TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 269

INTERSTATE CIRCUIT, INC., TEXAS CONSOLIDATED THEATRES, INC., KARL HOBLITZELLE, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 270

PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., VITAGRAPH, INC., RKO-RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

FILED AUGUST 12, 1938.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1938.

—7880

[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

In Equity. No. 3736-993

UNITED STATES OF AMERICA, Petitioner,

vs.

INTERSTATE CIRCUIT, INC., TEXAS CONSOLIDATED THEATRES, INC., Karl Hoblitzelle, R. J. O'Donnell, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation, and Twentieth Century-Fox Film Corporation of Texas, Defendants

[fol. 2] **Findings of Fact and Conclusions of Law Requested by Petitioner**—Filed May 10, 1938

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

United States of America, petitioner herein, submits the attached special findings of fact and conclusions of law and requests the court to adopt each of said special findings of fact and each of said conclusions of law as its findings of fact and conclusions of law in this cause.

United States of America, by Berkeley W. Henderson, Special Assistant to the Attorney General.

[fol. 3] FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Equity Rule 70½, the court makes the following special findings of fact in this cause and reaches the following conclusions of law thereon:

Findings of Fact

1. Definitions

1. A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

2. First run means the first exhibition of a picture in a given locality and subsequent run means a subsequent exhibition of the same picture in the same locality. Motion picture theatres giving first run exhibitions of feature pictures distributed by the distributor defendants will be referred to herein as first run theatres and those giving subsequent run exhibitions of such feature pictures will be referred to herein as subsequent run theatres.

3. Double featuring or double billing is the showing of two feature pictures on the same program at the same admission price.

4. The words "admission price" as used herein mean a lower floor night admission price for adults.

5. Certain of the corporate defendants will be referred to herein by abbreviated titles as follows:

Defendants	Titles
Interstate Circuit, Inc.	Interstate
Texas Consolidated Theatres, Inc.	Texas Consolidated
Columbia Pictures Corporation	Columbia
Twentieth Century-Fox Film Corporation	Fox
Metro-Goldwyn-Mayer Distributing Corporation	Metro
Paramount Pictures Distributing Company, Inc.	Paramount
RKO-Radio Pictures, Inc.	RKO
United Artists Corporation	United Artists
Universal Film Exchanges, Inc.	Universal
Vitagraph, Inc.	Vitagraph

A Class A picture is a feature picture shown in the cities of Dallas, Fort Worth, Houston or San Antonio at an admission price of 40¢ or more.

The restrictions as to admission price and against double features hereinafter referred to appl-ed only to class A pictures.

[fol. 4] 6. The defendants Interstate, Texas Consolidated, Karl Hoblitzelle and R. J. O'Donnell will be sometimes referred to herein as the exhibitor defendants and the other defendants will be sometimes referred to herein as the distributor defendants.

II. The Defendants

7. Interstate operates 43 motion picture theatres located in Austin, Dallas, Fort Worth, Galveston, Houston and San Antonio. It operates all of the first run theatres in these cities except one in Houston which is affiliated with Metro. In each of these cities it operates two or more first run theatres which regularly charge an admission price of 40¢ or more. In addition it operates several subsequent run theatres in each of these cities. In all of these cities except Galveston there are other subsequent run theatres competing with Interstate's first run and subsequent run theatres.

8. Texas Consolidated operates 66 theatres, some of them first run and others subsequent run houses. These theatres are located in various Texas cities other than those in which Interstate operates theatres and in Albuquerque, New Mexico. In some of these cities there are no competing theatres and in the leading cities of Abilene, Albuquerque, Amarillo, El Paso, Waco and Wichita Falls there are no competing first run theatres.

9. Defendant Karl Hoblitzelle is president and defendant R. J. O'Donnell is general manager of both Interstate and Texas Consolidated and they are in active charge and control of the business and operations of these two corporations. Interstate and Texas Consolidated are affiliated with each other and with Paramount.

10. Defendant Metro-Goldwyn-Mayer Distributing Corporation of Texas is a subsidiary of and acts as the Texas agent for Metro. Defendant Twentieth Century-Fox Film Corporation of Texas is a subsidiary of and acts as the Texas agent for Fox. The other eight distributor defendants distribute motion picture films in interstate commerce throughout the United States. They solicit from exhibitors located in Texas applications for licenses to exhibit films; forward such applications to their New York offices, where they are granted; ship films from points outside of Texas to their respective film exchanges in that state, from which exchanges the films are delivered and redelivered to local [fol. 5] exhibitors; and finally reship the films to laboratories maintained outside of Texas. They distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States.

11. All of the feature pictures distributed by the distributor defendants are copyrighted and each distributor defendant either is the copyright proprietor of each picture distributed by it or has the exclusive right to license its exhibition in the United States.

III. The Conspiracy

12. On April 25, 1934, defendant O'Donnell addressed an identical letter (Agreed Statement of Facts Par. 10) written on Interstate's letterhead to the Texas branch manager, located at Dallas, of each distributor defendant. The letter stated that Interstate, in contracting for pictures for the coming 1934-1935 season, would insist that any picture shown first run in an Interstate theatre at an admission price of 40¢ or more should not be exhibited at any future time in the same city at an admission price of less than 25¢. On July 11, 1934, after defendants Hoblitzelle and O'Donnell had discussed the proposed price restriction with the president of Paramount while attending a convention of that organization held in Los Angeles in June, O'Donnell sent a second letter (Agreed Statement of Facts, paragraph 11) written on Interstate's letterhead which was addressed jointly to the various Texas branch managers of the distributor defendants. In this letter he renewed and amplified his earlier demand and also demanded that any feature picture shown in a first run Interstate theatre at an admission price of 40¢ or more should not thereafter be double billed in the same city. The letter also included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢.

13. Prior to the 1934-1935 season, the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢. There is no evidence that these contract provisions were uniform or were adopted as a result of any agreement among the distributor defendants or any [fol. 6] agreement between any of them and any of their licensees. The price restriction proposed by defendant O'Donnell represented an increase of at least 66% in the

minimum admission price and it also contemplated that the distributor defendants agree to require that subsequent run exhibitors charge the requested minimum admission price. Upon these facts, and upon direct evidence to this effect, I find that the price restrictions proposed by defendant O'Donnell constituted a novel and important departure from prior practice.

14. The printed license agreement used by Vitagraph since the beginning of the 1933-1934 season has contained a provision prohibiting double billing. The regular printed forms of contract used by Metro and RKO throughout the United States for the 1934-1935 and subsequent seasons include an agreement by the licensee not to double bill, but the date of the adoption of these contract forms is not disclosed by the record. Each distributor defendant thus restricting double billing was free to abandon the restriction at any time or to waive it in particular cases, whereas defendant O'Donnell proposed that the distributor defendants bind themselves by agreement to maintain such a restriction. Upon these and other facts appearing of record, I find that the proposed restriction upon double billing constituted a novel and important departure from prior practice.

15. The branch managers, upon receipt of the letters referred to in paragraph 12, notified their home offices. The branch managers themselves had no authority to agree to the proposed restrictions and in the negotiations which followed with representatives of Interstate with reference to contracts for the 1934-1935 season each distributor defendant was represented, not only by its branch manager, but also by one or more superior officials from outside the State of Texas. Four of the eight branch managers could find in their files no correspondence whatever relating to the letters from defendant O'Donnell. Of the correspondence found in the files of the other four Dallas offices, in one instance the correspondence was not introduced in evidence. In each of [fol. 7] the other three instances hostility to or criticism of the proposed restrictions was expressed. In one instance the branch manager wrote that "a policy of this sort is extremely dangerous to everyone concerned and cannot help, in the long run, but cost us all plenty of money." A letter of a representative of another distributor defendant stated: "They are automatically trying to set up a model arrangement for the United States without giving us anything to

say about it." A letter from a representative of a third distributor defendant advised that defendant O'Donnell was "making some unfair demands" and imposing conditions "of which he is a flagrant violator."

16. During the summer of 1934 defendants Hoblitzelle and O'Donnell, representing Interstate, conferred at various times with the representatives of each distributor defendant. In the course of these conferences all of the distributor defendants agreed with Interstate to impose both of the requested restrictions upon subsequent run exhibitors. Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more and there were five cities, Austin, Dallas, Forth Worth, Houston and San Antonio, where Interstate operated such theatres and where there were competing subsequent run theatres. The various distributor defendants, with substantial unanimity, agreed to impose and did impose these restrictions only in four of these cities, Dallas, Fort Worth, Houston and San Antonio. Since Metro did not grant licenses to any subsequent run exhibitor in Houston, where an affiliate of Metro operated a first run theatre, it did not agree to impose the restrictions in Houston. Universal imposed restrictions on subsequent run theatres in Austin in the 1934-1935 season, but in the two following seasons it, like all the other distributor defendants, imposed restrictions only in the four cities previously mentioned. Interstate agreed to accept and subsequently observed both of the restrictions as to its own subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio.

17. Metro and Paramount incorporated the agreement to impose restrictions in their written contracts with Interstate for the 1934-1935 season. The other distributor defendants carried out the agreement without embodying it in their written licensing contracts with Interstate for the [fol. 8] 1934-1935 season. The provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors varied slightly in language or phraseology, but the substance of the restrictions imposed by each distributor defendant was the same.

18. None of the distributor defendants except Paramount, and it only for the 1934-1935 season, imposed any restriction

as to admission price upon subsequent run exhibitors in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres. There is no evidence that, prior to or during the negotiations with the distributor defendants, defendants Hoblitzelle and O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934.

It is agreed, however, that no demands were made in behalf of the defendant, Texas, Consolidated, upon the distributor defendants for the imposition of said restrictions for the seasons 1935-1936 and 1936-1937.

19. The president of an organization composed of and representing independent exhibitors in Texas, after learning of the restrictions, called a meeting of the exhibitors affected, and a committee was appointed to endeavor to persuade defendant Hoblitzelle to waive the proposed restrictions. The committee was given a hearing but met with no success. Defendant O'Donnell, who was aware of the hostility of the independent exhibitors to the restrictions, asked for and was given an opportunity to address a convention of their organization. Upon these facts and other evidence appearing of record, I find that the restrictions were strongly opposed by "independent" exhibitors, that is, those who are not affiliated with any distributor defendant.

20. Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect. Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform [fol. 9] to the restrictions and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally. The record is likewise clear that the more nearly unanimous the action of the distributor defendants in imposing restrictions, the greater the benefit that would be derived by Interstate.

21. The distributor defendants did not call as witnesses any of the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials. From defendants' failure to summon any of these officials as witnesses, I find that the testimony which they would have given, if called to testify, would have been unfavorable to the defendants on this issue.

22. From the facts set forth in findings 12 to 21, inclusive, and particularly from the unanimity of action on the part of the distributor defendants, not in one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio.

IV. The Effect of the Conspiracy

23. Prior to the 1934-1935 season most of the independently operated subsequent run theatres in Texas charged an admission price of 15¢ or 20¢ and it was also customary to double bill, either on certain days in the week or as occasion required. The restrictions imposed by the distributor defendants upon subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio caused some of said exhibitors, in order to be able to obtain pictures subject to the restrictions, to increase their admission price to 25¢, either generally or when pictures subject to the restrictions were [fol. 10] shown, and have prevented these exhibitors from double billing any of such pictures. Practically all of the exhibitors who have so increased their admission price would not have done so but for the restrictions imposed by the distributor defendants. The restrictions imposed by the distributor defendants have caused other subsequent run exhibitors who were unable or unwilling to accept the restrictions to be deprived of the opportunity to exhibit any

of the pictures subject to the restrictions, the best and most popular of all new feature pictures. The effect of the restrictions upon the low-income members of the community patronizing the theatres of these exhibitors was to withhold from them altogether the best entertainment furnished by the motion picture industry.

24. The restrictions imposed by the distributor defendants have increased the income of Interstate by attracting to its first run theatres charging an admission price of 40¢ or more patrons who, if the pictures shown at such theatres were later exhibited in the same city at a theatre charging an admission price of less than 25¢ or as part of a double feature program, would view these pictures at such other theatres. The attendance thus deflected from subsequent run theatres to Interstate's first run theatres has reduced the income of subsequent run exhibitors and there is no evidence that such loss in income has been offset by the higher scale in admission prices which, because of the restrictions, some of the subsequent run theatres have adopted. Since the license fees which the distributor defendants charge Interstate for exhibiting feature pictures in its first run theatres are generally based upon a percentage of Interstate's receipts from these pictures, the increased income which Interstate has received because of the restrictions has also increased the income of the distributor defendants.

Conclusions of Law

1. The court has jurisdiction of this cause under the provisions of the act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

2. All of the distributor defendants by acting pursuant to a common plan and understanding in imposing the re- [fol. 11] strictions as to *mi*nimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-35 and seasons subsequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle, and O'Donnell, and with each other.

3. All of the distributor defendants, (with the exception of Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing

Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-35 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

4. Said combination and conspiracy among the defendants restrained interstate commerce in motion picture films, that is, it restrained the rental and shipment, in the course of interstate commerce, of motion picture films by and between the distributor defendants and subsequent run exhibitors.

5. Said combination and conspiracy effected an unreasonable restraint of interstate commerce in that it constituted an agreement by those having a substantial monopoly of the best of all available feature pictures (1) to impose upon certain subsequent run exhibitors, customers of the defendant distributors, uniform and restrictive provisions in their exhibition contracts, and (2) not to enter into exhibition contracts with, that is, to boycott, any of these exhibitors unable or unwilling to accept such contract provisions.

6. The restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or [fol. 12] immunities conferred by the copyright law.

Apart from the combination and conspiracy referred to in paragraphs 2 to 6 inclusive of these conclusions I reach the following conclusions regarding certain provisions of each of the various license agreements involved:

7. Said provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

8. The provisions against double featuring appearing in the license agreements between all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

9. Such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between any or all of the distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

10. Such provisions as bind any or all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

[fol. 13] 11. Each and every agreement, whether oral or written, between all of the distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the distributor defendants agree to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

12. Each and every agreement, whether oral or written, between all of the distributor defendants, (except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the said distributor defendants agree to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

I have reached the foregoing conclusions regarding said provisions of said license agreements on the ground, among others, that such undue and unreasonable restraint of interstate commerce is not within any privileges or immunities conferred upon the distributor defendants by the copyright law since the restraint was the product, not solely of the exercise of each defendant distributor's copyright privileges, but of a combination between it and Interstate fixing the terms upon which the distributor defendant would grant to competitors of Interstate licenses to exhibit certain feature pictures after Interstate's license privilege to exhibit these pictures had expired.

13. The petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the cities of Dallas, Houston, [fol. 14] Fort Worth and San Antonio.

14. The petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) binding said distributor defendants to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

15. That the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar

combination and conspiracy having similar purposes and objects.

—— ——, United States District Judge.

[fol. 15] IN UNITED STATES DISTRICT COURT

MEMORANDUM IN SUPPORT OF GOVERNMENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 11, 1938

Statement

This case is back in this court for the purpose of making special findings of fact and conclusions of law, as directed by the order of the Supreme Court dated April 25, 1938.

The respective parties have each submitted proposed findings of fact and conclusions of law which, while they do not differ greatly in many minor details, do vary sharply in the ultimate decision their adoption by this Court would necessitate.

There are one important issue of fact and one serious question of law involved in this case. That issue of fact is: Was there a combination or agreement between the distributor defendants to impose the restrictions demanded by the exhibitor defendants?

This Court recognized the importance of this issue, for in the opinion it was said:

"The sharp issue—the battleground—of this case is whether the respondents conspired together to bring about the fixing of the minimum 25¢ charge by the subsequent exhibitor and the destruction of the practice of double featuring."

The defendants likewise recognized the importance of this issue, for in their main brief in the Supreme Court, they said, pp. 35-36:

[fol. 16] "Of course, the protection of the Copyright Act does not extend to unreasonable restraints of trade imposed pursuant to a combination, agreement or conspiracy between two or more copyright owners who have combined for the purpose of monopoly or restraint of trade. Strauss v. American Publishers Association, 231 US 222. Paramount-

Famous Corporation v. U. S., 282 US 30. Vitagraph, Inc. vs. Perelman, unreported, January 16, 1936. (C. C. A. 3.)''

A study of the briefs of the parties hereto in the Supreme Court leads to the conclusion that one of the real reasons for the action of the Supreme Court in sending this case back for findings of fact and conclusions of law is the confusion that was created in the minds of the reviewing court about what this Court actually held on this important question of combination and agreement between the distributor defendants. For example, the defendants said in their main brief in the Supreme Court, p. 45:

''There are, however, some ambiguous expressions in the written opinion of the Court upon which it may be urged by the government that the Court was of the opinion that there was concert of action between the distributor defendants.''

Again it was said (Appellants' Main Brief, pp. 26-27):

''Decision, therefore, rested upon the court's conclusion that distributors must not in their non-exclusive license agreements with exhibitors contract away their right to contract completely and fully with other exhibitors if they contract at all. By this the court meant that a single distributor could not contract with Interstate Circuit to impose the restrictions involved. The decree, as we have already shown, was drawn and entered precisely upon this theory. Neither the decree nor the complaint comprehended any conspiracy or agreement between the distributors prior to the execution of individual contracts with the first run exhibitor. Not only is there no support in the pleadings, the opinion, the decree or the evidence upon which an assertion of such a prior agreement and conspiracy can be supported, but all the testimony is to the contrary.''

And in their reply brief (Appellants' Reply Brief, p. 3), this language is found:

''Thus it appears that the decree rests not upon any findings of any prior combination, conspiracy or agreement between the distributor defendants, either to agree with Interstate Circuit to impose the restrictions upon subsequent run licensees or to impose them regardless of agree-

ment with Interstate Circuit. On the contrary, the decree [fol. 17] proceeds upon the erroneous conclusion of law that the distributor defendants, by executing their agreements with the Interstate Circuit, joined in an unlawful conspiracy in violation of the Sherman Act, that these agreements were *per se* illegal, and that their performance should be enjoined."

Now, of course, this Court did decide this most important issue of fact, and did it in such language that it is difficult to see how the foregoing statements quoted from appellants' briefs could be seriously made. This Court said, speaking of the agreement between the distributor defendants,

"The conviction is inescapable that there was such an agreement."

Government's Proposed Findings and Conclusions

Having in mind the recognized principle that equity rule 70½ contemplates findings of fac5 and conclusions of law upon which the decision of the lower court rests and does not require the inclusion of immaterial facts or unnecessary conclusions, the findings proposed by the government have gone into as much detail as is believed consistent with good pleading, in showing the factual background for this Court's decision upon this most important question of conspiracy. Such findings on this issue are Paragraphs XII to XXII, inclusive.

Paragraphs I to VI, inclusive, merely give definitions of terms used throughout the case.

Paragraphs VII to XI, inclusive, describe the various defendants and the business carried on by each.

The remaining paragraphs, numbered XXIII and XXIV, deal with the effects of the conspiracy, which, of course, is an important issue in this case.

Every finding of fact proposed by the government, with the exception of the first portion of Paragraph XX and Paragraph XXI, is based upon evidence contained in the record in this case. The first portion of Paragraph XX and Paragraph XXI are based upon interferences irresistibly to be drawn from the evidence in this case.

