108</sup> The Supreme Court's opinion in that case recognizes that monopoly in this medium may call for application of the First Amendment,<sup>109</sup> although it did not deem the case before it to require resort to the Constitution. The concern of the courts with monopoly and restraints in this medium of communication has grown as the industry's growth and influence have advanced.<sup>110</sup>

At present, eight companies are the dominant factors in the production and distribution of motion pictures. They have very substantial control over the former, and even greater control over the latter. Five of them have controlled the majority of the important first run motion picture theatres in the country. The monopoly power of this kind of integration is tremendous. Moreover, that power is frequently exercised to exclude or restrain competitors and to

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106. *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 802 (E. D. Pa. 1915).

107. Government brief pp. 122-126, *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948). It was argued that, "The content of films, regardless of who produces them, or exhibits them, must necessarily be conditioned to some extent by the prejudices and moral attitudes of those who control the channels of distribution. Only by assurance that the distribution field is equally open to all may the fullest diversity of film content be had."

108. *Id.* pp. 125-126. In the brief for the American Civil Liberties Union, as *Amicus Curiae*, filed in the *Paramount* case, *supra*, it was argued that the monopoly power of the Big Eight had abridged the constitutional right of the public to freely receive communications. An equally comprehensive argument on this point was proffered in the brief for the Society of Independent Producers as *Amicus Curiae* filed in the Supreme Court in the same case, pp. 10, *et seq.* Cf. Brady, *The Problems of Monopoly*, *supra* note 105,, 133 (1947).

109. *United States v. Paramount Pictures*, 334 U. S. 131, 166 (1948).

110. *Paramount Famous Corp. v. United States*, 282 U. S. 30 (1930); *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600 (8th Cir. 1942); *Milliam Goldman Theatres, Inc. v. Loew's Inc.*, 150 F.2d 738 (3d Cir. 1945), *cert. denied*, 68 Sup. Ct. 1016 (1948); *United States v. Schine Chain Theatres, Inc.*, 63 F. Supp. 229, 241 (W. D. N. Y. 1945), *modif.*, 68 Sup. Ct. 947 (1948).

deny to the public the benefits of a competitive system.<sup>111</sup> Control over distribution and the more lucrative theatres by the eight majors has made it difficult for pictures of independent producers to get adequate distribution and exhibition, since they must distribute through their competitors and compete with them for playing time in their theatres.<sup>112</sup> The right of the public to see has also been restricted by the reluctance, often expressed in contract, of the eight majors to distribute and exhibit pictures from other countries.<sup>113</sup> And the large chains have, at times, denied to the public the right to see pictures of their choice.<sup>114</sup> Block booking of

111. See Brady, *The Problem of Monopoly*, 254 ANNALS 125 (1947); Inglis, *Freedom to See and Hear: Movies*, 35 SURVEY GRAPHIC 477, 480 (1946); ERNST, *op. cit. supra* note 2, Ch. VI; HUETTIG, ECONOMIC CONTROL: MOTION PICTURE INDUSTRY, (1944); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567, 589 *et seq.* (1947); *The Motion Picture Industry, A Pattern of Control* (TNEC Monograph 43). Among the recent cases illustrating this monopoly power and its improper exercise are *Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945), *cert. denied*, 68 Sup. Ct. 1016 (1948) (Philadelphia); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 25 (1946) (Chicago); *Theatre Inv. Co. v. RKO Radio Pictures*, 72 F. Supp. 650 (W. D. Wash. 1947) (Seattle). A leading case decided some nine years ago involved part of Texas, *Interstate Circuit v. United States*, 306 U. S. 208 (1939). How the public fares because of the monopoly power of this integration was highlighted by the testimony of the President of RKO, as a witness in *United States v. Paramount* 334 U. S. 131 (1948), Rec. 1622: "In the first place if you have an unsuccessful picture, your first-run outlets that you control let it get into the flow of distribution and that is very important, because if you have an unsuccessful picture and your first-run exhibitor has no responsibility to you, you are foreclosed from that whole territory if you fail to get it into first-run theatres."

112. See *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 145-146 (3d Cir. 1938), *cert. denied*, 305 U. S. 610 (1938); brief for The Society of Independent Motion Picture Producers as *Amicus Curiae*, p. 3, *United States v. Paramount*, 334 U. S. 131 (1948), brief of American Civil Liberties Union in same case, pp. 15-16; brief of government in same case, p. 11. See Nelson, *The Independent Producer*, 254 ANNALS 49, 55-56 (1947).