As stated, there is one important issue of fact in this case and one important question of law. We have discussed the

[fol. 18] issue of fact and now refer to the question of law, which is:

Are the agreements of the various distributors with Interstate Circuit to impose these restrictions upon subsequent run competitors of Interstate in and of themselves contrary to the antitrust laws, regardless of whether or not a conspiracy existed?

This Court answered this question in no uncertain terms when it said in its opinion:

"Beyond even the citing of testimony is the irrefutable further fact that such contracts as the exhibitor respondents made with each of the distributor respondents was itself in violation of the Sherman antitrust law."

Doubtless this question can only be finally answered by the Supreme Court, but in view of its importance, Paragraphs VII to XII, inclusive, of the government's proposed conclusions of law deal with it.

Paragraphs XI to VI, inclusive, recite the conclusions of law necessarily flowing from the findings regarding the existence of a combination and agreement among the distributor defendants. The remaining conclusions proposed by the government, viz., Paragraphs XIII, XIV and XV, merely suggest the relief to which the prevailing party is entitled.

Defendants' Proposed Findings of Fact and Conclusions of Law

Without going into unnecessary detail, we will refer to paragraphs in the findings proposed by the defendants to which serious objection is made by the government and state the grounds for such objections.

Paragraphs VIII and IX contain subject matter absolutely immaterial to the decision of this case. The question of availability was not in issue here.

Paragraph X is merely repetitious of Paragraph IV.

Paragraphs XXI and XXII likewise contain subject matter immaterial to the decision of this case. What the exhibitor defendants were advised by their attorney, or what their intentions were in demanding the imposition of these [fol. 19] restrictions, have nothing to do with the real issue in anti-trust cases, as it has often been defined by the Supreme Court. That issue is: What was the effect of what

the defendants did, so far as the antitrust laws are concerned?

Paragraph XXIII summarizes all the evidence regarding the negotiations between Interstate Circuit and each distributor which resulted in the general imposition of these restrictions. Of course, this procedure was never contemplated by equity rule 70½, and the inclusion of this paragraph, as well as paragraph XXXII, which analyzes the evidence of the subsequent run exhibitors, would doubtless provoke censure by the appellate court. These matters are all in the record and can be argued by the defendants upon their next appeal.

The rule contemplates findings on ultimate and material facts, not detailed recitals of evidence already in the record. As Judge Mack said, in Kelly v. Central Hanover Bank and Trust Company et al, 14 F. Sup. 346, at 347,

"I am, however, clear that under equity rule 70½ (28 U. S. C. A. following Sec. 723), the district judge is not required, at least without request or direction of the appellate tribunal to make findings of fact or conclusions of law on all the questions presented by the evidence, *but only on such of them as he deems essential to support the decree.*" (Italics supplied.)

The government objects to the following language in Paragraph XXIV:

"Each distributor acted independently of every other company, and that no communication, conference or discussion was had with any other distributor as to the restrictions, or either of them."

This is a glaring example of the unfair findings requested by the defendants. The Court found that the local representatives of the distributors had no power to bind their respective companies, and yet we find this paragraph, starting,

"that several local representatives of the distributors testified,"

and ending with the conclusion,

[fol. 20] "that each distributor acted independently of every other company."

The inclusion of such a finding would nullify everything that this Court had previously decided as to the existence of a combination and agreement among the distributors.

Paragraph XXIX is not borne out by the record. All the testimony in this case is to the effect that these restrictions were suggested and imposed for the benefit of Interstate Circuit, and that but for its demand, they never would have been imposed by the distributors. The benefits accruing from these restrictions to the distributors were purely incidental.

Paragraphs XXXV and XL are contrary to the facts, and if adopted might necessitate a reversal of this case. It is only necessary to look at O'Donnell's letter of April 25, 1934, to see how utterly unfounded Paragraph XL is.

Certain unnumbered findings have likewise been proposed by the defendants. All of these are objected to. For example, in the one dealing with the committee of independent subsequent run exhibitors which called on Hoblitzelle in an effort to have these restrictions waived, an attempt is made to capitalize on the testimony of one member of this committee (Tidball). Only that portion of his testimony favorable to the defendants' position is referred to. Counsel has entirely omitted Mr. Tidball's testimony, as follows:

"I am not in favor of them." (Speaking of these restrictions). "I just don't think it is a healthy condition."

This omission illustrates the danger of attempting to quote testimony or to analyze it in findings of fact. The record will be before the reviewing court, and it includes all the testimony. The remaining unnumbered proposed findings of fact likewise attempt to vitiate this Court's finding as to a combination and agreement between the distributor defendants. From the entire record in this case, it is obvious that none of these distributors would have dared to impose these new, unusual and extremely unpopular restrictions without knowing that each of his fellow [fol. 21] distributors was about to do likewise.

The two conclusions of law proposed by the defendants would, of course, require a different decision of this case than that already made by this Court. We do not assume that this Court has any intention of reversing itself, nor do we believe that there is any serious danger that the Supreme Court may do so.

Conclusion

Naturally the defendants in this case desire to present findings of fact and conclusions of law to the reviewing court which will cast the most favorable light upon their position. It is submitted, however, that their zeal in this regard has caused them to propose findings of fact and conclusions of law that would almost automatically call for the reversal of a decision reached after a fair trial and after mature deliberation by the trial court.

On the other hand, the adoption by this court of the findings and conclusions proposed by the government will give the reviewing court an accurate picture of the foundations upon which this Court's decision rests, and present that picture without in anywise jeopardizing the rights on appeal which the defendants now have and always have had.

Respectfully submitted, Berkeley W. Henderson,
Special Assistant to the Attorney General.

BWH:MJP.

[fol. 22] In United States District Court

Defendants' Requested Findings of Fact and Conclusions of Law, and Reasons Therefor—Filed June 7, 1938

Request for Findings of Fact and Conclusions of Law

To the Honorable Judge of Said Court:

Each of the defendants herein requests the court to find as a part of the Findings of Fact each of the facts enumerated in the suggested Findings of Fact and Conclusions of Law hereto attached. Each suggested finding of fact is a separate request for the finding of that fact. The respective Findings of Fact are numbered successively and appear in the same document as a matter of convenience to court and counsel, but each defendant requests each of these findings separately.

On the margin of the respective findings attached hereto appears a notation indicating whether the Government has filed objection to the finding and if so, the nature of the objection. This is for the convenience of the court in considering the findings suggested by the defendants. After each finding there is a reference to a page of the printed

record in the United States Supreme Court, a copy of which is being furnished to the trial court for use in considering the findings requested in this case.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for Defendants.

[fol. 23] [Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1

(*No objection.*) The facts recited in the agreed statement of facts are found as therein recited, and the agreed statement of facts is hereby adopted as part of the findings of fact.

2

(*No objection.*) A feature picture is a film of five reels or more; and a reel is 1000 feet in length.

(*No objection.*) A "first run" is the first exhibition of a picture in a given locality; a "subsequent run" is a subsequent exhibition of the same picture in the same locality. A Class "A" picture is a feature picture shown in the cities of Dallas, Fort Worth, Houston or San Antonio first run at a lower floor night adult admission price of 40¢ or more. Class "B" and "C" pictures are those shown in those cities at first run at a lower floor night adult admission price of less than 40¢. Class "A" pictures as here designated do not refer to pictures that have been classified by the moving picture distributors as the best pictures, but are the pictures of the respective distributors selected by agreement with Interstate Circuit, Inc., as pictures to be exhibited in first run theatres in the four cities above named at an admission price of 40¢ or more.

Double featuring or double billing is the showing of two feature pictures on the same program at the same admission [fol. 24] price. 40¢ admission price means night adult lower floor 40¢ admission price; 25¢ admission price means 25¢ night adult lower floor admission price.

Clearance or availability is the difference in time of exhibition between first run and subsequent runs or between

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various subsequent runs as provided in the license agreements between a distributor and its several licensees.

Day and date means the right given by a distributor to two or more licensees to exhibit the same picture at the same time in the same locality.

3

(*No objection.*) As shown by the agreed statement of facts, at the time of the filing of this suit on December 16, 1936, Interstate Circuit, Inc., was a first run exhibitor in the cities of Dallas, Forth Worth, Houston, San Antonio, Austin and Galveston, Texas, and a subsequent run exhibitor in each of said cities except Galveston. The first and subsequent run theatres operated by Interstate Circuit, Inc., and the opposition theatres in the four cities of Dallas, Fort Worth, Houston and San Antonio were as follows:

	Interstate Circuit First run theatres	Interstate Circuit Subsequent run theatres	Opposition Subsequent run theatres
Dallas	5	6	21
Forth Worth	3	3	11
Houston	4	5	9
San Antonio	4	6	8

There are no other exclusively first run theatres in said four cities except one in Houston operated by Loew, Inc. (S. F. Par. 7, R. 20, 53, 58 & 80.)

4

(*No objection.*) The agreed statement of facts, as well as all of the testimony, shows that a cheap second run or subsequent run exhibition of a Class A picture destroys the earning capacity of the first run exhibitor and reduces the return to the film producer. (Trial Court's Opin. R. 236.)

5

(*No objection.*) The license fees paid to the distributor defendants by Interstate Circuit, Inc., as first run exhibitor were based upon a percentage of the gross receipts of first run exhibition in most instances, and where the agreement between Interstate Circuit, Inc., and a particular distributor was on a flat rental basis, the flat rental was arrived at by

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[fol. 25] an approximation of the gross receipts for the previous season. (R. 168.)

6

(*No objection.*) The distributors in their license agreements with Interstate Circuit, Inc., required a certain number of Class A pictures to be exhibited first run by Interstate Circuit, Inc., at an admission price of 40¢ or more, and if Interstate Circuit, Inc., showed such pictures at a lesser price, it was required to pay the distributor's percentage of the difference. (R. 168.)

7

(*No objection.*) The first run exhibitor spends approximately $1000 per picture in advertising, which redounds to the benefit of the subsequent run theatre owner. The subsequent run theatre owner exhibits in his theatre identically the same photoplay previously exhibited in the first run theatre and spends practically nothing for advertising. (R. 162-163.)

8

(*No objection except it is not material.*) The first run exhibitor, because of the difference in admission prices between first run and subsequent run, must have the picture in advance of its showing at a competing theatre and protection against its exhibition in the same locality for a certain time after its first showing in his theatre. This difference in time between first run exhibition and subsequent run exhibition is the availability for which the distributor receives compensation in license fees paid by the first run exhibitor. (R. 196-197.)

9

(*No objection except it is not material.*) In subsequent run exhibitions where the admission price, for example, in Dallas for twenty-seven theatres is 25¢, it is impossible and impracticable for the same picture to be shown in each theatre at the same time. The average number of prints supplied by the distributor defendants is approximately ten. The cost of these prints, black and white, is approximately $200 each, and colored approximately $800 each. The cost of print exceeds many times the film rental paid by sub-

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sequent run. From the standpoint of the exhibitor the showing day and date of the same picture in all 25¢ theatres is impracticable, because patrons who cannot see the picture on the one date shown can never see it. As a result, some of the subsequent runs at the same admission price exhibit prior to others. The exhibitor obtaining the prior exhibition right pays the higher rental. Interstate Circuit's subsequent run [fol. 26] rental per picture on Class A pictures was four or five times the average rental per picture of all subsequent run exhibitors. (R. 186-7, 197-8.)

10

(*No objection except it is repetition.*) The owner of a first run theatre who pays high license fees advertises at great expense and charges an admission price of 40¢ or more cannot successfully maintain his first run theatre if the distributor permits a subsequent run theatre in the same locality to exhibit the same picture at a subsequent date at an admission price of less than 25¢, or as a part of a double feature program. (R. 161-66.)

11

(*No objection.*) Prior to the season of 1934-1935 there had been admission price restrictions in exhibition contracts. The usual minimum restriction at that time was 15¢ adult lower floor. In some instances it was 20¢, 25¢ and 10¢. (R. 193.)

12

(*No objection.*) In 1934 Interstate Circuit acquired in receivership proceedings in the Federal Court all the exclusively first run theatres in Dallas, San Antonio and Fort Worth, and all the exclusively first run theatres in Houston and Austin except one in each of said cities, and also a number of subsequent run theatres in these cities. At that time there were no other theatres in any of said cities of sufficient capacity and equipment to operate as exclusively first run theatres, except one in Houston. These first run theatres of Interstate Circuit in these cities are the finest theatres in the State, with the most modern and efficient equipment and every convenience. Their individual seating capacity far exceeds that of any other theatre in the State. (S. F. Par. 20, R. 79-80, 183-4, 188-9.)

Matter in italics are marginal notations in copy.

13

(*No objection.*) In April, 1934, the cost of operation of theatres and cost of production of Class A feature pictures had been steadily increasing. The cost of feature pictures distributed by the distributor defendants ranged from $150,000 to $2,500,000. While these costs were increasing, the first run revenue had been constantly decreasing. (R. 161, S. F. Par. 16, R. 79.)

14

(*No objection.*) Interstate Circuit, Inc., was the largest customer of each of the distributor defendants. The license fees paid by Interstate Circuit, Inc., to the distributor defendants in Dallas, Fort Worth, Houston and San Antonio for the season of 1934-1935 was approximately four times larger than the amount of license fees paid by all other exhibitors in said cities. (S. F. Par. 5 & 6, R. 52.)

[fol. 27] 15

(*No objection.*) In 1934 a total of 480 feature pictures was released for exhibition, 361 by the distributor defendants and 119 by other distributors. Of this total 179 in Dallas, 158 in Fort Worth, 178 in San Antonio, and 92 in Houston were Class A pictures. (S. F. Par. 2 & 3, R. 49-52.)

16

(*No objection.*) In the spring of 1934 cheap subsequent run price admissions and double featuring of Class A pictures were damaging Interstate Circuit's first run earning capacity. At the same time it was being met with demands for increased rentals from the distributors because of their greatly increased cost of production. (Opinion, R. 236, Evidence, R. 161-66.)

17

(*No objection.*) Under these circumstances, defendant O'Donnell on April 25, 1934, wrote each distributor the letter set out in the agreed statement of facts. (S. F. Par. 10.)

18

(*No objection.*) In June, 1934, Hoblitzelle and O'Donnell discussed the price restriction with Mr. George Schaefer,

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an official of Paramount Pictures Distributing Company, the owner of an interest in Interstate Circuit. The discussion was as to Paramount's granting the restrictions. Hoblitzelle, O'Donnell and Schaefer were the only persons present. There was no discussion of the restrictions at the convention. (R. 173, 300.)

19

(*No objection.*) On July 11, 1934, O'Donnell wrote the local representatives of each of the distributor defendants the letter set out in the agreed statement of facts. (S. F. Par. 11.)

20

(*No objection.*) Each of the above letters was received by each distributor defendant.

21

(*No objection except it is not material.*) Prior to the writing of the letter of April 25, 1934, Interstate Circuit consulted its attorney and was advised that under the Copyright Law it, as licensee of a copyrighted motion picture photoplay, would have the right to contract with each distributor defendant as licensor for the exclusive right to show photoplays in certain cities and had the letter right to contract with such licensor that a photoplay shown by Interstate Circuit at a stipulated admission price should not be subsequently shown in the same city at a price less than that agreed upon between Interstate Circuit and such distributor. (R. 163.)

22

(*No objection except intent is not material.*) The 25¢ price restriction and the provision against double featuring were requested by Interstate Circuit because its managing officers regarded them important for the prosperity of [fol. 28] its business and not for the purpose or with the intent of injuring others. (R. 161-65).

23

(*No objection.*) The negotiations between the respective distributor defendants and Interstate Circuit, Inc., were conducted by Hoblitzelle and O'Donnell on behalf of Inter-

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state Circuit and a local representative and a New York representative of each distributor. No one was present at any negotiation with any distributor except the representative of that distributor and the representative of Interstate Circuit. (R. 181.)

(*No objection except not proper to give details.*) The first negotiation was with Mr. Dugger, Branch Manager of Paramount, about April 28, 1934. Dugger agreed that he thought it was a correct move and that it was justified. In June, 1934, Hoblitzelle and O'Donnell discussed the price restriction with George Schaefer of Paramount at Los Angeles. About the middle of June, 1934, Mr. Unger, Southern District Manager of Paramount, came to Dallas and had two or three conversations with Hoblitzelle and O'Donnell, and Hoblitzelle and O'Donnell finally convinced Mr. Unger that the restriction was a move for the good of Paramount, for Interstate theatres, and for the subsequent run theatres, and Paramount agreed at that time to go along on that basis. Hoblitzelle and O'Donnell gave to Mr. Unger their reasons at great length as to why the restrictions would be advantageous both for the distributor and the exhibitor. Paramount was demanding increased rentals from Interstate Circuit for the season 1934-1935. Hoblitzelle and O'Donnell stated to Unger that Interstate Circuit was having considerable difficulty in operating under the present terms, and before it could consider a 40% increase in terms it would have to have some definite understanding in reference to the restrictions. Mr. Unger and Mr. Dugger stated that their company must have increased rentals, that pictures that had previously cost $600,000 were costing $1,000,000 to $2,000,000. They had to get an increased return on these pictures. (R. 175-6.)

(*No objection except as to details.*) The next negotiation was with Vitagraph, Inc., in the early part of July, 1934, with Fred Jack, Southern District Manager of Vitagraph, with [fol. 29] headquarters in Dallas. This company already had a definite rule against double featuring. Interstate Circuit had done some double featuring prior to that time on account of double featuring by competitors, and Vitagraph had protested this double featuring. Hoblitzelle and O'Donnell fully presented their reasons for the restrictions to Mr. Jack on several occasions, and eventually Mr. Jack and Mr. Les-

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serman, assistant to Mr. Sears, General Sales Manager, discussed the price restriction for a period of two days. Lesserman and Jack returned for another conference and advised that they had discussed the matter with Mr. Sears, the General Sales Manager, and agreed that Vitagraph would go along. (R. 177.)

(*No objection except as to details.*) The next negotiation was with Mr. Connors of New York, Eastern and Southern Sales Manager for Metro, on his annual trip to Dallas. He was accompanied by Mr. Kessnich, of Atlanta, Southern Sales Manager. Mr. Connors stated that he thought the purpose was worth while, but wanted to know if Interstate Circuit would subscribe to the restrictions one hundred percent in its theatres. Hoblitzelle and O'Donnell assured them that it would. He stated that he had complained to Interstate about double billing because Metro was consistently against it. Mr. Connors after fully discussing the matter with Hoblitzelle and O'Donnell agreed to the price restriction and made it a part of the written contract set in the agreed statement of facts. All of Metro's pictures were licensed on a percentage basis. (R. 177-78.)

(*No objection except as to details.*) The next negotiaton was with Fox. Hoblitzelle and O'Donnell discussed the restrictions with Mr. Hilgers, the Branch Manager, and Mr. Balance of Atlanta, Georgia, who handles the South for Fox. Fox was asking a considerable increase in license fees. Hoblitzelle and O'Donnell called Ballance's attention to the fact that on a certain Will Rogers picture distributed by Fox, which produced one of the outstanding gross receipts at Interstate Circuit's first run exhibition and returned to Fox the largest film rental, was a short time thereafter exhibited in a downtown theatre with an announcer stating, "This is the only theatre in Texas where you can see Will Rogers for a dime." At three meetings between July and the end of September, 1934, O'Donnell and Hoblitzelle urged that such conditions were tearing down the first run rentals, making it impossible for Interstate Circuit to consider in- [fol. 30] creased rentals. After Mr. Ballance discussed the matter on several occasions with his New York office and after these three meetings with Mr. Ballance, Fox on October 1, 1934, agreed to the restrictions. (R. 178-9.)

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(*No objection except as to details.*) The next negotiation with Universal. The negotiation was with Olsmith of Dallas and Harry Graham, who represented the company in the South. Graham made at least ten trips to Dallas between July and November, attempting to work out the Universal contract with Interstate Circuit. The various reasons as to why the restrictions should be granted to Interstate Circuit were presented to Mr. Graham. Mr. Graham advised that Universal had had a very small number of pictures committed for exhibition in Class A theatres at 40¢ or more and that unless his company could get a larger number of Class A pictures, his company did not want to agree to the restrictions. Hoblitzelle and O'Donnell agreed with Graham and Olsmith upon eight Class A pictures, and that if the company made more fine pictures Interstate Circuit would be glad to play them in the 40¢ admission price theatres. Because of this it took a longer time to induce Universal to agree to the restrictions. The reason Mr. Graham wanted to increase his company's commitment on Class A pictures was because the minimum film rental in the 40¢ admission price theatres was $1500, while the minimum in the other two theatres in Dallas operated by Interstate Circuit first run, the Melba and the Old Mill Theatres, was $150 in one and $300 or $400 in the other. Universal was likewise demanding of Interstate Circuit increased license fees on film rentals. (R. 179.)

(*No objection except as to details.*) The next negotiation was with United Artists. Harry Gold, the Southern Sales Manager for United Artists, accompanied by Doak Roberts, the local Branch Manager, came to the office of Interstate Circuit with one of the letters in his hand and said, "Bob, this is what you are asking us to do. You are wrong. We are asking you to do it. That is exactly United Artists' sales policy. We are not going to have the very fine highly specialized pictures United Artists makes double billed at cheap prices, and we are certainly going to demand high film rentals and a greater admission price so we can participate to a greater extent." Gold pointed out that their General [fol. 31] Sales Manager, Mr. Lightman, was then in a controversy in Kansas City protesting the 20¢ admission price in that city. Mr. Gold heartily subscribed to the restrictions. (R. 180.)

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(*No objection except as to details.*) The next negotiation was with RKO. These negotiations covered a period of several months. At the start of the negotiations Hoblitzelle and O'Donnell explained fully their position to Hubert MacIntyre, Southern representative, and Cress Smith, of their New York office. While they did not agree or disagree on the price restriction, the great discussion was on terms. On the last visit Mr. Smith made to Dallas he and MacIntyre agreed on the price restriction. About the 10th of October O'Donnell went to New York and agreed with Jules Levy, the General Sales Manager on the terms of the license agreement. Levy notified MacIntyre, and sometime between the 10th of October, 1934, and the 1st of November, 1934, O'Donnell returned to Dallas and completed the RKO license agreement with MacIntyre. The terms discussed between O'Donnell and Levy in New York did not include these restrictions. (R. 180.)

(*No objection except as to details.*) The next negotiation was with Columbia. O'Donnell and Hoblitzelle discussed the restrictions with Jack Underwood, Branch Manager, from the middle of July to the middle of October. Underwood's concern was greatly the same as Universal's, the minimum number of Class A pictures committed. Finally O'Donnell agreed on eight Columbia Class A pictures with the promise that if Columbia produced more Class A pictures, Interstate Circuit would play them at an admission price of 40¢. During this time Underwood was in touch with Moscow, the Southern representative, and his New York office. Moscow came to Dallas and in company with Jack Underwood, Branch Manager, agreed with Interstate Circuit upon the restrictions. (R. 181.)

(*No objection.*) Never at any time during these negotiations with the respective distributors was anyone else present except the individual representatives of the company with whom the negotiations were being had. Interstate Circuit never made any threat that it would not do business with any distributor. Each distributor was told that if it could not grant Interstate's request, Interstate could not play their pictures at an admission price of 40¢ or more; [fol. 32] that if a distributor did not agree to the restrictions, Interstate would play that company's pictures at the Melba or the Capitol or the Old Mill, where the admission

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price was less than 40¢ and where the film rental would be less. (R. 181-2.)

(*No objection.*) Hoblitzelle and O'Donnell did not state to any distributor that what any other distributor did with Interstate Circuit would have any bearing on it. The whole sales policy of Interstate circuit was that these restrictions were for the good of its business and of the distributors' business. (R. 182.)

24

(*Object to language beginning "acted."*) The several local representatives of the distributors testified that in negotiating with Interstate Circuit and in making any agreements in connection with the restrictions, each distributor acted independently of every other company and that no communication, conference, or discussion was had with any other distributor as to the restrictions or either of them. (R. 200, 201, 213, 217, 152.)

25

(*No objection.*) Interstate Circuit and each of the distributor defendants in their respective answers filed in this case denied under oath the allegations in the Government's petition in reference to conspiracy, combination and agreement.

26

(*No objection.*) There was no testimony introduced showing any communication, verbally, by letter, telephone, telegraph, or otherwise between any distributor defendant and any other distributor defendant.

27

(*No objection.*) The written license agreements between Interstate Circuit, Inc., and the respective distributor defendants are fully described in paragraph 12 of the agreed statement of facts. The provisions in reference to the 25¢ price restriction and against double billing included by the respective distributor defendants in subsequent run license agreements in the cities of Dallas, Fort Worth, Houston and San Antonio are shown in Paragraph 12 of the agreed statement of facts. (R. 65, 68.)

Matter in italics are marginal notations in copy.

28

(*No objection.*) Metro, RKO and Vitagraph each had in their printed license agreements throughout the United States provisions prohibiting double featuring of pictures, as shown by Paragraph 12 of the statement of facts, and United Artists had a definite policy of a minimum 25¢ [fol. 33] admission price and against double featuring.

29

(*Objection: No evidence.*) The inclusion at the instance and behest of Interstate Circuit of either or both of such restrictions in its subsequent run license agreements by any distributor was for the purpose of doing that which it regarded as a salvation for its own business. (Opinion, R. 237.)

30

(*No objection.*) The 25¢ price restriction included by Vitagraph, Inc., and RKO Distributing Corporation, as shown by the agreed statement of facts, in their respective license agreements with subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, and by Metro-Goldwyn-Mayer Distributing Corporation in its license agreements in Dallas, Fort Worth and San Antonio were included at the instance and behest of Interstate Circuit, Inc.

31

(*No objection.*) The provisions against double featuring and as to admission price shown by the agreed statement of facts to have been included in their respective subsequent run license agreements in said four cities by Paramount, Fox, Columbia, United Artists and Universal were included at the instance and behest of Interstate Circuit, Inc.

32

(*No objection.*) The effect upon subsequent run exhibitors of the inclusion of the restrictions in their license agreements, as shown by the undisputed evidence, is as follows:

Matter in italics are marginal notations in copy.

(*No objection.*) (a) During the time that restrictions were in effect, Interstate Circuit exhibited all Class A pictures in its subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio at an admission price of 25¢ on a single feature program, and the profits of such theatres increased (R. 190-1);

(*No objection.*) (b) Since the adoption of these restrictions there has been an increase in the number of theatres operated in these four large cities by Interstate Circuit, Inc., and an increase in the number of theatres operated by competitors of Interstate Circuit, Inc., in said four cities (R. 174);

(*No objection.*) (c) In these four cities where the restrictions applied there were forty-nine subsequent run exhibitors in competition with Interstate Circuit, Inc. Of this number twenty testified. Of the twenty none was put out of business, and only two failed to make a profit. One of

[fol. 34] the two who failed to make a profit did not license any of the 182 unrestricted pictures of the distributor defendants, but exhibited only pictures of other distributors, and he made a profit in one of the theatres operated by him. One operated a while, closed, and operated again after the restrictions became effective, and made a profit each month for more than a year prior to the trial. Prior to the restrictions he had failed as an exhibitor three times. (R. 115, 129.)

(d) There were four of these subsequent run theatres in which no Class A pictures were exhibited, as follows:

(*No objection.*) (1) North Side Theatre, Houston, in about the poorest neighborhood of the City, its customers being mostly railroad employees and Mexicans, with an admission price of 15¢, two admissions for 15¢ on Monday; no balcony and no matinees. After the *tr*strictions this exhibitor tried Shirley Temple pictures on Sunday at a 25¢ admission and business was poor. Tried the same picture on Monday with two admissions for 25¢, and customers said they would not pay 25¢ in a 15¢ joint. Thereafter charged 15¢ admission and exhibited pictures released by distributor defendants that were not restricted and pictures

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released by other distributors, double featuring any of them when desired and has been making a profit. This exhibitor would like to get a few Class A pictures to exhibit at 15¢. Pictures like "The Life of Pasteur," and "Disraeli" could not stay in neighborhood of this theatre. (R. 110-11.)

(*No objection.*) (2) Midway Theatre at Houston; 15¢ admission, no balcony. Prior to restrictions this exhibitor failed in operation of theatres in three different locations. After the restrictions he operated for a period of five months, charging 25¢ two days a week on Class A pictures; other days, 15¢ admission for pictures not restricted. At the end of five months returned to 15¢ admission without using Class A pictures; continued for two months and closed the theatre for about six months, then opened with 15¢ admission price on unrestricted pictures and had been making a profit every month for more than a year. In his neighborhood restricted and unrestricted pictures are about on an *a*dverage as far as drawing power is concerned. (R. 113-115, 186.)

[fol. 35] (*No objection.*) (3) Heights Theatre at Houston; 15¢ admission, with balcony. Does not show Class A pictures, but has had very successful operation showing unrestricted pictures at 15¢. Would like to show some Class A pictures at 15¢, but does not know what he would do with pictures like "Romeo and Juliet" in his theatre. (R. 121-22.)

(*No objection.*) (4) Queen Amusement Company at Fort Worth operated two theatres; the New Liberty at 1107 Main Street and the Ideal at 1408 Main Street; the New Liberty having 850 seats downstairs and 650 in balcony; the Ideal having 350 seats downstairs and 175 in the balcony. Prior to restrictions the New Liberty charged 25¢ lower floor, 15¢ in the balcony on all pictures. The Ideal charged 15¢ lower floor and 10¢ in balcony. After restrictions no change in price at the New Liberty and theatre operated at a profit. Ideal changed to 25¢ on Class A pictures, but did not do well, then returned to old prices; did not show Class A pictures and did not license any of distributors' pictures that were unrestricted. (R. 127-29.)

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(*No objection.*) A large majority of the subsequent run exhibitors in the cities where these restrictions applied had increased profits after the restrictions became effective. (R. 121, 134, 142, 150, 190, 191, 204, 207, 212.)

34

(*No objection.*) The distributor defendants were in active competition with each other. (R. 201.)

35

(*Objection: Contrary to facts.*) It was to the interest of each distributor defendant having Class A pictures for exhibition to agree with Interstate Circuit, Inc., to impose the restrictions, regardless of the action that might be taken by other distributors in acceding or declining to accede to demands of Interstate Circuit. (S. F. Par. 18 & 19, R. 79; S. F. Par. 4, R. 52, 167, 179.)

If some of the distributors had refused to grant the restrictions, those granting them would have been benefited. (Same references as above).

36

(*No objection.*) During the period involved in this case Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc., did not operate any theatres in the same city or locality.

37

(*No objection.*) There were 901 moving picture theatres in the State of Texas during the period involved.

[fol. 36] 38

(*No objection.*) The Rio Grande Valley section of Texas consists of the following counties:

(*No objection.*) The cities in which Texas Consolidated Theatres, Inc., operated theatres in the Rio Grande Valley and their population are as follows: Brownsville, 22,000; Harlingen, 12,000; San Benito, 10,700; McAllen, 9,000; Mercedes, 6,600; Weslaco, 5,000.

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The distance, between these cities are as follows:

(*No objection.*) None of the cities of El Paso, Tyler, Amarillo, Waco and Wichita Falls is located in the Rio Grande Valley.

39

(*No objection.*) The population of the six cities in which Interstate Circuit operated theatres is as follows: Dallas, 260,000; Fort Worth, 163,000; Houston, 292,000; San Antonio, 230,000; Austin, 53,000; Galveston, 51,000.

40

(*Objection: Contrary to facts.*) In the negotiations following O'Donnell's letter of July 11th between Messrs. O'Donnell and Hoblitzelle on behalf of Interstate Circuit and the representatives of the respective distributors in reference to the restrictions, no reference was made to an imposition of the restrictions in Austin or Galveston and there was no reference to Texas Consolidated. (R. 175-181.) There were no subsequent run theatres in Galveston, and no witness was called to testify that subsequent run theatres operated by competing exhibitors in Austin charged an admission price of less than 25¢. At the time Interstate Circuit entered into the agreement with each of the distributors for the season 1934-1935, its subsequent run theatre in Austin charged an admission price of 25¢ for Class A pictures. The evidence did not show any complaint from any subsequent run theatre owner in Austin.

[fol. 37] (*Objection: Contrary to evidence.*) The committee of the independent exhibitors that called to see Messrs. Hoblitzelle and O'Donnell in reference to the restrictions, called on Messrs. Hoblitzelle and O'Donnell for the reason they understood they wanted to put in force the restrictions. One of the committee testified that he operated subsequent run theatres in Fort Worth, and when he went with the committee to see Hoblitzelle and O'Donnell, he had a fear the restrictions would be damaging to his business, but that after the operation of these restrictions they had not been damaging to the business of one of his theatres, and he did not know that they had been damaging to his other theatres; that

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he thought Class A pictures should be protected as to admission price and against double features. (R. 118-120.)

[fol. 38] (*Objection with no reason.*) If any distributor had refused the request of Interstate Circuit for these restrictions, the value of the pictures would have been reduced, and the total license fees of that distributor would have been reduced. (S. F., Paragraphs 18 and 19; Hoblitzelle's testimony, R., 167; O'Donnell's testimony, R., 179.)

(*Objection no reason.*) If some of the distributors had refused to grant the restrictions, each distributor that refused would have lost the difference between the license fees in the Melba and Old Mill Theatres, where there was a minimum license fee of $150 to $400, and the license fees of the Majestic and Palace Theatres, where there was a minimum license fee of $1500. (R. 179.)

(*Objection no reason.*) In the Majestic and Palace Theatres one picture was played each week. The requirements for pictures for these two theatres for the year was 104. If several of the distributors had refused the request of Interstate Circuit for these restrictions, and the balance had granted them, those granting the restrictions would have received the minimum rental of $1500 per picture for exhibition of their pictures in the Majestic and Palace Theatres, and these distributors granting the restrictions would have received license fees largely in excess of the total license fees paid by all competing subsequent run theatres, and the distributors who granted the request would have received the benefit of $1,000 of advertising per picture spent by Interstate Circuit. The distributors refusing the request would not have got the benefit of the advertising, nor the income from the Palace and Majestic Theatres, and each of them would have suffered a great financial loss. (R. 167, 179.)

[fol. 39] Each of the defendants respectfully requests the court to adopt each of the findings of fact above suggested as a part of the findings directed by the Supreme Court to be made in this cause, in order that the Supreme Court may properly pass upon the contentions of the respective parties in this cause.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for Defendants.

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[fol. 40] Conclusions of Law

1. A distributor defendant, owner of a copyrighted motion picture photoplay, acting independently of any other distributor, had the legal right to include either or both of the restrictions here in question in its subsequent run license agreements pursuant to agreement with or at the instance and behest of Interstate Circuit, Inc., and the license agreement between an individual distributor and Interstate Circuit, Inc., including either or both of said restrictions is a valid and legal contract.

2. There was no evidence to authorize a legal inference of a conspiracy, combination or agreement among the distributor defendants to include either or both of said restrictions in subsequent run license agreements.

Each of the defendants respectfully requests the court to adopt each of the conclusions of law above enumerated as its conclusions of law, and each suggested conclusion of law is requested as a separate conclusion of law.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for Defendants.

[fol. 40a] In United States District Court

[Title omitted]

Additional Findings of Fact and Conclusions of Law Requested by Defendants

Request for Additional Findings of Fact and Conclusions of Law

To the Honorable Judge of Said Court:

In addition to the requested findings of fact and conclusions of law heretofore filed in this Court, each of the defendants herein requests the Court to find as part of the findings of fact and conclusions of law each of the facts enumerated in the additional requested findings of fact and conclusions of law hereto attached. Each such additional requested finding of fact is a separate request for the finding of that fact. The respective additional findings of fact are numbered successively and appear in the same document as a

matter of convenience to the Court and counsel, but each defendant requests each of these findings separately.

Thompson, Knight, Baker, Harris & Wright, Jno. R. Moroney, George S. Wright, Attorneys for Defendants.

(Copy.)

[fol. 40b] [Title omitted]

ADDITIONAL REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Additional Findings of Fact

1. Upon receipt of the letters of April 25, 1934 and July 11, 1934 from R. J. O'Donnell, representatives of four of the distributor defendants (United Artists, Metro, Paramount and Vitagraph) expressed immediate agreement with the plan suggested in such letters, only one distributor defendant (Universal) expressed hostility to the plan and its primary concern was as to the number of its pictures which Interstate Circuit showed first run in its Class A theatres and, with respect to the three other distributor defendants (RKO, Fox and Columbia), there is no evidence, other than their eventual agreement to the plan, of the immediate reaction of their representatives thereto.

2. There is no evidence that during the negotiations between the distributor defendants and defendants Hoblitzelle and O'Donnell, the request for a price restriction in the Rio Grande Valley, which was made on behalf of Texas Consolidated in the letter of July 11, 1934, was ever mentioned.

3. There is no evidence that imposition of the price restriction in the Rio Grande Valley, requested by Texas Consolidated in the letter of July 11, 1934, was to the advantage of any distributor defendant.

[fol. 40c] 4. There is no evidence that during the negotiations between the distributor defendants (except Universal) and defendants Hoblitzelle and O'Donnell, the request for the restrictions in the City of Austin was ever mentioned.

5. There is no evidence that any subsequent run theatres in the City of Austin charged an admission price of less than 25¢.

6. The request of Interstate Circuit was for the imposition of both the price and double feature restrictions. Imposition by any distributor defendant of one of the requested restrictions without the other would not have been a compliance by it with the request of Interstate Circuit, and such noncompliance would have caused such distributor defendant a serious loss in first run revenue and would have reduced its total license fees.

7. The imposition of the restrictions by each distributor defendant, pursuant to agreement with or at the instance and behest of Interstate Circuit, had a reasonable relationship to the reward of the copyrights owned by such distributor defendant and was necessary for the protection of the profits accruing to it from the exhibition of its copyrighted films.

Additional Conclusions of Law

1. Since the first agreement between Interstate Circuit and a single distributor defendant containing the restrictive provisions was a legal contract, the mere fact that thereafter at different times each of the distributors, acting independently of each other, entered into similar agreements with Interstate Circuit does not constitute an agreement, combination or conspiracy in violation of the Sherman Anti-Trust Law.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright.

(Copy.)