113. See Inglis, *supra* note 111, at 481; *United States v. Paramount Pictures, Inc.* 66 F. Supp. 323, 352 (S. D. N. Y. 1945) *aff'd*, 334 U. S. 131 (1948). The advent of Rank, the English Producer, as a very large chain exhibitor in foreign countries where American producers distribute their pictures has led to more English pictures being shown in this country, recently, but Rank has continued to complain of the type of distribution he gets.

114. In *United States v. Paramount*, 334 U. S. 131, 166 (1948), the Supreme Court thought monopoly in the motion picture field at the production end might involve consideration of the First Amendment, but not at the exhibition end. The Court's distinction seems premised upon a lack of knowledge of the actualities in this industry.

Even in the absence of integration, the public in large areas may be deprived of a right to see, when a large chain exhibitor, having monopolies in a number of towns, decides not to take any of the pictures of a distributor for a season. This was true in *United States*

motion pictures has had the effect of compelling the exhibitor to take the poor pictures along with the good. That practice by the major distributors has been outlawed recently by the Supreme Court.<sup>115</sup>

It has been customary in the industry to channel the early showings of pictures into the large downtown theatres, then for an extended period not to play the picture in any theatre in the city, and after such period to begin playing the picture in neighborhood theatres. This system, known as the clearance system, has been applied to the showing of news events as well. A great deal of the independent exhibitors' complaints has been levied against "unreasonable clearance." In addition, the larger circuits of theatres were licensed to exhibit early runs, while the "independent" theatres were either denied such license or were bound by such terms as prevented effective competition. This has been especially true of theatre circuits affiliated with the major distributors.<sup>116</sup>

Exhibitors, circuit or independent, have not been free from antitrust taint.<sup>117</sup> In many areas of the country exhibitor motion picture chains have not only monopoly power, but customarily engage in practices of monopoly and restraints.<sup>118</sup> They have banded together to oppose building

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v. Crescent Amusement Co., 323 U. S. 173 (1943); Schine Chain Theatres v. United States, 334 U. S. 110 (1948). See as to the Skouras Circuit shutting out Paramount pictures for more than a year because of a dispute over terms for pictures, *Variety*, May 5, 1948, p. 5.

The record in the Paramount case showed that Paramount pictures were not played for a considerable period in any New York City neighborhood houses because of Paramount's preference to deal with Loew despite inability to arrive at acceptable terms for an inordinate length of time. See *United States v. Paramount Pictures, Inc.* (S. D. N. Y. 1949) CCH, TRADE REG. SERV. ¶ 62,473.

115. See *United States v. Paramount Pictures Inc.*, 334 U. S. 131 (1948); *Hearings before Committee on Interstate Commerce on Block Booking and Blind Selling in Motion Pictures on S. 3012*, 74th Cong., 1st Sess. (1936). See McDonough, Jr. and Winslow *supra* note 105.

116. See *United States v. Paramount Pictures*, 334 U. S. 131 (1948).

117. Federal courts have found the requisite interstate trade and commerce under the Sherman Act when confronted with restraints on the exhibition of motion pictures in particular localities. *Binderup v. Pathe Exchange*, 263 U. S. 291 (1923); *Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945), *cert. denied*, 68 Sup. Ct. 1016 (1948). Some state courts, despite a plethora of federal cases to the contrary, have refused to find trade and commerce, *Paramor Theatre Co. v. Trade Commission*, 95 Utah 354, 81 P.2d 639 (1938).

118. *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1943); *Schine Chain Theatres v. United States*, 334 U. S. 110 (1948). Their monopoly rested upon the support of eight major companies in the industry.



of new theatres by would-be competitors;<sup>119</sup> and with the distributors they have gone to considerable lengths to prevent 16 millimeter films being made available in competition to standard 35 millimeter exhibition.<sup>120</sup>

The larger exhibitor chains have also shown a marked sensitivity to pressure groups; thus, at times, denying to the public the opportunity of seeing a picture which not only some segments of the public might desire to see, but which has had the approbation of many critics.<sup>121</sup> The Catholic War Veterans put on an organized pressure campaign to keep "Monsieur Verdoux" from playing in New York because they did not like the political views and non-citizenship of the star, Charles Chaplin. Loew, one of the two most important movie chains in the New York metropolitan area, pulled the picture after a very short run.<sup>122</sup> A group called Sons of Liberty Boycott Committee sponsored boycotts of British films because of resentment against the British attitude toward Palestine. These boycotts prevented the showing of a number of British pictures in some localities.