[fol. 41] IN UNITED STATES DISTRICT COURT

MEMORANDUM IN SUPPORT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUESTED BY DEFENDANTS—Filed June 7, 1938

In support of the findings of fact and conclusions of law requested by the defendants, we submit—

1. The agreed statement of facts, which was carefully prepared and filed, recites a great many of the facts material to the issues involved in this case. The parties have agreed that no evidence should be introduced contrary to the agreed statement of facts, and we respectfully submit

that this Court should by all means find the facts as recited in the agreed statement of facts and make the agreed statement of facts by reference a part of its findings of fact.

2. The definitions attached to the suggested findings of fact will be very helpful to the appellate court in considering the case.

3. Requested findings Nos. 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, the first and last two paragraphs of 23, 25, 26, 27, 28, 30, 31, 32, 33, 34, 36, 37, 38 and 39 are not objected to by the Government, and they are supported by the undisputed evidence as shown by the citations of pages of the record following the respective suggested findings, and each is a fact material to a consideration of the questions involved in this case, and the defendants are entitled to have each of them found as a fact.

4. The only objection made by the Government to finding No. 8 suggested by the defendants is that it is not material, and yet in this case the Government has contended that one [fol. 42] of the reasons for the unreasonableness of these provisions is the difference in time between the exhibition of the pictures. The legality of availability is not involved, but it is material to the facts in this case that the difference in time between first and subsequent runs, and the difference in time between subsequent runs at the same admission price is a matter of contract for which the exhibitor having the advantage in time pays the distributor. Under these circumstances this finding should be made by the Court.

5. The only objection the Government makes to suggested finding No. 9 is that it is not material. This is a material finding supported by the undisputed evidence, as shown by the page reference following it. The Government has taken the position in this case that one of the reasons these restrictions are unreasonable is that Interstate Circuit showed in its 25¢ theatres pictures prior in point of time to the showing of the same pictures in other theatres at the same admission price. Suggested finding No. 9 gives a valid reason for this difference in time.

6. The only objection the Government makes to suggested finding No. 21 is that the advice of counsel to Mr. Hoblit-

zelle before he requested the restrictions is immaterial. In view of the fact that the Government has contended in this case that the object, purpose and intent of Mr. Hoblitzelle was to injure his competitors or drive them out of business and to create a monopoly, this undisputed fact is material and should be found by the Court.

7. The only objection made by the Government to suggested finding No. 22 is that the latter part, showing that it was not the intent or purpose of Interstate Circuit in making the request to injure others, is immaterial. In this case in the trial court and in the United States Supreme Court, the Government has taken the position that the record showed that it was the intent of Mr. Hoblitzelle and Mr. O'Donnell in requesting these restrictions to injure subsequent run exhibitors, to put them out of business, and to monopolize the moving picture business. Of course good intentions do not excuse a violation of law, but where one of the charges made is based upon unlawful purpose and intent, then the courts hold that the accused party can testify as to his intentions and that that testimony is material. [fol. 43] For some reason the Government contends here that the intention is immaterial, although when the case was submitted to the Supreme Court the Solicitor General stated to the Supreme Court that it was the purpose in requesting and enforcing these restrictions that made them illegal.

8. The only objection made by the Government to suggested finding No. 23, beginning with the second paragraph and continuing to the next to the last paragraph, in which paragraphs objected to the negotiations of Messrs. Hoblitzelle and O'Donnell with the respective distributors' representatives are summarized, is that it is not necessary or proper to give these details. As shown by the record references after each one of these paragraphs, the suggested finding is supported by the undisputed evidence, and the Government does not contend that they are not supported by the undisputed evidence. This summary of the respective negotiations is very material upon the question as to whether the various distributor defendants had made a prior agreement among themselves to include the restrictions, or either of them, in their subsequent run license agreements. The summary shows that these distributors

acted independently of each other, and shows that in the respective negotiations any restrictions for Texas Consolidated Theatres were not considered by either party, and that any restrictions for the cities of Austin and Galveston were not considered by either party. If your honor will take the time to look at the Government's brief in the Supreme Court, you will find that although the Government is contending now that these negotiations are immaterial and unimportant, in the Supreme Court the Government urged that one of the inferences to support a common understanding or agreement among the various distributors to include the restrictions requested by Texas Consolidated and granted the restrictions of Interstate Circuit, and the unanimity with which the distributors refused the restrictions at Austin and granted them in the other four cities.

This summary covers less than three pages, and we respectfully submit that this Court should include in its find-[fol. 44] ings this short summary of these material negotiations. These negotiations also show the purpose and intent of the parties in requesting and granting the restrictions and the action of the respective distributors.

9. Our suggested finding No. 24 is to the effect that the several local representatives of the distributors testified that in negotiating with Interstate Circuit and in making any agreement in connection with the restrictions, each distributor acted independently of every other company and that no communication, conference or discussion was had with any other distributor as to the restrictions or either of them. The Government objects to this finding and refers to it as a glaring example of unfair findings requested by the defendants, and then said:

"The Court found that the local representatives of the distributors had no power to bind their respective companies and yet we find this paragraph, starting, 'The several local representatives of the distributors testified,' and ending with the conclusion, 'that each distributor acted independently of every other company.' "

In other words, the Government accused the defendants of being unfair in requesting a finding on this undisputed evidence, because this Court held that a local branch manager had no authority to enter into a conspiracy, combination and

agreement in violation of law on behalf of his company. The fact that a local representative has no authority to bind his superior by entering into an unlawful agreement does not disqualify him from testifying to a fact. He is not disqualified as a witness because of this lack of authority when he participated in the negotiations with Interstate Circuit. The Government says further:

"The inclusion of such finding would nullify everything this Court had previously decided as to the existence of a combination, conspiracy or agreement among the distributors."

This Court has never found a combination, conspiracy or agreement among the distributors to include the restrictions. Even if it had done so, it should not deny these defendants the right to have the findings include such an undisputed fact. In other words, the United States Government, in its effort to obtain a finding unsupported by evidence, objects to this finding, testified to without dispute, simply because the local representative of each company was without authority to enter into an unlawful agreement. This Court in its opinion (R. p. 237) indicates that the local representatives [fol. 45] of the distributors so testified, by this statement:

"The respondents O'Donnell and Hoblitzelle and the Dallas agents of the distributor respondents all strenuously contend that there was no conspiracy or agreement."

10. The next objection made by the Government to our suggested findings is its objection to suggested finding No. 29 to the effect that the inclusion by a distributor at the instance and behest of Interstate Circuit of either or both of such restrictions in its subsequent run license agreements was for the purpose of doing that which it regarded as a salvation of its own business. The astounding objection made by the Government is that, "This is not borne out by the record," and yet the Government points to not one line of testimony to the contrary. This suggested finding is supported by the undisputed evidence and by the opinion of this Court. (R. 237.) There was not a line of testimony introduced indicating any other purpose on the part of any distributor in inserting in its license agreements either of these restrictions. On behalf of the Government one man tries the case, another presents it to the United States

Supreme Court, and the Solicitor General of the United States solemnly states to the United States Supreme Court that one of the reasons these restrictions were illegal is that the distributors had an unlawful purpose in granting them. The Government makes the contention that this finding is not supported by the evidence, notwithstanding paragraphs 18 and 19 of the agreed statement of facts, reading as follows:

"18. The exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city will reduce the income of the theatre giving such first run exhibition and the total license fees of the distributor of such motion pictures.

"19 The exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fees of the distributor of such moving picture."

It is clear from paragraph 18 quoted above that if a distributor permitted its feature pictures to be exhibited at an admission price of less than 25¢ subsequent run, the total license fees of the distributor of such motion pictures would be reduced.

Under paragraph 19 of the agreed statement of facts, if a distributor refused the restriction against double fea- [fol. 46] turing and permitted its feature pictures to be double featured on subsequent runs, such double featuring would reduce the value of such motion pictures and would reduce the total license fees of the distributor of such pictures. The undisputed evidence of Mr. Hoblitzelle (R. 167) and of Mr. O'Donnell (R. 179), unimpeached by any other testimony or any inference, shows that if any distributor had refused to grant either of these restrictions, that distributor would not have been permitted to exhibit its pictures in the Palace and Majestic Theatres with a minimum rental of $1,500, but would have been forced to exhibit his pictures in other Interstate Circuit theatres with a minimum rental of $150 in one instance and $400 in another. In other words, the distributor refusing either of the restrictions would have lost on each picture the difference between $400 and $1,500, and this difference of $1,100 was more than the

total license fees of all competing subsequent run theatres in the City of Dallas.

Mr. Hoblitzelle's undisputed testimony further shows that at the time these restrictions were granted by the respective distributors, cheap subsequent runs were destroying the earning capacity of the first run theatres and first run license fees of the distributor. (R. ——)

Mr. O'Donnell's letter of July 11th, which the Government construes erroneously in its suggested findings, clearly states:

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

And yet, the Government, in its efforts to win the case right or wrong, says this suggested finding is not "borne out by the record."

11. The next finding suggested by us and objected to by the Government is finding No. 35, as follows:

"It was to the interest of each distributor defendant having Class A pictures for exhibition to agree with Interstate Circuit, Inc., to impose the restrictions, regardless of the action that might be taken by other distributors in acceding or declining to accede to the demands of Interstate Circuit. If some of the distributors had refused to grant the restrictions, those granting them would have benefited."

[fol. 47] The objection of the Government is that "this finding is contrary to the facts and if adopted *might necessitate a reversal of this case.*" That a finding of an undisputed fact may reverse a judgment of this Court should be of no concern to the Government, or to this Court, and we are sure it is of no concern to this Court. Unless the judgment of this Court under the law and the evidence is right, it should be reversed. There is not the slightest doubt that suggested finding No. 35 is supported by the undisputed evidence. Take, for example, the City of Dallas, in which was the largest number of competing theatres and the largest film rentals paid each distributor. Under the agreed statement of facts Interstate Circuit paid to the distributors four times as much license fees in the four large cities as were paid by all competing theatres. (S. F. Par.

5, R. 52.) The license fees paid by Interstate Circuit for first run exhibition of first class feature pictures in said four cities averages between $1500 and $5,000 per picture (S. F. Par. 4, R. 52.), while the license fees of the exhibition of the same pictures shown at subsequent run in the same localities average between $20 and $30. (S. F. Par. 4, R. 52.) According to the undisputed evidence of Messrs. Hoblitzelle and O'Donnell, pictures were exhibited in the Palace and Majestic Theatres in Dallas at a minimum rental of $1500, and the minimum rental in the two other downtown theatres is in one instance $150 and in the other $400. (R. 167, 179.)

As indicated in the foregoing paragraph, beginning with the letter of July 11th and continuing through the negotiations with the respective distributors, Messrs. Hoblitzelle and O'Donnell positively stated to each distributor that if it did not grant these restrictions, it would be impossible for Interstate Circuit to exhibit that company's pictures in the Majestic and Palace Theatres with these high rentals, and that that company's pictures would be exhibited in the theatres with the minimum rentals of $150 in one instance and $400 in the other.

The twenty-one competing theatres in Dallas averaging $30 per picture film rental would pay at the most a total of $630 film rentals on any picture of any distributor. If [fol. 48] any one distributor had refused the request of Interstate Circuit for either of these restrictions, it would have deprived itself on each picture of a film rental of the minimum of the difference between $1500 and $400 and a maximum of the difference between $150 and $1500, depending upon the theatre in which the picture was exhibited. The minimum loss would have been nearly twice as much as all the total revenue from all competing subsequent run theatres in the city. The maximum loss would have been $1350, more than twice as much as the total revenue of all subsequent run competing exhibitors; and yet the Government says that the record does not support a finding that it was to the interest of each distributor having Class A pictures for exhibition to agree with Interstate Circuit to impose the restrictions, regardless of the action that might be taken by the other distributors. Under this undisputed evidence if one, two, three or four distributors had refused to accede to the request of Interstate Circuit,

each of those distributors would have lost money and the other distributors acceding to the request for restrictions would have had the profit of their pictures being exhibited in the Palace and Majestic Theatres, where the minimum film rental was $1500 and the average rental between $1500 and $5,000 per picture.

On the trial of this case before your honor, no such contention was made by the Government. When Mr. O'Donnell was on the stand, he positively testified that the distributors granting the request would be benefited and the distributors refusing the request would be damaged. (R. 194) When the case reached the United States Supreme Court, there for the first time the Government in its effort to support its claim by inference that there was a combination, conspiracy and agreement among the several distributors to include these restrictions, made this contention. Having made the contention in the Supreme Court, it now makes it here, notwithstanding the solemn agreement between the Government and these defendants, as shown by paragraphs 18 and 19 of the agreed statement of facts, that if feature pictures are exhibited subsequent run in these cities at an admission price of less than 25¢, or are double featured, the total license fees of the distributors [fol. 49] of such motion pictures will be reduced.

12. The next suggested finding of fact made by us and objected to by the Government is finding No. 40. The substance of this finding is that in the negotiations between Messrs. Hoblitzelle and O'Donnell and the respective distributors' representatives in reference to the restrictions, no reference was made to an imposition of the restrictions in Austin or Galveston, and there was no reference to Texas Consolidated Theatres. The objection is that this suggested finding is contrary to the evidence and, if adopted, might necessitate a reversal of this case. The Government then states: "It is only necessary to look at O'Donnell's letter of April 25, 1934, to see how utterly unfounded paragraph suggested finding 40 is."

There can be no dispute as to what the letter of April 25th contains, nor as to what the letter of July 11th contains. The letter of April 25th (Par. 10, S. F.) does not refer in any way to Texas Consolidated Theatres. It does refer to Austin and Galveston in the first paragraph, but in the letter of July 11th no mention is made of Austin

or Galveston, and on behalf of Interstate Circuit the letter refers to certain of Interstate Circuit cities. As Interstate Circuit had only six cities, certain of them must have meant less than six. However, in view of the statement of the Government, suggested finding 40 is limited to negotiations following O'Donnell's letter of July 11th.

Having no evidence of an agreement or understanding among the distributor defendants to include these restrictions, the Government in its brief before the Supreme Court argued that, as the evidence showed that the request had been made for the same restrictions on behalf of Texas Consolidated and Interstate Circuit, unanimity in granting the request of Interstate Circuit and refusing the request of Texas Consolidated indicated understanding or agreement among the distributors. In said brief it was also argued that, in view of the fact that Interstate Circuit requested restrictions for Austin and all the distributors granted the restrictions for the four large cities and refused them for Austin, that was evidence of an understanding or agreement among the distributors in reference to the [fol. 50] matter. The letter of July 11th shows that Texas Consolidated did not make the same request made by Interstate Circuit in that letter. The request of Interstate Circuit was that the pictures shown at 40¢ should not thereafter be shown in the same city for less than 25¢ nor double billed. The request of Texas Consolidated in the letter of July 11th shows that a picture shown in the Rio Grande Valley at 35¢ should not thereafter be shown anywhere in the Rio Grande Valley for less than 25¢,—two entirely different requests.

The requested finding of fact No. 40 shows that no request for Texas Consolidated and no request for restrictions in Austin were mentioned in the negotiations following the letter of July 11th, and in view of the Government's contention in the United States Supreme Court, this Court should make this finding.

The Government makes no objection to the last two sentences of suggested finding No. 40.

13. The next requested finding by the defendants objected to by the Government is in reference to the committee of independent subsequent run exhibitors that called on Mr. Hoblitzelle in an effort to have the restrictions waived. The Government states that only that portion of the testimony

of one of the committee favorable to defendants' position is referred to. This requested finding was for the purpose of showing that when Mr. Tidball, one of the member- of the committee, protested to Mr. Hoblitzelle, he was actuated by a fear that the restrictions would damage his business, but after the operation of the restrictions, this member of the committee found, according to his testimony, that his business was not damaged by the restrictions. During the trial of the case your honor held that it was immaterial whether a particular exhibitor was opposed to or in favor of the restrictions. The Government in its suggested findings of fact seeks to create the inference that all the subsequent run exhibitors were damaged because the committee called on Mr. Hoblitzelle.

14. The next finding suggested by defendants and objected to by the Government is the finding to the effect that [fol. 51] if any distributor refused the request of Interstate Circuit for the restrictions, the value of his pictures would have been reduced and the total license fees of that distributor would have been reduced. (S. F. Par. 18 and 19; Hoblitzelle's testimony, R. 167; O'Donnell's testimony, R. 179.) No reason is given by the Government for its objection. It objects, notwithstanding the agreed statement of facts and the undisputed evidence supports this suggested finding.

15. The next finding suggested by the defendants and objected to by the Government is to the effect that if some of the distributors refused to grant the restrictions, each distributor that refused would have lost the difference between the license fees in the Melba and Old Mill Theatres, where there was a minimum license fee of $150 to $400, and the license fees of the Majestic and Palace Theatres, where there was a minimum license fee of $1500. (R. 179.) There was no reason given by the Government for objecting, notwithstanding this finding is taken from the undisputed evidence and is material to the contentions mentioned by the Supreme Court in its opinion.

16. The next finding suggested by the defendants and objected to by the Government is on page 16, giving the facts as to the results of playing pictures in the Majestic and Palace Theatres for a year by some of the distributors

granting the requested restrictions, and the effect of one or more distributors' refusing the request, and the loss of license fees, and the loss of the benefit of advertising of each picture by the first run exhibitor. No reason is given for the objection and no claim is made that the finding is not supported by the undisputed evidence.

The defendants in this case have prepared each of these suggested findings for the consideration of this Court from the undisputed evidence introduced at the trial of this case. These facts suggested to be found by this honorable Court are material to the issues of law involved in this litigation; and the defendants respectfully request this honorable Court for action upon defendants' requests in reference to [fol. 52] each of these findings, and suggest that if these suggested findings are made, the Supreme Court will be in a position to determine fairly the issues involved.

Respectfully submitted, Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright.

[fol. 53] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 17, 1938

In accordance with an order from the Supreme Court and Equity Rule No. 70½, I make the following special findings of fact and conclusions of law in the above styled cause:

1. Definitions

1. A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

2. First run means the first exhibition of a picture in a given locality and subsequent run means a subsequent exhibition of the same picture in the same locality. Motion picture theatres giving first run exhibitions of feature pictures distributed by the distributor defendants will be referred to herein as first run theatres and those giving subsequent run exhibitions of such feature pictures will be referred to herein as subsequent run theatres.

3. Double featuring or double billing is the showing of two feature pictures on the same program at the same admission price.

4. The words "admission price" as used herein mean a lower floor night admission price for adults.

A Class A picture is a feature picture shown in the cities of Dallas, Fort Worth, Houston or San Antonio at an admission price of 40¢ or more.

The restrictions as to admission price and against double features hereinafter referred to applied only to Class A pictures.

5. Certain of the corporate defendants will be referred to herein by abbreviated titles as follows:

Defendants	Titles
Interstate Circuit, Inc.	Interstate.
Texas Consolidated Theatres, Inc.	Texas Consolidated.
Columbia Pictures Corporation	Columbia.
Twentieth Century-Fox Film Corp'n.	Fox.
Metro - Goldwyn - Mayer Distributing Corporation	Metro.
Paramount Pictures Distributing Company, Inc.	Paramount.
[fol. 54] RKO Radio Pictures, Inc.	RKO.
United Artists Corporation	United Artists.
Universal Film Exchanges, Inc.	Universal.
Vitagraph, Inc.	Vitagraph.