119. See Box Office, Sept. 13, 1947; Variety, Feb. 4, 1948, pp. 7, 18.

120. See The Film Daily, April 5, 1949, pp. 1, 7; Motion Picture Herald, April 9, 1949, p. 38.

121. Charles Chaplin's, "Monsieur Verdoux," is reported to have had the phenomenally low record of less than 1,000 playdates in the first year of its release. "Difficulty has resulted mainly from inability of United Artists, the distributors, to line up circuit bookings for the film. It has played no major chains at all, except for a few houses. As a matter of fact, it was on this score that Chaplin urged UA execs recently to bring suit on a charge that the circuits were conspiring to keep the film off the screen." Variety, April 7, 1948, pp. 3, 22. Much of the opposition to the picture seems to have been the result of an emotional bias against Mr. Chaplin for leftist views he is supposed to possess. *Id.*

In Washington, D.C., the picture was first booked to play in a downtown first run Loew's theatre. When it appeared that the picture would play at the same time as that of a hearing of the Un-American Activities Committee, Loew's found reasons for not playing the picture. The picture was then played simultaneously at the neighborhood theatres of one particular chain. It never had a downtown run.

The economic effect on a picture which does not play the houses of the major chains is directly related not only to the absence of bookings in the larger, most lucrative houses, but also the lack of benefit of advertising exploitation which accompanies the playing of a picture in these first run theatres.

122. It is disputed as to whether Loew's pulled the picture because of this pressure or for some other reason, but it would seem that Loew was not unaffected in its decision by such organized hostility. See PM, Nov. 26, 1947, p. 13. Variety, Jan. 21, 1948. In Jersey City, N.J., the Catholic War Veterans threw a picket line around the theatre playing the picture. PM., *supra*.

While various self-regulatory bodies have been held in violation of the antitrust laws,<sup>123</sup> one powerful body has received little complaint from exhibitors. This body, The Production Code Administration, has arrogated to itself the primary determination of what the public shall see. The Administration<sup>124</sup> was set up by the major producers and distributors as part of the Motion Picture Association.<sup>125</sup> The Motion Picture Production Code came into being in 1930 as did the Advertising Code.<sup>126</sup> They are administered by the Production Code Administration<sup>127</sup> and the Advertising Code Administration, within the framework of the Motion Picture Association.<sup>128</sup> At first voluntary, since October of 1931 member companies have to submit copies of all scripts. In addition, books, plays, lyrics of songs, titles, as well as films before and after printing, must be passed upon by this

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123. These include Boards of Trade, Grievance Boards, Clearance Boards, Arbitration. *United States v. First Nat. Pictures, Inc.*, 282 U. S. 44 (1930); *Paramount Famous Corp. v. United States*, 282 U. S. 30 (1930); *Youngclaus v. Omaha Film Board of Trade*, 60 F.2d 538 (D. Neb. 1932). See Bertrand, *The Motion Picture Industry*, N. R. A. Work Materials, No. 34, Industry Studies Section (1936); Brady, *The Problem of Monopoly*, 254 ANNALS 125, 130 (1946).

124. Perhaps the most comprehensive treatment of the history and operation of the Production Code Administration is found in INGLIS, FREEDOM OF THE MOVIES, Chs. 3-5, inclusive (1947). See also, Note, *Censorship of Motion Pictures*, 47 YALE L. J. 87, 102 *et seq.* (1939). As to movie censorship at the governmental level, see CHAFFEE, FREE SPEECH IN THE UNITED STATES, 540 *et seq.* (1941); ERNST & LINDSEY, THE CENSOR MARCHES ON, (1945).

125. The association itself in regulating the industry has been a breeder of the type of concerted action with which the antitrust laws are concerned. See Brady, *The Problem of Monopoly*, 254 ANNALS 125, 129 *et seq.* (1947). This is the successor to the Motion Picture Producers and Distributors of America which originated in 1922, with Will H. Hays as director. INGLIS, FREEDOM OF THE MOVIES, 87 *et seq.* (1947). Inglis states that the alter ego of this organization is the Association of Motion Picture Producers, Inc., with which it has a very close operating arrangement. The membership of both associations is comprised of the top executives of the large movie companies. This Association has a much larger scope of activity than precensorship of movies.

126. Shurlock, *The Motion Picture Production Code*, 254 ANNALS 140 (1947). There were earlier private pressure groups which worked with the industry. One of some importance, the National Board of Review, still exists. INGLIS, *op. cit. supra*, note 125, at 74. A long list of private review committees is found in *The Film Daily*, May 31, 1949, pp. 1, 6.

127. Its English counterpart, the British Board of Film Censors, was established in 1913. INGLIS, *op. cit. supra* note 125, at 73.