6. The defendants Interstate, Texas Consolidated, Karl Hoblitzelle and R. J. O'Donnell will be sometime referred to herein as the exhibitor defendants and the other defendants will be sometimes referred to herein as the distributor defendants.

II. The Defendants

7. Interstate operates 43 motion picture theatres located in Austin, Dallas, Fort Worth, Galveston, Houston and San Antonio. It operates all of the first run theatres in these cities except one in Houston which is affiliated with Metro. In each of these cities it operates two or more first run theatres which regularly charge an admission price of 40¢ or more. In addition, it operates several subsequent run theatres in each of these cities. In all of these cities except Galveston there are other subsequent run theatres competing with Interstate's first run and subsequent run theatres.

8. Texas Consolidated operates 66 theatres, some of them first run and others subsequent run houses. These theatres

are located in various Texas cities other than those in which Interstate operates theatres and in Albuquerque, New Mexico. In some of these cities there are no competing theatres and in the leading cities of Abilene, Albuquerque, Amerillo, El Paso, Waco and Wichita Falls there are no competing first run theatres.

9. Defendant Karl Hoblitzelle is president and defendant R. J. O'Donnell is general manager of both Interstate and Texas Consolidated and they are in active charge and control of the business and operations of these two corporations. Interstate and Texas Consolidated are affiliated with each other and with Paramount.

10. Defendant Metro Goldwyn Mayer Distributing Corporation of Texas is a subsidiary of and acts as the Texas agent for Metro. Defendant Twentieth Century Fox Film Corporation of Texas is a subsidiary of and acts as the Texas agent for Fox. The other eight distributor defendants distribute motion picture films in interstate commerce throughout the United States. They solicit from exhibitors located in Texas applications for licenses to exhibit films; [fol. 55] forward such applications to their New York offices, where they are granted; ship films from points outside of Texas to their respective film exchanges in that state, from which exchanges the films are delivered and redelivered to local exhibitors; and finally reship the films to laboratories maintained outside of Texas. They distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States.

11. All of the feature pictures distributed by the distributor defendants are copyrighted and each distributor defendant either is the copyright proprietor of each picture distributed by it or has the exclusive right to license its exhibition in the United States.

III. The Conspiracy

12. On April 25, 1934, defendant O'Donnell addressed an identical letter (Agreed Statement of Facts, Par. 10), written on Interstate's letterhead to the Texas branch manager, located at Dallas, of each distributor defendant. The letter stated that Interstate, in contracting for pictures for the coming 1934-1935 reason, would insist that any picture shown first run in an Interstate theatre at an admission

price of 40¢ or more should not be exhibited at any future time in the same city at an admission price of less than 25¢. On July 11, 1934, after defendants Hoblitzelle and O'Donnell had discussed the proposed price restriction with George Shaeffer, of Paramount in Los Angeles, California, sometime after April 25, 1934, O'Donnell sent a second letter (Agreed statement of facts, Par. 11), written on Interstate's letterhead, which was addressed jointly to the various Texas branch managers of the distributor defendants. In this letter he renewed and amplified his earlier demand and also demanded that any feature picture shown in a first run Interstate theatre at an admission price of 40¢ or more should not thereafter be double billed in the same city. The letter also included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢.

[fol. 56] 13. Prior to the 1934-1935 season, the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢. There is no evidence that these contract provisions were uniform or were adopted as a result of any agreement among the distributor defendants or any agreement between any of them and any of their licensees. This price restriction represented a large increase in the minimum admission price, and also contemplated that distributor defendants agree to require that subsequent run exhibitors charge the requested minimum admission price. These price restrictions was an important departure from previous practice.

14. The printed license agreement used by Vitagraph since the beginning of the 1933-1934 season has contained a provision prohibiting double billing. The regular printed forms of contract used by Metro and RKO throughout the United States for the 1934-1935 and subsequent seasons include an agreement by the licensee not to double bill, but the date of the adoption of these contract forms is not disclosed by the record. Each distributor defendant thus restricting double billing was free to abandon the restriction at any time or to waive it in particular cases, whereas defendant O'Donnell proposed that the distributor defendants bind themselves by agreement to maintain such a re-

striction. The proposed restriction upon double billing constituted a novel and important departure from prior practice.

15. The branch managers, upon receipt of the letters referred to in paragraph 12, notified their home offices. The branch managers themselves had no authority to agree to the proposed restrictions and in the negotiations which followed with representatives of Interstate with reference to contracts for the 1934-1935 season each distributor defendant was represented, not only by its branch manager, but also by one or more superior officials from outside the State of Texas. Four of the eight branch managers could find in their files no correspondence whatever relating to the letters from defendant O'Donnell. Of the correspondence found in the files of the other four Dallas offices, in one instance the correspondence was not introduced in evidence. In each of the other three instances hostility to or criticism of [fol. 57] the proposed restrictions was expressed. In one instance the branch manager wrote that "a policy of this sort is extremely dangerous to everyone concerned and cannot help, in the long run, but cost us all plenty of money." A letter of a representative of another distributor defendant stated: "They are automatically trying to set up a model arrangement for the United States without giving us anything to say about it." A letter from a representative of a third distributor defendant advised that defendant O'Donnell was "making some unfair demands" and imposing conditions "of which he is a flagrant violator."

16. During the summer of 1934 defendants Hoblitzelle and O'Donnell, representing Interstate, conferred at various times with the representatives of each distributor defendant. In the course of these conferences all of the distributor defendants agreed with Interstate to impose both of the requested restrictions upon subsequent run exhibitors. Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more, and there were five cities, Austin, Dallas, Fort Worth, Houston and San Antonio, where Interstate operated such theatres and where there were competing subsequent run theatres. The various distributor defendants, with substantial unanimity, agreed to impose and did impose these restrictions only in four of these cities, Dallas, Fort Worth, Houston and San Antonio.

Since Metro did not grant licenses to any subsequent run exhibitor in Houston, where an affiliate of Metro operated a first run theatre, it did not agree to impose the restrictions in Houston. Universal imposed restrictions on subsequent run theatres in Austin in the 1934-1935 season, but in the two following seasons, it, like all the other distributor defendants, imposed restrictions only in the four cities previously mentioned. Interstate agreed to accept and subsequently observed both of the restrictions as to its own subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio.

17. Metro and Paramount incorporated the agreement to impose restrictions in their written contracts with Interstate [fol. 58] for the 1934-1935 season. The other distributor defendants carried out the agreement without embodying it in their written licensing contracts with Interstate for the 1934-1935 season. The provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors varied slightly in language or phraseology, but the substance of the restrictions imposed by each distributor defendant was the same.

18. None of the distributor defendants except Paramount, and it only for the 1934-1935 season, imposed any restriction as to the admission price upon subsequent run exhibitors in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres. There is no evidence that, prior to or during the negotiations with the distributor defendants, defendants Hoblitzelle and O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934.

It is agreed, however, that no demands were made in behalf of the defendant, Texas Consolidated, upon the distributor defendants for the imposition of said restrictions for the seasons 1935-1936 and 1936-1937.

19. The president of an organization composed of and representing independent exhibitors in Texas, after learning of the restrictions, called a meeting of the exhibitors affected and a committee was appointed to endeavor to persuade defendant Hoblitzelle to waive the proposed restrictions. The committee was given a hearing but met with no success. Defendant O'Donnell, who was aware of the hostility of the

independent exhibitors to the restrictions, asked for and was given an opportunity to address a convention of their organization. The restrictions were strongly opposed by "independent" exhibitors, that is, those who are not affiliated with any distributor defendant.

[fol. 59] 20. Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect. Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally. The more nearly unanimous the action of the distributor defendants in imposing restrictions, the greater the benefit that would be derived by Interstate.

21. The distributor defendants did not call as witnesses any of the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials.

22. From the facts set forth in findings 12 to 21, inclusive, and particularly from the unanimity of action on the part of the distributor defendants, not on one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio.

[fol. 60] 23. Hoblitzelle and O'Donnell, with their large interests in and managements of Interstate and Texas Con-

solidated, discussed among themselves the demand for an inclusion of two restrictions in all contracts that they were to make with defendant distributors on and after 1934-35. Hoblitzelle consulted his attorney and O'Donnell wrote the first letters hereinbefore mentioned on April of that year. Shortly after those letters were written, each was in California during meetings of at least some of the defendant distributor executives, and there then followed the demand later of July, 1934, heretofore mentioned. These discussions and these demands appear to have originated with Hoblitzelle and O'Donnell. Not with the distributor defendants. Such restrictions appeared to be advisable and imperative from the standpoint of Hoblitzelle and O'Donnell to their own interests as first and subsequent run exhibitors in the towns mentioned and as beneficial to the distributor defendants. The Hoblitzelle and O'Donnell interests were the largest purchasers of pictures in the covered area from the distributor defendants. Hoblitzelle and O'Donnell interests were active competitors with many subsequent run houses in the cities shown in these findings.

24. By 1934 the cost of operation of theatres and the cost of production of class A feature pictures had been steadily increasing. The cost of feature pictures distributed by the distributor defendants, ranged from $150,000.00 to $2,500,000.00. First run revenue had not kept pace with this increase.

IV. The Effect of the Conspiracy

25. Prior to the 1934-1935 season most of the independently operated subsequent run theatres in Texas charged an admission price of 15¢ or 20¢ and it was also customary to double bill, either on certain days in the week or as [fol. 61] occasion required. The restrictions imposed by the distributor defendants upon subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio caused some of said exhibitors, in order to be able to obtain pictures subject to the restrictions, to increase their admission price to 25¢, either generally or when pictures subject to the restrictions were shown, and have prevented these exhibitors from double billing any of such pictures. Practically all of the exhibitors who have so increased their admission price would not have done so but for the restrictions imposed by the distributor defendants. The restrictions im-

posed by the distributor defendants have caused other subsequent run exhibitors who were unable or unwilling to accept the restrictions to be deprived of the opportunity to exhibit any of the pictures subject to the restrictions, the best and most popular of all new feature pictures. The effect of the restrictions upon the low-income members of the community patronizing the theatres of these exhibitors was to withhold from them altogether the best entertainment furnished by the motion picture industry.

26. The restrictions imposed by the distributor defendants have increased the income of Interstate by attracting to its first run theatres charging an admission price of 40¢ or more patrons who, if the pictures shown at such theatres where later exhibited in the same city at a theatre charging an admission price of less than 25¢ or as part of a double feature program, would view these pictures at such other theatres. The attendance thus deflected from subsequent run theatres to Interstate's first run theatres has reduced the income of subsequent run exhibitors and there is no evidence that such loss in income has been offset by the higher scale in admission prices which, because of the restrictions, some of the subsequent run theatres have adopted. Since the license fees which the distributor defendants charge Interstate for exhibiting feature pictures in its first run theatres are generally based upon a percentage of Interstate's receipts from these pictures, the increased income which Interstate has received because of [fol. 62] the restrictions has also increased the income of the distributor defendants.

27. Defendant Hoblitzelle sought legal advice before he began crusading for these contracts. The attorney advised him that since distributors were copyright owners, they would have a right to enter into such stipulation with his company.

[fol. 63] Conclusions of Law

1. The court has jurisdiction of this cause under the provisions of the act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

2. All of the distributor defendants by acting pursuant to a common plan and understanding in imposing the re-

strictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-1935 and seasons subsequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

3. All of the distributor defendants, (with the exception of Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas), by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-1935 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

4. Said combination and conspiracy among the defendants restrained interstate commerce in motion picture films, that is, it restrained the rental and shipment, in the course of interstate commerce, of motion picture films by and between the distributor defendants and subsequent run exhibitors.

5. Said combination and conspiracy effected an unreasonable restraint of interstate commerce in that it constituted an agreement by those having a substantial monopoly of the best of all available feature pictures (1) to impose [fol. 64] upon certain subsequent run exhibitors, customers of the defendant distributors, uniform and restrictive provisions in their exhibition contracts, and (2) not to enter into exhibition contracts with, that is, to boycott, any of these exhibitors unable or unwilling to accept such contract provisions.

6. The restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or immunities conferred by the copyright law.

Apart from the combination and conspiracy referred to in paragraphs 2 and 6 inclusive of these conclusions I reach

the following conclusions regarding certain provisions of each of the various license agreements involved:

7. Said provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

8. The provisions against double featuring appearing in the license agreements between all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

9. Such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between any or all of the distributor defendants and Interstate, for the seasons 1934-35 [fol. 65] and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

10. Such provisions as bind any or all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

11. Each and every agreement, whether oral or written, between all of the distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the distributor defendants agree to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

12. Each and every agreement, whether oral or written, between all of the distributor defendants, (except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas), and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the said distributor defendants agree to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

Such undue and unreasonable restraint of interstate commerce is not within any privilege or immunity conferred upon the distributor defendants by the copyright law since the restraint was the product, not solely of the exercise of each defendant distributor's copyright privilege, but of a combination between it and Interstate fixing the terms upon which the distributor defendant would grant to competitors of Interstate license to exhibit certain feature pictures after Interstate's license privilege to exhibit these [fol. 66] pictures had expired.

13. The petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

14. The petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), binding said distributor defendants to impose said

restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

15. That the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar combination and conspiracy having similar purposes and objects.

16. Attention is respectfully called to a written opinion in this case reported in 20 Fed. Supplement, 868, not as a compliance with Rule 70½, which failure I regret, but as showing substantially these same findings.

(Signed) Wm. H. Atwell, United States District Judge.

In Chambers, at Dallas, May 17, 1938.

[fol. 67] IN UNITED STATES DISTRICT COURT

OBJECTIONS OF DEFENDANTS TO THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND MOTION FOR MODIFICATION OF THE COURT'S FINDINGS IN ACCORDANCE WITH SUCH OBJECTIONS—Filed June 14, 1938.

Each of the defendants files the following objections to the Court's respective findings of fact and conclusions of law, and moves the Court to sustain each of said objections to the Court's respective findings of fact and conclusions of law, and to change and modify such findings of fact and conclusions of law to meet such objections. Each objection is separately urged by each defendant, but for the convenience of Court and counsel the objections and motions are included in one instrument.

1. The statement in the 10th paragraph of the Court's findings of fact, "They distribute about 75% of the total motion picture films that are distributed for exhibition in the United States," is contrary to the Agreed Statement of Facts, which provides that the defendant distributors distribute 75% of the first-class feature pictures exhibited in the United States.

2. In paragraph 12 of the Court's findings of fact the statement, "that on July 11, 1934, after defendants Hoblitzelle and O'Donnell had discussed the proposed price restriction with George Shaeffer, of Paramount, in Los Angeles, California, sometime after April 25, 1934, O'Donnell [fol. 68] sent a second letter written on Interstate's letterhead, which was addressed jointly to the various Texas branch managers of the distributor defendants," is incorrect. The undisputed evidence shows that the letter of July 11, 1934, was addressed to each of the representatives of the distributors named in the letter. (S. F. Par. 11.) The conversation with Mr. Shaeffer was a private one between Hoblitzelle and O'Donnell and the President of Paramount, with no one else present, that Paramount owns an interest in Interstate Circuit, and the discussion was in reference to the inclusion of such restriction in Paramount's contract. (R. 175, 181, 170, 173.)

3. The statement in the last part of paragraph 12 of the Court's findings to the effect that the letter of July 11, 1934, included a demand that any feature pictures exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢, is contrary to the Agreed Statement of Facts, in which the letter is copied, and the letter clearly shows that the request made on behalf of Texas Consolidated was that any feature picture exhibited by Texas Consolidated first run in the Rio Grande Valley at an admission price of 35¢ must be restricted to subsequent runs in the Rio Grande Valley at 25¢. (S. F. Par. 11.)

4. The statement in paragraph 13 of the Court's findings of fact that "prior to the season of 1934-35 the licensing contracts of distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢," is contrary to the undisputed evidence, because in a number of cases the minimum admission price was 20¢ and in others 25¢. (R. 118, 203, 211.)

5. The statement in paragraph 13 of the Court's findings of fact to the effect that "there is no evidence that these contract provisions were adopted as a result of any agreement between any of the distributors and any of their licensees," is contrary to the undisputed evidence, which

[fol. 69] shows that the previous price restrictions were a part of the license agreements between the respective distributors and their licensees.

6. The statement in paragraph 13 of the Court's findings that "this price restriction contemplated that the distributor defendants agree to require that subsequent run exhibitors charge the requested minimum admission price," is contrary to the Agreed Statement of Facts and to the undisputed evidence, in that the price restriction contemplated that a particular distributor require its subsequent run exhibitors to charge the requested admission price, but did not contemplate any agreement among the distributors. (R. 63, 167, 179.)

7. In paragraph 14 of the Court's findings of fact the statement made by the Court, "Each distributor defendant thus restricting double billing was free to abandon the restriction at any time," is contrary to the undisputed evidence, because the provision against double billing was a part of the contract between the distributor and its licensee. (S. F. Par. 12.)

8. The statement in paragraph 14 of the Court's findings that, "Defendant O'Donnell proposed that the distributor defendants bind themselves by agreement to maintain such a restriction," is contrary to the undisputed evidence and the Agreed Statement of Facts. The letter of Mr. O'Donnell, set out in the Agreed Statement of Facts is not reasonably subject to such a construction, but, on the contrary, clearly shows that the only agreement contemplated was an agreement between an individual distributor and Interstate Circuit. The letter stated:

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

The evidence of Mr. O'Donnell, which is undisputed, shows that each distributor was told during the negotiations that if it did not desire to grant the restrictions, it definitely meant that its pictures could not be shown, for example, in [fol. 70] the Majestic and Palace Theatres in Dallas, with a minimum film rental of $1500, but would be shown in the other theatres in Dallas where the minimum rental was $150

in one instance and $400 in the other. There was no evidence of any suggestion or proposal on O'Donnell's part or on the part of Hoblitzelle or Interstate Circuit that any of the distributors should make any agreement among themselves about the matter.

9. The statement in paragraph 15 of the Court's findings to the effect that in the negotiations which followed the O'Donnell letters each distributor was represented by its branch manager and by one or more superior officials from outside the State of Texas, is contrary to the undisputed evidence, because some of the representatives were not branch managers (R. 100, 101, 201), and the New York office representatives were not superior officials, but merely sales managers.

10. The statement in paragraph 15 of the Court's findings that, "Of the correspondence found in the files of the other four Dallas offices, in one instance the correspondence was not introduced in evidence," should be eliminated, because it creates the impression that the distributor defendants had withheld certain correspondence, whereas the record shows that searches of the files were made and all the correspondence referred to was delivered by the defendants to the Government's counsel at the trial as a result of a request made by the Government for the first time on the first day of the trial, more than three years after the transactions occurred. One letter delivered to the Government was not introduced in evidence by the Government. (R. 160.)

11. The statement in paragraph 15 of the Court's findings to the effect that the branch managers, upon receipt of the letters, notified their home offices, and four of the eight branch managers could find in their files no correspondence, may indicate that these companies' home offices were notified by letter, whereas the undisputed evidence shows that [fol. 71] the local representatives of the distributors communicated with the home offices by telephone. The Court's construction of the letters written is not a correct construction and ignores the explanations made of the letters by the parties writing them. The statement, "that in each of these letters hostility to or criticism of the proposed restrictions was expressed," is incorrect, because in one of the letters there is a clear indication that Metro-Goldwyn-Mayer thought well of the restrictions. (R. 155.)