128. They work in conjunction with studio censorship departments of member companies. See Luraschi, *Censorship at Home and Abroad*, 254 ANNALS 147 (1947).

organization to obtain its Code Seal of Approval.<sup>129</sup> Not only must member companies have their pictures passed upon by the Production Code Administration, but also non-members who use the distribution or exhibition facilities of members.<sup>130</sup> Foreign pictures distributed in member theatres likewise must be approved by the Production Code Administration. There appears to have been considerable effort to keep the penal provisions of the Code out of the light of publicity.<sup>131</sup> In fact, the Code has provided for a \$25,000 fine for producing, distributing or exhibiting a picture lacking the Production Code Administration's approval.<sup>132</sup> Since March 30, 1942, the fine has been made inapplicable to exhibition,<sup>133</sup> although member companies having theatres are still pledged to maintain the Production Code policies. Perhaps as effective a sanction requiring observance of the Code is the economic power of the major elements as a group.<sup>134</sup>

This sort of organizational setup not only invites further restrictions on each member of the industry because of the

129. ERNST AND LINDSEY, *THE CENSOR MARCHES ON*, 91 (1940); Shurlock, *The Motion Picture Production Code*, 254 ANNALS 140, 142-144 (1947). It is also said that an Agreement for Uniform Interpretation requires all advertising copy be submitted to the Association, and that disapproved copy not be used. INGLIS, *op. cit. supra* note 125, at 146.

130. One of the administrators of the Code has estimated that over 95 per cent of all motion pictures made in the United States are made with the cooperation of the Production Code Administration. Shurlock, *The Motion Picture Production Code*, 254 ANNALS 140, 142 (1947). The same source states: "Virtually all producers of foreign-made pictures to be made in the English language, which are to be exhibited in this country, also submit both script and finished product." *Ibid.*

131. Shurlock, a code administrator, in discussing enforcement avoids any mention of a penal sanction. Shurlock, *supra*, note 130, at 145.

132. See Inglis, *Need for Voluntary Self-Regulation*, 254 ANNALS 153-154 (1947).

133. Inglis suggests this modification had its genesis in a fear of vulnerability to the antitrust laws, INGLIS, *op. cit. supra* note 125, at 142; and see Inglis, *Need for Voluntary Self-Regulation*, 254 ANNALS 153, 154 (1947).

134. "But the main basis for its observance in the past was the economic influence of the major producer-distributors over the theatres. Since the affiliated theatres would not show pictures unless they had the approval of the Code Administration, almost all the independent producers routed their pictures through that office as a matter of discretion." THE COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS*, 70 (1947). See also, Inglis, *Need for Voluntary Self-Regulation*, 254 ANNALS 153 (1947): "The fact is that the program was forced on practically the entire industry by a dozen or so powerful executives in the major companies." Inglis, *Freedom to See and Hear: Movies*, 34 SURVEY GRAPHIC 477, 480 (1946).

fears of or susceptibility to pressure groups of some of the members,<sup>135</sup> but it naturally leads to concerted restrictions in collateral fields.<sup>136</sup> It has an important effect on the shaping of books and plays we read which may be written with a view to being potential motion picture material.<sup>137</sup>

While the Code Administration does have a measure of

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135. In December of 1947, the Motion Picture Association of America agreed on substantial changes in the Production Code and the Advertising Code. No film based upon the life of a notorious criminal may be approved unless the character is punished for the crimes committed by him. (Does this mean that it may no longer be suggested on the screen that Hitler escaped, and what of that kindly knave, Robin Hood?). It is no secret that under this revision a picture about Capone will not be shown unless it departs from the truth. At the same time it was announced that in the future P. C. A. may refuse a Code seal to a picture determined by it to be "objectionable." "Objectionable" is not defined.

Only slightly less vague is a modification of Section XI of the Code forbidding, "Titles which suggest or are currently associated in the public mind with material, characters or occupations unsuitable for the screen." See *The Film Daily*, December 4, 1947, pp. 1, 8; *Id.* December 5, 1947; *The Independent Film Journal*, December 6, 1947, p. 16. An immediate result of these changes was the elimination of more than 25 titles of pictures released between 1928-1947 from the Title Registration List. Included are such titles as "The Killers" and "The Racketeer." These changes were accompanied by a statement from Eric Johnston, M. P. A. A. President, that, "The action by the board of directors is further evidence of the determination of our members to utilize our self-regulatory machinery to the fullest to assure decency and good taste in motion pictures, titles and advertising." Trade press comments give point to the economic significance of the Code: "Henceforth, the Production Code seal, a virtual requisite for the successful release of a feature in the U. S. . . ." *The Film Daily*, December 4, 1947, pp. 1, 8.

136. According to INGLIS, *op. cit. supra* note 125, at 149, the Advertising Code Administration and the Production Code Administration cooperate to prevent advertising in pictures. See *Variety*, April 28, 1948, p. 9, for an illustration of such action. Inglis also states that, "In order that the public may not confuse the advertising of the sex-circuit theatres with that of members of the Association, there are unwritten agreements or informal arrangements with many newspapers that unsuitable motion picture advertising will not be accepted." In 1924, the Association is said to have adopted what came to be known as the Formula, a resolution, "to prevent the prevalent type of picture; to exercise every possible care that only books or plays which are of the right type are used for screen presentation." In 1927, "an agreement was made with the Authors League of America whereby books or plays which were unacceptable for screen presentation in their original form could be accepted if they were re-written so as to be made unobjectionable." INGLIS, pp. 112-113. See also Shurlock, *The Motion Picture Production Code*, 254 ANNALS 140 (1947); ERNST, *op. cit. supra* note 2, at 25, states that as the result of conspiracy of the major motion picture companies, authors of manuscripts submitted to one company and rejected by the Hays office can find no ready market place to reach a movie audience.

137. Original stories, of course, are even more strongly affected. INGLIS, *op. cit. supra* note 125, at 153.

popular appeal<sup>138</sup> and possibly has dulled government censorship, it suffers from an ailment common to group activity. The common denominator of its approach to life and thought is the average of the group, and more inclined to be below than above that average.<sup>139</sup> It substitutes the subjective and objective judgment of the group for the subjective and objective judgment of the individual. In the realm of the subjective, it denies the right of the individual to use his own judgment. The Code contains many taboos which must not be created at all or only in a limited manner. As to some of these taboos, many might disagree, or might think they could be best exorcised and dealt with by treatment on the screen.<sup>140</sup> The Code and the Code Administration have often been charged with stifling the full realization of this means of communication as an educator, entertainer, and conveyor of ideas.<sup>141</sup> This organization and its Code, as part of the Motion Picture Association, have restricted trade and commerce in all the multitude of fields that go into the produc-

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138. Inglis, while critical of the monopoly and restraints attendant upon the codes and their administration, favors this sort of self-regulation on a broader, more representative scale. Inglis, *Need for Voluntary Self-Regulation*, 254 ANNALS 153, 156-159 (1947); INGLIS, *op. cit. supra* note 125, at 74. Cf., Luraschi, *Censorship at Home and Abroad*, 254 ANNALS 147 (1947). The 1948 national convention of the Daughters of the American Revolution responded to changes in the Production Code, the Advertising Code and Title Registration by passing a resolution congratulating the President of the Motion Picture Association of America and presidents of member companies, "for the industry's action in strengthening its system of self-regulation covering picture content, titles and advertising in order to develop fine motion picture entertainment in America." Washington (D. C.) Evening Star, April 21, 1948, p. 1. See Shurlock, *The Motion Picture Production Code*, 254 ANNALS 140, 145-146 (1947); Quigley, *Importance of the Entertainment Film*, 254 ANNALS 65, 67 (1947). Quigley played an important part in the framing of the Code; Luraschi and Shurlock have worked with and for the Production Code Administration, respectively. The Director of the Code has been both praised and criticised for his administration. INGLIS, *FREEDOM OF THE MOVIES*, 152 (1947); Note, *Censorship of Motion Pictures*, 47 YALE L. J. 106 (1939). For an interesting debate upon self-imposed movie censorship, see Saturday Review of Literature, Feb. 26, March 2, April 30, 1949.

139. See Note, *Censorship of Motion Pictures*, 47 YALE L. J. 87, 106-107 (1939); cf. WHITE, *THE AMERICAN RADIO*, 72 (1947) as to the effect of a broadcasters' code.

140. The taboos include miscegenation, white slavery, sex hygiene, ministers of religion as villains, illegal drug traffic. One of the general principles of the Code reads: "Correct standards of life, subject only to requirements of drama and entertainment shall be presented."

The Production Code Administration is said to have been responsible for shelving projected films such as Sinclair Lewis', "It Can't Happen Here." ERNST AND LINDSEY, *THE CENSOR MARCHES ON*, 91 (1940).

141. See INGLIS, *op. cit. supra* note 125, at 128. Adherence to precedents of interpretation of practice undoubtedly makes it difficult to achieve much flexibility in the Code's administration. See Shurlock, *The Motion Picture Production Code*, 254 ANNALS 140, 142 (1947).

tion, distribution and exhibition of pictures. All of this is done in an atmosphere of anonymity and absence of publicity quite alien to the normal tests by which we judge good from bad.<sup>142</sup>

The trouble with evaluating what the Production Code Administration has done in terms of motion pictures released, is that we are in no position to know what has been denied the public in pictures not released because of the Administration's expressed or understood disapproval, unattended by publicity.<sup>143</sup> It may well be that, unless courts, from fear of alternative increased government censorship or from emotional approval of what the Code is doing, find "reasonableness" in such type of restraint, this organizational set-up and its activities violate the antitrust laws.<sup>144</sup>

Group action by the Production Code Administration makes each member less inclined to stand on its own feet in the face of pressure groups even more extreme in what they would or would not have on the screen—and, in turn, encourages the existence and exertions of such groups.<sup>145</sup> The

142. Shurlock, *supra* note 138, at 140, states that since the Code Administration "works with a high degree of anonymity little authentic information concerning its operations ever reaches the general public."