12. The statements in paragraph 16 of the Court's findings in reference to the negotiations between the respective distributors and Hoblitzelle and O'Donnell to the effect that "All of the distributor defendants agreed with Interstate Circuit to impose both of the requested restrictions upon subsequent run exhibitors, and Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more and there were five cities where Interstate operated such theatres and where there were competing subsequent run theatres," are contrary to the undisputed evidence. Negotiations between each distributor and Messrs. Hoblitzelle and O'Donnell, as shown by the undisputed evidence, clearly show that there was no agreement or understanding among the distributors, that each acted independently of the other, that the request for the restrictions by Interstate Circuit was only for the four cities of Dallas, Fort Worth, Houston and San Antonio, and that the cities of Austin and Galveston were not mentioned in any of these negotiations, and this statement of the Court's findings is contrary to the clear meaning of these negotiations. (R. 175-181.)

13. The statement in paragraph 17 of the Court's findings that "Metro and Paramount incorporated the agreement to impose the restrictions in their written contracts with Interstate Circuit for the 1934-35 season," is contrary to the Agreed Statement of Facts, which shows that Metro did not include in its written license contract with Interstate Circuit any agreement to impose the double feature restriction.

[fol. 72] 14. The statement in paragraph 17 of the Court's findings that "The provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors varied slightly in language or phraseology, but the substance of the restrictions imposed by each distributor defendant was the same," is contrary to the Agreed Statement of Facts. The evidence as to the respective distributors' contracts with their subsequent run exhibitors is set out in paragraph 12 of the Agreed Statement of Facts. It shows that the language is wholly dissimilar in the respective contracts. (R. 67-78.)

15. The statements in paragraph 18 of the Court's findings that "None of the distributor defendants, except Paramount, and it only for the 1934-35 season, imposed any re-

striction as to admission price on subsequent run exhibitors in cities either in the Rio Grande Valley or elsewhere in which Texas Consolidated operated its theatres. There is no evidence that prior to or during the negotiations with distributor defendants, defendants Hoblitzelle or O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934," are incorrect. The negotiations between the respective distributors and Hoblitzelle and O'Donnell clearly show that Texas Consolidated's request in the letter of July 11th was never mentioned in any of the negotiations. (R. 175-181.)

16. The statement in paragraph 19 of the Court's findings that "the restrictions were strongly opposed by independent exhibitors, that is, those who are not affiliated with any distributor defendant," carries with it the inference that all of the independent exhibitors were opposed to the restrictions, when the evidence shows that upon the trial of the case a number of them testified they were in favor of the restrictions and profited by reason of them. (R. 207, 208, 209, 212.)

17. The statement in paragraph 20 of the Court's find-
[fol. 73] ings that "Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect," is contrary to the undisputed evidence and the Agreed Statement of Facts. The request of Interstate Circuit was for both restrictions. Each distributor was advised specifically that unless both restrictions were granted, its pictures could not be shown in Interstate's Class A theatres where there were large film rentals, but would have to be exhibited in its other theatres where there were small film rentals. Each distributor was given the choice of granting both restrictions and profiting, or declining to grant both restrictions and losing money. (S. F. Par. 11, 18 & 19; R. 79, 167, 179.)

18. The statement in paragraph 20 of the Court's findings that "Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distribu-

tor defendants would have caused such distributor defendants to lose the business of the subsequent run exhibitors who were unwilling to conform to the restrictions and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally," is contrary to the Agreed Statement of Facts and the undisputed evidence. The adoption of either one or both of the restrictions by one or more distributor defendants would not have caused such distributor defendants to lose money. On the contrary the undisputed evidence shows that the rental, for example, at the Majestic and Palace Theatres in Dallas, was a minimum of $1500 per picture. The minimum rental in the other two theatres in Dallas was $150 in one and $400 in the other. If any distributor had refused the request, it would have suffered a minimum loss of the difference between $1500 and $400 per picture, and this difference far exceeded the total license fees paid by subsequent run theatres on that picture. If one, two, three or more distributors had refused the request for the restrictions, each of those [fol. 74] refusing would have lost a large amount of film rental and each of those granting the request would have profited by a receipt of the large film rental. (R. 179.)

Paragraph 18 of the Agreed Statement of Facts reads:

"The exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city, will reduce the income of the first run theatre giving such exhibition and the total license fees of the distributor of such motion picture."

Paragraph 19 of the Agreed Statement of Facts reads:

"The exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fees of the distributor of such moving picture."

The finding of fact referred to immediately above is contrary to these two provisions of the Agreed Statement of Facts, which show that the total license fees, that is, the total license fees the distributor will receive from all sources, would have been reduced if either of these restrictions had not been granted.

The Government sought to prove by cross-examination of Mr. O'Donnell that in the absence of substantially unanimous action by the distributors with respect to the restrictions, the adoption of the restrictions by one or more individual distributors would have caused loss and damage to such distributors, but Mr. O'Donnell's testimony, which was undisputed, clearly shows that the distributor granting the restrictions would have benefited. (R. 194-5.)

19. The statements of the Court's findings in paragraph 21 that "The distributor defendants did not call as witnesses any of the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials," are not supported by the evidence, in that there was no evidence that any of the superior officials of the distributor defendants participated in the negotiations. [fol. 75] The sales representatives of the respective companies, some from New York and some from Dallas, conducted the negotiations. The New York representatives came to Dallas and negotiated with Interstate Circuit in company with the local representatives. They all were merely employes of the distributor defendants. No evidence had been introduced of any combination, conspiracy or agreement among the several distributors to include the restrictions. The allegations of conspiracy in the Government's petition were officially denied by each distributor under oath. There was testimony from the local representatives of the distributors indicating that the companies acted independently. There was no showing that any of the New York representatives of the distributor defendants were in court or in Texas, and under these circumstances the fact that the New York sales representatives who participated in the negotiations were not brought to Dallas to testify in the case is not evidence of any unlawful agreement and cannot be used to make on behalf of the Government a prima facie case of an unlawful agreement, understanding or combination and should not be included in the Court's findings of fact.

20. The statement in paragraph 22 of the Court's findings, "and particularly from the unanimity of action on the part of the distributor defendants, not in one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other," is a mere conclusion, which the Supreme Court of the United States, in its opinion in this case, said was not sufficient as a finding of fact. It is contrary to the undisputed evidence and contrary to the Agreed Statement of Facts. There is no evidence of any communication of any kind between any distributor defendant and any other distributor defendant. There is positive evidence of the local representatives of the distributors indicating that there was no such agreement. The Agreed Statement of Facts and the undisputed evidence indicates that it was to the interest of [fol. 76] each to grant the restrictions and this Court is without power or authority to infer or find that there was any combination, conspiracy or agreement among the distributors to include the restrictions or either of them. (R. 167, 179.)

21. The statement in paragraph 23 of the Court's findings that "Shortly after these letters were written, each was in California during meetings of at least some of the defendant distributor executives, and there then followed the demand letter of July, 1934," is an incorrect statement, because the undisputed evidence shows that the meeting in California was a Paramount convention. There was no evidence that any representative of any other distributor was there, and the undisputed evidence shows that neither of the restrictions was discussed at any meeting of the California convention, but that the conversation was a private one between Mr. Hoblitzelle, Mr. O'Donnell and Mr. Shaeffer, President of Paramount, an owner of an interest in Interstate's business, and the testimony of Mr. O'Donnell shows that no one else was present at this conversation except Mr. Hoblitzelle, Mr. O'Donnell and Mr. Shaeffer. The statement, "of at least some of the distributor executives," creates the impression that there may have been others present at such conversation.

22. The statement in paragraph 25 of the Court's findings that "The effect of the restrictions upon the low-income members of the community patronizing the theatres of these exhibitors was to withhold from them altogether the best entertainment furnished by the motion picture industry," is contrary to the undisputed evidence. There were only four subsequent run theatres in the four cities that did not show Class A pictures. The evidence shows that in the neighborhoods of the poorer people the unrestricted pictures, not the restricted pictures, were the most popular. These theatres desired to exhibit only a few of the Class A pictures. There was no evidence that Class A pictures were the most popular pictures in these neighborhoods. (R. 112-115, 186.) The communities patronizing these four theatres were not de- [fol. 77] prived altogether of the best entertainment furnished by the motion picture industry. The evidence shows that in Dallas, for example, there were twenty-one subsequent run theatres in competition with Interstate Circuit's theatres. Many of these had matinees on Saturdays and Sundays. The poorer people could see the pictures at 5¢ or 10¢ admission at the matinees, because the restrictions did not affect matinee prices. Many of the theatres in Dallas had balconies. Class A pictures could be seen from the balcony at 5¢, 10¢ or 15¢, or whatever price the individual exhibitor desired to charge. These theatres were located in various parts of Dallas and the poorer people were not deprived of the right to see the best pictures. (S. F. Par. 7; Testimony of Exhibitors.)

23. The statement in paragraph 26 of the Court's findings, "The attendance thus deflected from subsequent run theatres to Interstate's first run theatres has reduced the income of subsequent run exhibitors, and there is no evidence that such loss in income has been offset by the higher scale in admission prices, which, because of the restrictions, some of the subsequent run theatres have adopted," is contrary to the evidence, which shows that the income of a majority of the subsequent run theatres was increased. If a subsequent run theatre owner had an attendance of 200 at a performance at his theatre at an admission price of 15¢, the total revenue for that performance would be $30. If his admission price was increased to 25¢, his attendance would have to be reduced below 120 before such exhibitor would lose a cent. In other words, the decrease in the number of

attendants would have to be in excess of 40% before the subsequent run exhibitor would begin to lose money. There was no evidence that the subsequent run exhibitor suffered any such loss in attendance after the restrictions went into effect. Most of the subsequent run theatre owners' profits increased. (R. 121, 134, 142, 150, 190, 191, 204, 207, 212.)

24. The statements in paragraph 27 of the Court's findings that "Defendant Hoblitzelle sought legal advice before he began crusading for these contracts. The attorney ad- [fol. 78] vised him that since distributors were copyright owners, they would have a right to enter into such stipulation with his company," are incorrect. The record shows that the advice given Mr. Hoblitzelle by his attorney was: "Under the copyright law, I, as the licensee, would have the right to contract with the licensor, giving us exclusive right to show the pictures in Dallas. I also was advised that I had the lesser right to contract with the licensor that pictures shown at our theatre at a stipulated price should not be shown at a lesser price than the price agreed upon between me and the licensor." (R. 163.)

[fol. 79] Conclusions of Law

1. The Court's second conclusion of law to the effect that all distributor defendants, by acting pursuant to a common plan and understanding in imposing the restriction as to admission price suggested by Interstate Circuit, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate Circuit and with each other, is erroneous. There was no evidence of such a common plan and understanding, and each distributor had the legal right to impose either or both of the restrictions for the protection of its business and to prevent damage to the first run licensee's business.

2. The Court's third conclusion of law to the effect that the distributor defendants other than Vitagraph and Metro Goldwyn Mayer, by acting pursuant to a common plan and understanding in imposing the restriction against double featuring suggested by Interstate Circuit, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate Circuit and each other, is erroneous, because there is no evidence of a common understanding among the distributors, and each of said

distributors had the legal right for the protection of the first run exhibition and for the protection of its license fees to impose said restrictions.

3. The Court's conclusions of law Nos. 2 and 3 are erroneous, because there is an absence from the record of any evidence of an agreement among the distributors to include the restrictions named. Each distributor, as the owner of a copyrighted motion picture photoplay, had the legal right to protect the granted right of first run exhibition from damage by covenanting with the first run licensee that certain pictures shown first run at an admission price of 40¢ or more should not thereafter be shown in the same city for less than 25¢ or as a part of a double feature program. [fol. 80] 4. The Court's conclusion of law No. 4 to the effect that said combination, conspiracy and agreement among the defendants restrained interstate commerce in motion picture films, that is, it restrained the rental and shipment, in the course of interstate commerce, of motion picture films by and between the distributor defendants and subsequent run exhibitors, is erroneous, because there is no evidence to support it, and any restraint of trade resulting from the imposition of either or both of said restrictions by any distributor is not a restraint of trade within the Sherman Anti-Trust Act.

5. The Court's conclusion of law No. 5 to the effect that said combination and conspiracy effected an unreasonable restraint of interstate commerce, in that it constituted an agreement by those having a substantial monopoly of the best of all available feature pictures to impose upon certain subsequent run exhibitors, customers of the defendant distributors, uniform and restrictive provisions in their exhibition contracts, and not to enter into exhibition contracts with, that is, to boycott any of these exhibitors unable or unwilling to accept such contract provisions, is erroneous, because there is no evidence to support it. The undisputed evidence shows that each agreement made was an agreement between a particular distributor and its licensee for the purpose of protecting the granted right of first run exhibition from damage by subsequent run exhibition, and any restraint resulting from such an agreement is not within the Sherman Anti-Trust Act.

6. The Court's conclusion of law No. 6 to the effect that the restraint of interstate commerce effected by united

exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or immunities conferred by the copyright law, is erroneous, because there is no evidence showing any agreement or understanding between the respective distributors in reference to the im- [fol. 81] position of the restrictions complained of, and the agreement between Interstate Circuit and any distributor that certain pictures shown first run at an admission price of 40¢ or more should not thereafter be exhibited in the same city for less than 25¢ or as a part of a double feature program was merely a covenant between the licensor and licensee of a copyrighted motion picture photoplay to protect the granted right of first run exhibition and the licensee's fee of that distributor, and such a contract is a legal contract, not condemned by the Sherman Anti-Trust Act.

7. The Court's conclusion of law No. 7 to the effect that, apart from the conspiracy above referred to, the provisions as to minimum night adult admission price appearing in the license agreements of the distributor defendants and subsequent run exhibitors restrain trade and commerce in feature films and are illegal and void, is erroneous because under the decisions of the United States Supreme Court such a provision has a reasonable relation to the reward of the copyrighted motion picture play and has a reasonable relation to the value of the granted right of first run exhibition, and any restraint of trade occasioned by such provision is not within the condemnation of the Sherman Anti-Trust Act.

8. The Court's conclusion of law No. 8 to the effect that the provisions against double featuring appearing in the license agreements between the distributor defendants and certain exhibitors in certain cities restrain trade and commerce in feature films and are illegal and void, is erroneous, because such a provision has a reasonable relation to the reward of the copyrighted motion picture photoplay and a reasonable relation to the granted right of first run exhibition, and any restraint of trade caused by such provision is not within the Sherman Anti-Trust Act.

9. The Court's conclusion of law No. 9 to the effect that any agreement between a distributor defendant and Inter-

state Circuit requiring the distributor to impose the night admission price restriction upon subsequent run exhibitors [fol. 82] in certain cities restrains trade and commerce in feature films and is illegal and void, is erroneous, because the respective distributors, licensors of copyrighted feature photoplays, and Interstate Circuit, the licensee, have the legal right to contract for such a restriction for the protection of the licensee and the licensor.

10. The Court's conclusion of law No. 10 to the effect that any provision of the contract between a distributor and Interstate Circuit requiring the distributor to impose the restriction against double featuring restrains trade and commerce in feature films and is illegal and void, is erroneous, because such a provision has a reasonable relation to the value of the first run exhibition and the license fees of the distributor and is not condemned by the Sherman Anti-Trust Act.

11. The Court's conclusion of law No. 11 is erroneous for the reasons stated in the objection to conclusion of law No. 10.

12. The Court's conclusion of law No. 12 is erroneous for the same reasons stated in objection to conclusion of law No. 10.

13. That part of the Court's conclusion of law No. 12 to the effect that the restraint of interstate commerce occasioned by an agreement between a particular distributor and Interstate Circuit to the effect that certain pictures shown first run at an admission price of 40¢ or more should not thereafter be shown as a part of a double feature program is not within any privilege or immunity conferred upon the distributor defendants by the Copyright Law, since the restraint was the product not solely of the exercise of each distributor defendant's copyright privilege, but of a combination between it and Interstate fixing the terms upon which the distributor defendant would grant to competitors of Interstate license to exhibit certain feature pictures after Interstate's license privilege to exhibit these pictures had expired, is erroneous, because the owner of a copyrighted motion picture photoplay, in granting a license to exhibit [fol. 83] that photoplay to a first run licensee, has the legal right to attach to such license agreement any condition having a reasonable relation to the value of the first run exhibition and to the value of the reward of the copyright.

Under the undisputed evidence and the Agreed Statement of Facts the restriction against double featuring has such relation.

Wherefore, each of the defendants prays that each of the objections to the findings of fact and conclusions of law be considered by the Court and that the findings of fact and conclusions of law be modified and changed to meet such objections.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for all Defendants. Jno. Moroney, Atty. for Exhibitor Defendants.

[fol. 84] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEFENDANTS' OBJECTIONS TO COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 5, 1938

The Court having fully considered each of the objections filed by each of the defendants in this cause to the findings of fact and conclusions of law, is of the opinion that each of said objections should be overruled.

It is therefore Ordered that each of said objections to the respective findings of fact and respective conclusions of law of the Court is hereby overruled, to which action of the Court each of the defendants in open court excepted.

July 5th, 1938.

Wm. H. Atwell, U. S. District Judge.

[fol. 85] IN UNITED STATES DISTRICT COURT

ORDER REFUSING DEFENDANTS' REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 5, 1938

Be it Remembered that after the decision of the United States Supreme Court remanding this cause with directions to the trial court to file separate findings of fact and conclusions of law, each of the defendants presented to the court request for findings of fact and conclusions of law, which have been filed herein, each suggested finding of fact being a separate request for the finding of that fact. And

the court having fully considered the findings of fact and conclusions of law requested by each of the defendants as shown by the written request filed herein, and the findings of fact and conclusions of law requested by petitioner, and having filed in accordance with Equity Rule No. 70½ its own findings of fact and conclusions of law, is of the opinion that each of the findings of fact and conclusions of law requested by the defendants should be refused.

It is therefore Ordered that each of said requested findings of fact and conclusions of law filed by the defendants is refused, to which action of the Court each of the defendants in open court excepted.

July 5th, 1938.

Wm. H. Atwell, U. S. District Judge.

[fol. 86] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed June 9, 1938

The final decree herein dated October 13, 1937, having been set aside by the Supreme Court of the United States pending the making of findings of fact and conclusions of law by this court, pursuant to Equity Rule 70½, and said findings of fact and conclusions of law having been made and filed in this cause on the 17th day of May, 1938,

It is Hereby Ordered, Adjudged and Decreed as follows:

1. That the defendants Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia-Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Vitagraph, Inc., Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Corporation of Texas, Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas are sometimes hereinafter referred to as the distributor defendants.

2. That all of the distributor defendants and their respective officers, agents, representatives and employees be, and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreement with subsequent run exhibitors of motion films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such sub-

sequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the sams city for a night adult lower floor admission price of 40¢ or more.

3. That all of the said distributor defendants, except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas, and their respective officers, agents, representatives and employees be, and they are hereby, perpetually enjoined [fol. 87] and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities above named, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

4. That all of the distributor defendants be, and they are hereby, enjoined and restrained from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc.,—this latter company not having made any such agreements since 1934-35—Karl Hoblitzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, or any of them.