143. Ingrid Bergman was recently quoted: "The insistence of civic and religious groups on controlling what goes into films has resulted in a serious obstacle in creating stories for the screen. Hollywood is afraid to do anything in a creative vein that suggests reality. The Production Code (The Johnston office) demands that punishment for any deviation from set behavior by a character be made perfectly clear in a screen play. The Legion of Decency imposes its will on every picture even before it can be formed in the writer's mind. Lesser groups, too, have weakening effects on all screen stories. The result is that pictures have achieved a deadly sameness." The Washington (D. C.) Post, April 5, 1948, p. 10. Richard S. Coe, movie critic, reporting this statement of Miss Bergman's, goes on to say: "That she can hold her tongue, too, is evident in her care not to refer to one of the Legion of Decency's latest rulings—in Metro's forthcoming 'The Three Musketeers,' Cardinal Richelieu, a sinister fellow in the Dumas classic, will become a Protestant. The Roman Catholic group wouldn't give its approval of the role." See also Blanshard, *Roman Catholic Censorship*, 166 NATION 499 (1948), commenting upon other historical distortions on the screen induced by pressure from these groups. Life Magazine, Oct. 25, 1948, pp. 67-68. See also Washington (D. C.) Post, Nov. 6, 1948, p. 4, on script changes required by the Code Administration.

144. ERNST AND LINDSEY, *THE CENSOR MARCHES ON*, 91 (1940), note that the Federal Government, when drafting its complaint against the major members of the industry in *United States v. Paramount*, 334 U. S. 131 (1948), considered adding allegations based upon the Code as evidencing monopolistic combination.

145. Compare, Shurlock, *The Motion Picture Production Code*, 254 ANNALS 140, 143 (1947): "In addition to other duties, P. C. A. members must keep abreast of public reactions to pictures showing currently, and be cognizant of present trends of the various pressure groups. These observations they share with the producer." To the same effect,

most powerful of these fringe groups is the National Legion of Decency.<sup>146</sup> It came into being in 1934. Through the weapon of organized boycott, the Legion has exerted direct pressure on motion picture producers, distributors and exhibitors to prevent showing of pictures it deems unfit. While it operates primarily at the exhibition end, it has been credited with being a primary factor in bringing about the Production Code Administration. Catholics were circularized to sign a pledge to remain away from movies except those which do not offend "decency and Christian morality," and to secure as many members as possible for the Legion of Decency. The Legion publishes a weekly list of ratings for pictures.<sup>147</sup> In some cities the Legion's campaign has included picketing motion picture theatres.<sup>148</sup>

If we may believe the press, the Legion of Decency can and does exert an economic power in respect to what we may see, which inevitably has a serious effect on interstate commerce.<sup>149</sup> Economic pressure of this sort has been particularly prevalent and effective in Philadelphia.<sup>150</sup> It has

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see Metzger, *Pressure Groups and the Motion Picture Industry*, 254 ANNALS 110, 111 (1947).

146. This is a Catholic organization. Parallel Protestant and Jewish organizations have and do exist but they have never been as aggressive and as influential as the Legion of Decency. Cf. Metzger, *Pressure Groups and the Motion Picture Industry*, 254 ANNALS 110, 111-112 (1947); INGLIS, *op. cit. supra* note 125, at 120 *et seq.* But see Variety, Sept. 21, 1949, pp. 1, 26. As to similar activities by the Legion of Decency in other fields, such as birth control and magazines, see ERNST AND LINDSEY, *op. cit. supra* note 140, at 216, 245.

147. A critical analysis of their ratings appears in Blanshard, *Roman Catholic Censorship*, 166 NATION 499 (1948). Thus, "Gentlemen's Agreement" and "Miracle on 34th Street" are said to have received objectionable ratings because of a divorcee being the heroine, Blanshard, *supra*, at 500.

148. The Legion's less aggressive counterpart in England, the Catholic Film Society of England reportedly conferred with the Legion to effect a liaison between the two. Variety, December 14, 1947, p. 16.

149. "Halt of double features in some localities loom as a result of a barrage on film companies by individual members of the Legion of Decency around the country. . . . Mail received here indicates its a concerted drive with letters worded alike from far flung sections of the country. One studio received a bunch from Maine and another bunch from Missouri, all commencing, 'I feel bound in conscience to conform to ideals of the Legion of Decency by refusing to attend theatres where an unobjectionable film is being shown with an objectionable film. . . .'" Studios are turning the matter over to the Motion Picture Ass'n. Variety, December 31, 1947. See Life, May 16, 1949, pp. 97-100. At the *Hearings on Block Booking and Blind Selling*, *supra* note 115, the Executive Secretary of this organization stated, pp. 472-473: "The Bishop's Committee . . . is exclusively authorized to dictate the policies and practices to be followed by the Catholic people of the United States in the campaign for wholesome pictures."

150. Cardinal Dougherty is said to have threatened a year's boycott of Philadelphia theatres venturing to show "The Outlaw" and "Forever

operated nationally to impede the showing of the picture "Mom and Dad," which deals with matters of sex.<sup>151</sup> It is alleged to have forced changes in "Black Narcissus" because the picture reflected on convent life.<sup>152</sup> An abject apology by the President of Twentieth Century Fox for having opposed the Legion of Decency's attempts to impede the showing of "Forever Amber" further attests to the economic power of the Legion.<sup>153</sup> A church group, of course, has a right to express its views of a picture. It may be doubted, however, that because its motive is morality, it is entitled to use economic sanction to enforce such views. The right to persuade is not the right to coerce or boycott.<sup>154</sup> It often has been held, and even more often reiterated, that benevolent motives are not a defense to an antitrust suit.<sup>155</sup> Yet, what we find on an increasing scale in the motion picture industry, is a system of private courts regulating an industry.

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Amber," Blanshard, *Roman Catholic Censorship*, 166 NATION 499, 501 (1948).

151. See Variety, January 28, 1948, pp. 3, 20. Persons associated with the exploitation of this picture assert it has educational and social value. They have considered the possibility of antitrust action. And it has been reported that they have filed a complaint with the Federal Trade Commission against the Legion of Decency, charging a restraint of trade. The Film Daily, May 10, 1948, pp. 1, 9. In New Jersey, a restraining order was granted against the carrying out by city officials of a threat to revoke the license of a theatre if it showed the picture. *Hygienic Productions v. Keenan*, 62 A.2d 151 (N. J. Sup. Ct. 1948).

152. Blanshard, *supra* note 147, at 499. Blanshard points out that the Legion's attitude is influenced by denominational considerations as well as those of morality.

153. According to Variety, January 28, 1948, pp. 3, 28, the apology was a condition to the Legion of Decency's further negotiations with Fox as to modifications of "Forever Amber." Other examples of obedience to the Legion are said to have occurred with respect to the pictures "Mom and Dad" and "Volpone."

154. In *Paramount Pictures v. United Motion Pictures T. C.*, 93 F.2d 714 (3d Cir. 1937), a group of exhibitors believed they were being unfairly treated by Paramount. Through an association, they decided to take drastic concerted action to get better terms. Picketing was first decided upon, but abandoned. It was decided to refrain from dealing with Paramount and to use "lawful" persuasion against other exhibitors by reciting their grievances against Paramount. Paramount, for once the plaintiff in an antitrust suit, sought an injunction. The court held this concerted action was an unlawful boycott in restraint of trade, "even though the restraint is produced by means of peaceful persuasion." In *People v. Masiello*, 177 Misc. 608, 615, 31 N. Y. S.2d 512, 520 (Sup. Ct. N. Y. Co. 1941), newsdealers concertedly boycotted 7 newspapers to get better terms. Picketing was resorted to. In granting an injunction the court said: "Even peaceful picketing may not be resorted to for the purpose of aiding and furthering a conspiracy to restrain trade in violation of a penal statute such as the Donnelly Act."

155. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49 (1912); *United States v. General Motors Corp.*, 121 F.2d 376, 406 (7th Cir. 1941), *cert. denied*, 314 U. S. 618 (1941), and see cases cited *infra*, next three footnotes.



Vigilantism, practiced in a business suit is no more compatible with our system of a government of laws and not of men than when practiced in a hood or riding clothes.<sup>156</sup> In the earliest antitrust case in this field, the defendants argued that it was their purpose to improve the art and protect the morals of the public. They claimed credit for censorship which they said had been neglected by government authorities. This apology was held no defense to the suit.<sup>157</sup> Since that time, the courts have repeatedly taken a similar position.<sup>158</sup>

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156. In *American Medical Ass'n. v. United States*, 130 F.2d 233, 249 (App. D. C. 1942), *aff'd*, 317 U. S. 519 (1943), the Court said: "Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. They have been given no power to require their members, or Group Health Association, to reveal the intimate details of their affairs, as was attempted in the present case. Except for their size, their prestige, and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands. Although extreme situations may seem sometimes to have required vigilante action where effective law enforcement by duly constituted officers had broken down or never been established; and although persons who reason superficially concerning such matters may find justification for extra-legal action to secure what seems to them desirable ends, this is not the American way of life."