5. That the defendant, Interstate Circuit, Inc., its officers, agents, representatives and employees, and the individual defendants be, and they are hereby, perpetually restrained and enjoined from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring hereinbefore referred to.

[fol. 88] 6. That each and every one of the corporate defendants and their respective officers, agents, representatives and employees, and each of the individual defendants be, and they are hereby, perpetually enjoined and restrained from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or similar combination, conspiracy or agreement.

7. That the petitioner recover of the defendants its costs herein.

Dallas, Texas, this 9th day of June, 1938.

Wm. H. Atwell, United States District Judge.

Approved: Berkeley W. Henderson, Special Assistant to the Attorney General of counsel for Petitioner. ——— ———, Attorneys for the Defendants.

[fols. 89-91] Order extending term, filed July 5, 1938, omitted in printing.

[fol. 92] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., ET AL., ORDER ALLOWING APPEAL FIXING AMOUNT OF BOND—Filed July 6, 1938

To the Honorable Judge of Said Court:

Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation, and Twentieth Century-Fox Film Corporation of Texas, petitioners, jointly and severally pray an appeal from the judgment, decree and final order of the District Court of the United States for the Northern District of Texas, Dallas Division, and respectfully show as follows:

(1) That the evidence in this case was taken in open court and final decree entered on the 13th day of October,

1937, which decree was reversed by the Supreme Court of the United States on the 25th day of April, 1938, with directions to the trial court that Findings of Fact and Conclusions of Law, under Equity Rule 70½, be filed by the trial court. Thereafter, the trial court, in accordance with such directions, filed Findings of Fact and Conclusions of Law, and on the 9th day of June, 1938, entered final decree in which it was adjudged in substance as follows:

The final decree herein dated October 13, 1937, having been set aside by the Supreme Court of the United States pending the making of findings of fact and conclusions of law by this court, pursuant to Equity Rule 70½, and said findings of fact and conclusions of law having been made [fol. 93] and filed in this cause on the 17th day of May, 1938.

It is hereby ordered, adjudged and decreed as follows:

1. That the defendants Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Vitagraph, Inc., Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Film Corporation of Texas, Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas are sometimes hereinafter referred to as the distributor defendants.

2. That all of the distributor defendants and their respective officers, agents, representatives and employes be, and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

3. That all of the said distributor defendants, except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas, and their respective officers, agents, representatives and employes be, and they are hereby, perpetually enjoined and restrained from enforcing or attempt-

ing to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities above named, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

[fol. 94] 4. That all of the distributor defendants be, and they are hereby, enjoined and restrained from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc.,—this latter company not having made any such agreements since 1934-35—, Karl Hoblitzelle and R. J. O'Donnell operate picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, and R. J. O'Donnell, or any of them.

5. That the defendant, Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants be, and they are hereby, perpetually restrained and enjoined from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring hereinbefore referred to.

6. That each and every one of the corporate defendants and their respective officers, agents, representatives and employes, and each of the individual defendants be, and they are hereby, perpetually enjoined and restrained from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or [fol. 95] similar combination, conspiracy or agreement.

7. That the petitioner recover of the defendants its costs herein.

(2) Each petitioner saved due exception to the order and final decree of said court granting the relief to the plaintiff, United States of America.

(3) Each petitioner further alleges that the honorable district court erred in rendering said final decree, and the errors are shown in the assignments of error herewith filed and made a part of this prayer for appeal.

Petitioners present their joint and several assignments of error and respectfully pray that an appeal may be allowed.

Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro Goldwyn Mayer Distributing Corporation, Metro Goldwyn Mayer Distributing Corporation of Texas, Twentieth Century Fox Film Corporation, and, Twentieth Century Fox Film Corporation of Texas, Petitioners, by Geo. S. Wright, Their Counsel.

ORDER ALLOWING APPEAL

The foregoing joint and several appeal is allowed upon giving bond for costs as required by law in the sum of $1,000.00. July 6, 1938.

Wm. H. Atwell, United States District Judge.

[fol. 96] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR OF PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., ET AL.—Filed July 6, 1938

Paramount Pictures Distributing Company, Inc., (hereinafter called "Paramount"), Vitagraph, Inc. (hereinafter called "Vitagraph"), RKO-Radio Pictures, Inc. (hereinafter called "RKO"), Columbia Pictures Corporation (hereinafter called "Columbia"), United Artists Corporation (hereinafter called "United Artists"), Universal Film

Exchanges, Inc. (hereinafter called "Universal"), Metro-Goldwyn-Mayer Distributing Corporation (hereinafter called "Metro"), Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation (hereinafter called "Fox"), and Twentieth Century-Fox Film Corporation of Texas, defendants in the Trial Court (hereinafter sometimes referred to collectively as "the distributor defendants"), represent that in the proceedings had in the above entitled cause and in the rendition of the final decree there is error, which final decree of the District Court of the United States for the Northern District of Texas, Dallas Division, should be reversed, and file the following joint and several assignments of error, upon which each will rely upon appeal from the said final decree made by said Honorable Court on June 9, 1938, and say that said Honorable Court erred in the following respects:

1

The Court erred in perpetually enjoining and restraining all of the distributor defendants and their respective officers, agents, representatives and employes from enforcing or attempting to enforce the provisions in their respective [fol. 97] license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

2

The Court erred in perpetually enjoining and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and their respective officers, agents, representatives and employes from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

3

The Court erred in enjoining and restraining all of the distributor defendants from including in any future license agreements with subsequent run exhibitors in any city in the States of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, or any of them.

[fol. 98]

4

The Court erred in perpetually enjoining and restraining defendant Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants (Karl Hoblitzelle and R. J. O'Donnell) from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films distributed by said distributor defendants the restrictions as to night adult lower floor admission price, or against double featuring.

5

The Court erred in perpetually enjoining and restraining each and every one of the corporate defendants and their respective officers, agents, representatives and employes, and each of the individual defendants from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or similar combination, conspiracy or agreement.

6

The Court erred in denying the motion of each of the defendants for judgment dismissing the case at the conclusion of all the evidence.

7

The Court erred in finding as a fact (Findings of Fact No. 10) that the distributor defendants distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States, and in overruling defendants' objection to such finding of fact.

8

The Court erred in finding as a fact (Findings of Fact No. 12) that the letter, dated July 11, 1934, sent by R. J. O'Donnell on Interstate's letterhead, included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley, at an [fol. 99] admission price of 35¢ or more, should not thereafter be exhibited in the same city at an admission price of less than 25¢, and in overruling defendants' objection to such finding of fact.

9

The Court erred in finding as a fact (Findings of Fact No. 13) that prior to the 1934-1935 season the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢, and in overruling defendants' objection to such finding of fact.

10

The Court erred in failing to find as a fact that prior to the 1934-1935 season, United Artists had a definite policy against double featuring (R. 213).

11

The Court erred in finding as a fact (Findings of Fact No. 15) that in the negotiations with Interstate with reference to contracts for the 1934-1935 season, each distributor defendant was represented not only by its branch manager, but also by one or more superior officials from outside the State of Texas, and in overruling defendants' objection to such finding of fact.

12

The Court erred in failing and refusing to find as a fact that, upon receipt of the letters of April 25, 1934, and July

11, 1934, from R. J. O'Donnell, representatives of four of the distributor defendants (United Artists, Metro, Paramount and Vitagraph) expressed immediate agreement with the plan suggested in such letters, that only one distributor defendant (Universal) expressed hostility to the plan and that its primary concern was as to the number of its pictures which Interstate Circuit showed first run in its Class A theatres and that, with respect to the three other distributor defendants (RKO, Fox and Columbia), there is no evidence, other than their eventual agreement to the plan, of the immediate reaction of their representatives thereto.

[fol. 100] 13

The Court erred in failing and refusing to find as a fact that at the conference between the defendants Hoblitzelle and O'Donnell, representing Interstate, and the representatives of each distributor defendant during the summer of 1934 with respect to the 1934-1935 licensing agreements, only the representatives of Interstate and of the particular distributor defendant involved were present.

14

The Court erred in finding as a fact (Findings of Fact No. 17) that the substance of the restrictions imposed by each distributor defendant was the same.

15

The Court erred in finding as a fact (Findings of Fact No. 17) that Metro incorporated in its written contract with Interstate for the 1934-1935 season an agreement to impose both restrictions, and in overruling defendants' objection to such finding of fact.

16

The Court erred in failing and refusing to find as a fact that during the negotiations between the distributor defendants and defendants Hoblitzelle and O'Donnell, the request for a price restriction in the Rio Grande Valley, which was made on behalf of Texas Consolidated in the letter of July 11, 1934, was never mentioned.

17

The Court erred in failing and refusing to find as a fact that there is no evidence that the price restriction in the Rio Grande Valley, requested by Texas Consolidated in the letter of July 11, 1934, was to the advantage of any distributor defendant, and in considering the fact that none of the distributor defendants imposed such restriction as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it.

[fol. 101] 18

The Court erred in failing and refusing to find as a fact that during the negotiations between the distributor defendants (except Universal) and defendants Hoblitzelle and O'Donnell, the request for the restrictions in the City of Austin, was never mentioned; in failing and refusing to find that there is no evidence that any subsequent run theatres in the City of Austin charged an admission price of less than 25¢, and in considering the fact that only one of the distributor defendants (and it only for a single season) agreed to impose the restrictions in the City of Austin as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate to agree with Interstate to impose the restrictions requested by it.

19

The Court erred in finding as a fact (Findings of Fact No. 19) that the restrictions were strongly opposed by exhibitors not affiliated with any distributor defendant and that defendant O'Donnell was aware of the hostility of such exhibitors; and in considering such facts thus erroneously found in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

20

The Court erred in finding as a fact (Findings of Fact No. 20) that in the absence of substantially unanimous action by all of the distributor defendants with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions, and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally, and in considering such facts [fol. 102] thus erroneously found as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendant's objection to such finding of fact.

21

The Court erred in failing and refusing to find as a fact that adoption of the restrictions by each of the distributor defendants would have been to its own independent advantage, irrespective of any action taken by any of the other distributor defendants, and that less than substantially unanimous action by all of the distributor defendants would not have been harmful to any distributor defendant adopting the restrictions.

22

The Court erred in failing and refusing to find as a fact that failure of any distributor defendant to adopt either or both of the restrictions would have caused it a serious loss in first run revenue and would have reduced its total license fees.

23

The Court erred in failing and refusing to find as a fact that, since the request of Interstate was for the imposition of both the price and double feature restrictions, imposition by any distributor defendant of one of the requested restrictions without the other would not have been a compliance by it with the request of Interstate Circuit, and that such non-compliance would have caused such distributor de-

fendant a serious loss in first run revenue and would have reduced its total license fees.

24

The Court erred in failing and refusing to find as a fact the fact recited in Paragraph 18 of the Agreed Statement of Facts that the exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult ad-
[fol. 103] mission price of 40¢ or more in the same city will reduce the income of the theatre giving such first run exhibition and the total license fees of the distributor of such motion pictures.

25

The Court erred in failing and refusing to find as a fact the fact recited in Paragraph 19 of the Agreed Statement of Facts that the exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fees of the distributor of such moving picture.

26

The Court erred in failing and refusing to find as a fact that the imposition of the restrictions by each distributor defendant, pursuant to agreement with or at the instance and behest of Interstate, had a reasonable relationship to the reward of the copyrights owned by such distributor defendant and was necessary for the protection of the profits accruing to it from the exhibition of its copyrighted films.

27

The Court erred in finding as a fact (Findings of Fact No. 21) that the most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and that facts material to this issue were within the peculiar knowledge of the superior officials of the distributor defendants outside the State of Texas who negotiated the 1934-1935 contracts with Interstate, and in considering the fact that the distributor defendants did not call any of such superior officials as wit-

nesses as evidence to support its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

[fol. 104]

28

The Court erred in finding (Findings of Fact No. 22) on the basis of the facts set forth in Findings 12 to 21, inclusive, that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, and in overruling defendants' objection to such finding of fact.

29

The Court erred in finding as a fact (Findings of Fact No. 22) that there was unanimity of action on the part of the distributor defendants not in one respect only but in many different respects, and in finding that the situation was such that, apart from agreement, diverse action would inevitably have resulted, and in overruling defendants' objection to such finding of fact.

30

The Court erred in finding as a fact (Findings of Fact No. 23) that shortly after April 25, 1934, Hoblitzelle and O'Donnell were in California during meetings of at least some of the defendant distributor executives, and in overruling defendants' objection to such finding of fact.

31

The Court erred in failing and refusing to find as a fact that the distributor defendants did not agree and conspire among themselves with respect to the action to be taken by them upon the proposals made by Interstate, and that they did not agree and conspire among themselves to agree with Interstate to impose the restrictions requested by Interstate.

32

The Court erred in failing and refusing to find as a fact that the granting of Interstate's request by the several distributors does not create any inference of any combination, conspiracy or agreement among the distributor defendants.

[fol. 105] 33

The Court erred in finding as a fact (Findings of Fact No. 25) that the effect of the restrictions upon the low-income members of the community patronizing theatres who were unable or unwilling to accept the restrictions was to withhold from them altogether the best entertainment furnished by the motion picture industry, and in overruling defendants' objection to such finding of fact.

34

The Court erred in finding as a fact (Findings of Fact No. 26) that attendance deflected from subsequent run theatres to Interstate's first run theatres as a result of imposition of the restrictions has reduced the income of subsequent run exhibitors, and in further finding that there is no evidence that such loss of income has been offset by the higher scale in admission prices, which because of the restrictions, some of the subsequent run theatres have adopted, and in overruling defendants' objection to such finding of fact.

35

The Court erred in failing and refusing to find as facts the facts as recited in the stipulation of facts.

36

The Court erred in failing and refusing to adopt each of the several findings of fact proposed by the defendants in their proposed findings of fact numbered consecutively from 2 to 40, inclusive.

For convenience of the Court, and to save repetition of the record, errors are thus severally assigned upon each refusal to find the facts as requested without repeating here each request, all of which appear in the defendants' proposed findings of fact and conclusions of law.

37

The Court erred in its Conclusion of Law No. 2 that all of the distributor defendants, by acting pursuant to a common plan and understanding in imposing the restrictions [fol. 106] as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio for the season of 1934-1935 and seasons subsequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

38

The Court erred in its Conclusion of Law No. 3 that all of the distributor defendants (with the exception of Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring, suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio for the season 1934-1935 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

39

The Court erred in its Conclusion of Law No. 4 that the combination and conspiracy described in Conclusions of Law Nos. 2 and 3 restrained interstate commerce in motion picture films.

40

The Court erred in its Conclusion of Law No. 5 that said combination and conspiracy effected an unreasonable restraint of interstate commerce.

41

The Court erred in its Conclusion of Law No. 6 that the restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted

feature pictures is not within any privileges or immunities conferred by the Copyright Law.

[fol. 107] 42

The Court erred in its Conclusion of Law No. 7 that the provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio for the seasons 1934-1935 and subsequent thereto restrain trade and commerce in feature films and are illegal and void.

43

The Court erred in its Conclusion of Law No. 8 that the provisions against double featuring appearing in the license agreements between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio for the seasons 1934-1935 and subsequent thereto restrain trade and commerce in feature films and are illegal and void.

44

The Court erred in its Conclusion of Law No. 9 that such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between any or all of the distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

45

The Court erred in its Conclusion of Law No. 10 that such provisions as bind any or all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate for the seasons 1934-

1935 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

[fol. 108] 46

The Court erred in its Conclusion of Law No. 11 that each and every agreement, whether oral or written, between all of the distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, wherein the distributor defendants agreed to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio is illegal and void.

47

The Court erred in its Conclusion of Law No. 12 that each and every agreement, whether oral or written, between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and Interstate for the seasons 1934-1935 and subsequent thereto, wherein the said distributor defendants agreed to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void, and in concluding as a matter of law that such agreement constitutes an undue and unreasonable restraint of interstate commerce and is not within any privilege or immunity conferred upon the distributor defendants by the Copyright Law.

48

The Court erred in its Conclusion of Law No. 13 that the petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

[fol. 109] 49

The Court erred in its Conclusion of Law No. 14 that the petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), binding said distributor defendants to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

50

The Court erred in its Conclusion of Law No. 15 that the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar combination and conspiracy having similar purposes and objects.

51

The Court erred in failing and refusing to conclude as a matter of law that each distributor defendant, as the owner of copyrighted motion picture photoplays, had the legal right, acting independently of any other distributor, to include either or both of the restrictions in subsequent run license agreements, pursuant to agreement with or at the instance and behest of Interstate Circuit.

52

The Court erred in failing and refusing to conclude as a matter of law that, since the first agreement between Interstate Circuit and a single distributor containing the restrictive provisions was a legal contract, the fact that thereafter at different times each of the distributors, acting independ- [fol. 110] ently of each other, entered into similar agreements with Interstate Circuit does not constitute an agree-

ment, combination or conspiracy in violation of the Sherman Anti-Trust Law.

53

The Court erred in failing and refusing to conclude as a matter of law that there was no evidence to authorize an inference of conspiracy, combination or agreement among the distributor defendants.

54

The Court erred in failing and refusing to conclude as a matter of law that the price and double featuring restrictions imposed by the distributor defendants, pursuant to agreement with or at the instance and behest of Interstate Circuit, did not unreasonably restrain interstate trade or commerce.

55

The Court erred in enjoining and restraining Texas Consolidated Theatres, Inc., from continuing in the combination, conspiracy and agreement described in the Findings of Fact and Conclusions of Law, and from entering into or becoming a party to a like or similar combination, conspiracy or agreement, when under the undisputed evidence Texas Consolidated Theatres, Inc., did not make any contract with reference to either of said restrictions with any distributor other than Paramount.

56

The Court erred in enjoining each distributor defendant from including in its license agreements with subsequent run exhibitors any restriction as to admission price to be charged by said subsequent run exhibitor for such motion picture films or as to double featuring as a result of any agreement between said distributor and Texas Consolidated Theatres, Inc.

Wherefore, petitioners jointly and severally pray that the said final decree of the District Court of the United States for the Northern District of Texas, Dallas Division, be set [fol. 111] aside and reversed; that the respective injunctions granted by said Court be dissolved and judgment rendered herein for each of the petitioners, or that the cause be remanded to the court below with directions to dismiss said

cause of action for want of equity for reasons set forth in the assignments of error, and for other and further relief.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for Petitioners, Paramount Pictures Distributing Co., Inc., et al.

[fol. 112] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF INTERSTATE CIRCUIT, INC., ET AL., ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND—Filed July 6, 1938

To the Honorable Judge of Said Court:

Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, petitioners, jointly and severally pray an appeal from the judgment, decree and final order of the District Court of the United States for the Northern District of Texas, Dallas Division, and respectfully show as follows:

(1) That the evidence in this case was taken in open court and final decree entered on the 13th day of October, 1937, which decree was reversed by the Supreme Court of the United States on the 25th day of April, 1938, with directions to the trial court that Findings of Fact and Conclusions of Law, under Equity Rule 70½, be filed by the trial court. Thereafter, the trial court, in accordance with such directions, filed Findings of Fact and Conclusions of Law, and on the 9th day of June, 1938, entered final decree in which it was adjudged in substance as follows:

The final decree herein dated October 13, 1927, having been set aside by the Supreme Court of the United States pending the making of findings of fact and conclusions of law by this court, pursuant to Equity Rule 70½, and said findings of fact and conclusions of law having been made and filed in this cause on the 17th day of May, 1938.