157. *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 808 (E. D. Pa. 1915). ". . . the law is its own measure of right and wrong,' as well as the judge of whether a transaction is of the character which it condemns."

158. *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U. S. 600, 613 (1914); *Paramount Famous Corp. v. United States*, 282 U. S. 30, 43, 44 (1930); *United States v. First National Pictures, Inc.*, 282 U. S. 44 (1930). In *Fashion Guild v. Trade Commission*, 312 U. S. 457, 463 (1941), the Court said, "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." *United States v. General Dyestuff Corp.*, 57 F. Supp. 642, 649 (S. D. N. Y. 1944) (claim of same purpose as tariff acts); *Manaka v. Monterey Sardine Industries, Inc.*, 41 F. Supp. 531 (N. D. Cal. 1941) (purpose alleged: conservation of important food fish by regulating prices and manner of taking fish). *United States v. Alexander & Reid Co.*, 280 Fed. 924 (S. D. N. Y. 1922) (use of private courts [committee of an association] before which contractors charged with owing money to members were to appear, held bad). *Federal Trade Commission v. Wallace*, 75 F.2d 733 (8th Cir. 1935) (Coal Dealers Association attempted to pressure producers not to deal with non-members by a wide variety of means, including disparaging statements). One of the defenses was that defendant's activities were designed to abet the NRA Code by bringing about prosecution of coal dealers who shortweighted, over-charged, and misrepresented their coal. The court said: "It is not a prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to enforce by drastic and restrictive measures their conceptions thus formed." *Federal Trade Commission v. Wallace*, *supra* at 737.

Despite the cases supporting the previous statements, where economic self-aggrandizement is not the obvious primary motive, and the primary motive is one which the judge is in sympathy with, one should not be too rudely surprised to find some court suddenly emphasizing motives.<sup>159</sup> The danger of entertaining motive as a test of antitrust liability is heightened by the encouragement it gives to all sorts of groups to try to use group action to impose their will upon the rest of the public by restricting exploitation of a picture.<sup>160</sup>

### CONCLUSION

No more than other fields is that of communication free from restraints and monopoly. New forms continue to take the place of older methods. The danger of government control or regulation to a free dissemination of ideas and information is probably well realized by the public. But strangely enough, it is likely that government agencies enforcing the antitrust laws or acting in conformity with such laws, will continue to be guardians of "a right to know."

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159. In *Hughes Tool Co. v. Motion Picture Ass'n*, 66 F. Supp. 1006 (S. D. N. Y. 1946), the plaintiff sought an injunction *pendente lite* to restrain defendants from revoking a seal of approval. A combination and conspiracy was alleged to coerce film producers to use the Production Administration, thus causing them to avoid controversial film treatment of social, political and economic matters in contravention of the First Amendment and the Sherman Act. The controversy actually had to do with risqué advertising of "The Outlaw."

The court denied the injunction on a number of grounds. One ground was the motive of the defendants. It said that the fact that the defendants' members had agreed not to release, distribute, or promote the release or distribution of an unapproved picture was not a violation of the Sherman Act. "The purpose of the approval is in furtherance of the proper purpose of the defendants to censor pictures which it may consider are not up to the highest moral and artistic standards. Defendants, I believe, owe that duty to the public." *Hughes Tool Co. v. Motion Picture Ass'n*, *supra*, at 1013. This approach reveals an attitude toward the Sherman Act which would emasculate it. The Act denies to a group the right to determine what shall and shall not go into interstate commerce, and what the public shall receive in the course of that commerce. Its philosophy is that competition gives the public the best opportunity to get the best and that self-regulation is the antithesis of competition. The judge who decided this case has shown a tendency to restrict the scope of the Sherman Act. See *Shuster v. New Syndicate Co.* (S. D. N. Y. 1943), CCH TRADE REG. SERV. ¶ 52,921; *United States v. Paramount Pictures*, 66 F. Supp. 323 (S. D. N. Y. 1946), *modif.*, 334 U. S. 131 (1948).

160. Recently, the board of directors of the Allied Independent Theatre Owners of Iowa and Nebraska passed a resolution asking its 325 members not to show the movie, "The Senator was Indiscreet," because it was "a reflection on the integrity of every duly elected representative of the American people" and, "The picture could be used as vicious propaganda by subversive elements in this nation as well as by our enemies abroad." *The Independent*, January 17, 1948, p. 23.