It is hereby ordered, adjudged and decreed as follows:

1. That the defendants Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pic-[fol. 113] tures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Vitagraph, Inc., Twentieth

Century-Fox Film Corporation, Twentieth Century-Fox Film Corporation of Texas, Metro-Goldwyn-Mayer Distributing Corporation, and Metro-Goldwyn-Mayer Distributing Corporation of Texas are sometimes hereinafter referred to as the distributor defendants.

2. That all of the distributor defendants and their respective officers, agents, representatives and employes be, and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

3. That all of the said distributor defendants, except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas, and their respective officers, agents, representatives and employes be, and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities above named, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

4. That all of the distributor defendants be, and they are hereby, enjoined and restrained from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Con- [fol. 114] solidated Theatres, Inc.,—this latter company not having made any such agreements since 1934-35, Karl Hoblitzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said dis-

tributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, or any of them.

5. That the defendant, Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants be, and they are hereby, perpetually restrained and enjoined from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring hereinbefore referred to.

6. That each and every one of the corporate defendants and their respective officers, agents, representatives and employes, and each of the individual defendants be, and they are hereby, perpetually enjoined and restrained from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or similar combination, conspiracy or agreement.

7. That the petitioner recover of the defendants its costs herein.

[fol. 115] (2) Each petitioner save due exception to the order and final decree of said court granting the relief to the plaintiff, United States of America.

(3) Each petitioner further alleges that the honorable district court erred in rendering said final decree, and the errors are shown in the assignments of error herewith filed and made a part of this prayer for appeal.

Petitioners present their joint and several assignments of error and respectfully pray that an appeal may be allowed.

Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, and R. J. O'Donnell, Petitioners, by Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, John R. Moroney, Their Attorneys.

ORDER ALLOWING APPEAL

The foregoing joint and several appeal is allowed upon giving bond for costs as required by law in the sum of $1,000.

July 6, 1938.

Wm. H. Atwell, United States District Judge for the Northern District of Texas, Dallas Division.

[fol. 116] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR OF INTERSTATE CIRCUIT, INC., ET AL. —Filed July 6, 1938

Interstate Circuit, Inc. (hereinafter sometimes called "Interstate"), Texas Consolidated Theatres, Inc. (hereinafter sometimes called "Texas Consolidated"), Karl Hoblitzelle and R. J. O'Donnell, defendants in the trial court, represent that in the proceedings had in the above entitled cause and in the rendition of the final decree there is error, which final decree of the District Court of the United States for the Northern District of Texas, Dallas Division, should be reversed, and file the following joint and several assignments of error, upon which each will rely upon appeal from the said final decree made by said Honorable Court on June 9, 1938, and say that said Honorable Court erred in the following respects:

1

The Court erred in perpetually enjoining and restraining all of the distributor defendants and their respective officers, agents, representatives and employes from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

[fol. 117] 2

The Court erred in perpetually enjoining and restraining all of the distributor defendants (except Vitagraph, Metro

and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and their respective officers, agents, representatives and employes from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

3

The Court erred in enjoining and restraining all of the distributor defendants from including in any future license agreements with subsequent run exhibitors in any city in the States of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, or any of them.

4

The Court erred in perpetually enjoining and restraining defendant Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants (Karl Hoblitzelle and R. J. O'Donnell) from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture [fol. 118] films distributed by said distributor defendants the restrictions as to night adult lower floor admission price, or against double featuring.

5

The Court erred in perpetually enjoining and restraining each and every one of the corporate defendants and their

respective officers, agents, representatives and employes, and each of the individual defendants from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or similar combination, conspiracy or agreement.

6

The Court erred in denying the motion of each of the defendants for judgment dismissing the case at the conclusion of all the evidence.

7

The Court erred in finding as a fact (Findings of Fact No. 10) that the distributor defendants distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States, and in overruling defendants' objection to such finding of fact.

8

The Court erred in finding as a fact (Findings of Fact No. 12) that the letter, dated July 11, 1934, sent by R. J. O'Donnell on Interstate's letterhead, included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley, at an admission price of 35¢ or more, should not thereafter be exhibited in the same city at an admission price of less than 25¢, and in overruling defendants' objection to such finding of fact.

9

The Court erred in finding as a fact (Findings of Fact No. 13) that prior to the 1934-1935 season the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases [fol. 119] the minimum was 10¢, and in overruling defendants' objection to such finding of fact.

10

The Court erred in failing to find as a fact that prior to the 1934-1935 season, United Artists had a definite policy against double featuring (R. 213).

11

The Court erred in finding as a fact (Findings of Fact No. 15) that in the negotiations with Interstate with reference to contracts for the 1934-1935 season, each distributor defendant was represented not only by its branch manager, but also by one or more superior officials from outside the State of Texas, and in overruling defendants' objection to such finding of fact.

12

The Court erred in failing and refusing to find as a fact that, upon receipt of the letters of April 25, 1934, and July 11, 1934, from R. J. O'Donnell, representatives of four of the distributor defendants (United Artists, Metro, Paramount and Vitagraph) expressed immediate agreement with the plan suggested in such letters, that only one distributor defendant (Universal) expressed hostility to the plan and that its primary concern was as to the number of its pictures which Interstate Circuit showed first run in its Class A theatres and that, with respect to the three other distributor defendants (RKO, Fox and Columbia), there is no evidence, other than their eventual agreement to the plan, of the immediate reaction of their representatives thereto.

13

The Court erred in failing and refusing to find as a fact that at the conferences between the defendants Hoblitzelle and O'Donnell, representing Interstate, and the representatives of each distributor defendant during the summer of 1934 with respect to the 1934-1935 licensing agreements, only the representatives of Interstate and of the particular distributor defendant involved were present.

[fol. 120]

14

The Court erred in finding as a fact (Findings of Fact No. 17) that the substance of the restrictions imposed by each distributor defendant was the same.

15

The Court erred in finding as a fact (Findings of Fact No. 17) that Metro incorporated in its written contract with Interstate for the 1934-1935 season an agreement to

impose both restrictions, and in overruling defendants' objection to such finding of fact.

16

The Court erred in failing and refusing to find as a fact that during the negotiations between the distributor defendants and defendants Hoblitzelle and O'Donnell, the request for a price restriction in the Rio Grande Valley, which was made on behalf of Texas Consolidated in the letter of July 11, 1934, was never mentioned.

17

The Court erred in failing and refusing to find as a fact that there is no evidence that the price restriction in the Rio Grande Valley, requested by Texas Consolidated in the letter of July 11, 1934, was to the advantage of any distributor defendant, and in considering the fact that none of the distributor defendants imposed such restriction as evidence in support of its finding of fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it.

18

The Court erred in failing and refusing to find as a fact that during the negotiations between the distributor defendants (except Universal) and defendants Hoblitzelle and O'Donnell, the request for the restrictions in the City of Austin, was never mentioned; in failing and refusing to find that there is no evidence that any subsequent run theatres [fol. 121] in the City of Austin charged an admission price of less than 25¢, and in considering the fact that only one of the distributor defendants (and it only for a single season) agreed to impose the restrictions in the City of Austin as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate to agree with Interstate to impose the restrictions requested by it.

19

The Court erred in finding as a fact (Findings of Fact No. 19) that the restrictions were strongly opposed by ex-

hibitors not affiliated with any distributor defendant and that defendant O'Donnell was aware of the hostility of such exhibitors and in considering such facts thus erroneously found in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

20

The Court erred in finding as a fact (Findings of Fact No. 20) that in the absence of substantially unanimous action by all of the distributor defendants with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions, and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally, and in considering such facts thus erroneously found as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

[fol. 122]

21

The Court erred in failing and refusing to find as a fact that adoption of the restrictions by each of the distributor defendants would have been to its own independent advantage, irrespective of any action taken by any of the other distributor defendants, and that less than substantially unanimous action by all of the distributor defendants would not have been harmful to any distributor defendant adopting the restrictions.

22

The Court erred in failing and refusing to find as a fact that failure of any distributor defendant to adopt either or both of the restrictions would have caused it a serious loss in first run revenue and would have reduced its total license fees.

23

The Court erred in failing and refusing to find as a fact that, since the request of Interstate was for the imposition of both the price and double feature restrictions, imposition by any distributor defendant of one of the requested restrictions without the other would not have been a compliance by it with the request of Interstate Circuit, and that such non-compliance would have caused such distributor defendant a serious loss in first run revenue and would have reduced its total license fees.

24

The Court erred in failing and refusing to find as a fact the fact recited in Paragraph 18 of the Agreed Statement of Facts that the exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city will reduce the income of the theatre giving such first run exhibition and the total license fees of the distributor of such motion pictures.

[fol. 123] 25

The Court erred in failing and refusing to find as a fact the fact recited in Paragraph 19 of the Agreed Statement of Facts that the exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fee of the distributor of such moving picture.

26

The Court erred in failing and refusing to find as a fact that the imposition of the restrictions by each distributor defendant, pursuant to agreement with or at the instance and behest of Interstate, had a reasonable relationship to the reward of the copyrights owned by such distributor defendant and was necessary for the protection of the profits accruing to it from the exhibition of its copyrighted films.

27

The Court erred in finding as a fact (Findings of Fact No. 21) that the most important issue in the case was

whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and that facts material to this issue were within the peculiar knowledge of the superior officials of the distributor defendants outside the State of Texas who negotiated the 1934-1935 contracts with Interstate, and in considering the fact that the distributor defendants did not call any of such superior officials as witnesses as evidence to support its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

28

The Court erred in finding (Findings of Fact No. 22), on the basis of the facts set forth in Findings 12 to 21, inclusive, that the distributor defendants agreed and conspired among [fol. 124] themselves to take uniform action upon the proposals made by Interstate, and agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, and in overruling defendants' objection to such finding of fact.

29

The Court erred in finding as a fact (Findings of Fact No. 22) that there was unanimity of action on the part of the distributor defendants not in one respect only but in many different respects, and in finding that the situation was such that, apart from agreement, diverse action would inevitably have resulted, and in overruling defendants' objection to such finding of fact.

30

The Court erred in finding as a fact (Findings of Fact No. 23) that shortly after April 25, 1934, Hoblitzelle and O'Donnell were in California during meetings of at least some of the defendant distributor executives, and in overruling defendants' objection to such finding of fact.

31

The Court erred in failing and refusing to find as a fact that the distributor defendants did not agree and conspire among themselves with respect to the action to be taken by them upon the proposals made by Interstate, and that they did not agree and conspire among themselves to agree with Interstate to impose the restrictions requested by Interstate.

32

The Court erred in failing and refusing to find as a fact that the granting of Interstate's request by the several distributors does not create any inference of any combination, conspiracy or agreement among the distributor defendants.

33

The Court erred in finding as a fact (Findings of Fact No. 25) that the effect of the restrictions upon the low-[fol. 125] income members of the community patronizing theatres who were unable or unwilling to accept the restrictions was to withhold from them altogether the best entertainment furnished by the motion picture industry, and in overruling defendants' objection to such finding of fact.

34

The Court erred in finding as a fact (Findings of Fact No. 26) that attendance deflected from subsequent run theatres to Interstate's first run theatres as a result of imposition of the restrictions has reduced the income of subsequent run exhibitors, and in further finding that there is no evidence that such loss of income has been offset by the higher scale in admission prices, which, because of the restrictions, some of the subsequent run theatres have adopted, and in overruling defendants' objection to such finding of fact.

35

The Court erred in failing and refusing to find as a fact the facts as recited in the stipulation of facts.

36

The Court erred in failing and refusing to adopt each of the several findings of fact proposed by the defendants

in their proposed findings of fact numbered consecutively from 2 to 40, inclusive.

For convenience of the Court, and to save repetition of the record, errors are thus severally assigned upon each refusal to find the facts as requested without repeating here each request, all of which appear in the defendants' proposed findings of fact and conclusions of law.

37

The Court erred in its Conclusion of Law No. 2 that all of the distributor defendants, by acting pursuant to a common plan and understanding in imposing the restrictions as to minimum night adult admission price upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio for the season 1934-1935 and seasons sub-[fol. 126] sequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

38

The Court erred in its Conclusion of Law No. 3 that all of the distributor defendants (with the exception of Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring, suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio for the season 1934-1935 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

39

The Court erred in its Conclusion of Law No. 4 that the combination and conspiracy described in Conclusions of Law Nos. 2 and 3 restrained interstate commerce in motion picture films.

40

The Court erred in its Conclusion of Law No. 5 that said combination and conspiracy effected an unreasonable restraint of interstate commerce.

41

The Court erred in its Conclusion of Law No. 6 that the restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or immunities conferred by the Copyright Law.

42

The Court erred in its Conclusion of Law No. 7 that the provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the [fol. 127] Cities of Dallas, Houston, Fort Worth and San Antonio for the seasons 1934-1935 and subsequent thereto restrain trade and commerce in feature films and are illegal and void.

43

The Court erred in its Conclusion of Law No. 8 that the provisions against double featuring appearing in the license agreements between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio for the seasons 1934-1935 and subsequent thereto restrain trade and commerce in feature films and are illegal and void.

44

The Court erred in its Conclusion of Law No. 9 that such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between any or all of the distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

45

The Court erred in its Conclusion of Law No. 10 that such provisions as bind any or all of the distributor defendants

(except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) to impose said restrictions against double featuring upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

46

The Court erred in its Conclusion of Law No. 11 that each and every agreement, whether oral or written, between all [fol. 128] of the distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, wherein the distributor defendants agreed to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio is illegal and void.

47

The Court erred in its Conclusion of Law No. 12 that each and every agreement, whether oral or written, between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and interstate for the seasons 1934-1935 and subsequent thereto, wherein the said distributor defendants agreed to impose said restrictions against double featuring upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void, and in concluding as a matter of law that such agreement constitutes an undue and unreasonable restraint of interstate commerce and is not within any privilege or immunity conferred upon the distributor defendants by the Copyright Law.

48

The Court erred in its Conclusion of Law No. 13 that the petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corpora-

tion of Texas) from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the Cities of Dallas, Fort Worth, Houston and San Antonio.

49

The Court erred in its Conclusion of Law No. 14 that the petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its [fol. 129] agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) binding said distributor defendants to impose said restrictions against double featuring upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio.

50

The Court erred in its Conclusion of Law No. 15 that the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar combination and conspiracy having similar purposes and objects.

51

The Court erred in failing and refusing to conclude as a matter of law that each distributor defendant, as the owner of copyrighted motion picture photoplays, had the legal right, acting independently of any other distributor, to include either or both of the restrictions in subsequent run license agreements, pursuant to agreement with or at the instance and behest of Interstate Circuit.

52

The Court erred in failing and refusing to conclude as a matter of law that, since the first agreement between Inter-

state Circuit and a single distributor containing the restrictive provisions was a legal contract, the fact that thereafter at different times each of the distributors, acting independently of each other, entered into similar agreements with Interstate Circuit does not constitute an agreement, com-[fol. 130] bination or conspiracy in violation of the Sherman Anti-Trust Law.

53

The Court erred in failing and refusing to conclude as a matter of law that there was no evidence to authorize an inference of conspiracy, combination or agreement among the distributor defendants.

54

The Court erred in failing and refusing to conclude as a matter of law that the price and double featuring restrictions imposed by the distributor defendants, pursuant to agreement with or at the instance and behest of Interstate Circuit, did not unreasonably restrain interstate trade or commerce.

55

The Court erred in enjoining and restraining Texas Consolidated Theatres, Inc., from continuing in the combination, conspiracy and agreement described in the Findings of Fact and Conclusions of Law, and from entering into or becoming a party to a like or similar combination, conspiracy or agreement, when under the undisputed evidence Texas Consolidated Theatres, Inc., did not make any contract with reference to either of said restrictions with any distributor other than Paramount.

56

The Court erred in enjoining each distributor defendant from including in its license agreements with subsequent run exhibitors any restriction as to admission price to be charged by said subsequent run exhibitor for such motion picture films or as to double featuring as a result of any agreement between said distributor and Texas Consolidated Theatres, Inc.

Wherefore, petitioners jointly and severally pray that the said final decree of the District Court of the United States

for the Northern District of Texas, Dallas Division, be set aside and reversed; that the respective injunctions granted by said Court be dissolved and judgment rendered herein [fol. 131] for each of the petitioners, or that the cause be remanded to the court below with directions to dismiss said cause of action for want of equity for reasons set forth in the assignments of error, and for other and further relief.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Jno. R. Maroney, Attorneys for Petitioners, Interstate Circuit, Inc., et al.

[fols. 132-135] Bonds on appeal for $1,000.00, approved and filed July 6, 1938, omitted in printing.

[fols. 136-141] Citation, in usual form, showing service on Clyde Eastus, filed July 6, 1938, omitted in printing.

[fol. 142] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 143] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 269

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed August 12, 1938

Come now the appellants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, and state that the points upon which they intend to reply in this Court in this case are as follows:

1. The Court erred in holding that the defendants, Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, by including by agreement with or at the instance and behest of

the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in license agreements for motion picture films released and distributed by them, beginning with the exhibition season of 1934-1935 and for each season subsequent thereto, with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, provisions requiring that said motion picture films so released and distributed by them that had been shown in the same city first run at a night adult lower floor admission price of 40¢ or more should not be exhibited by said subsequent run exhibitors for less than a night adult lower floor admission price of less than 25¢ and should not be exhibited as a part of a double feature program, have engaged in a combination, conspiracy and agreement with said defendants, Inter- [fol. 144] state Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

2. The Court erred in holding that the defendant, Vitagraph, Inc., by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, beginning with the exhibition season of 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

3. The Court erred in holding that defendant, Metro-Goldwyn-Mayer Distributing Corporation, by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth and San Antonio, beginning with the exhibition season 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in

said motion picture films in violation of the Sherman Anti-Trust Law.

4. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendants Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Twentieth Century-Fox Film Corporation of [fol. 145] Texas, is illegal and void.

5. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendant, Vitagraph, Inc., is illegal and void.

6. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendant, Metro-Goldwyn-Mayer Distributing Corporation, is illegal and void.

7. The Court erred in holding that the provision against double featuring, so included in subsequent run license agreements by defendants, Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, is illegal and void.

8. A distributor defendant as the owner of a copyrighted motion picture photoplay has the legal right:

(a) To attach to its license agreement with a first run exhibitor, its licensee, any condition that has a reasonable relation to the reward of its copyright. The reward of the copyright of a distributor is measured by the amount of its license fees;

(b) To so attach such a condition for its protection as licensor, for the protection of the licensee, the first run exhibitor, or for the mutual protection of the licensor and the licensee;

(c) To attach to its license agreement with subsequent run exhibitor in the same city with its first run licensee any

condition that has a reasonable relation to the reward of its copyright, for its protection, for the protection of the first run exhibitor, or for the mutual protection of the first run exhibitor and the distributor;

[fol. 146] (d) To contract with its first run licensee that the granted right of first run exhibition of a motion picture photoplay should not be impaired or destroyed by a subsequent exhibition at an admission price of less than 25¢ or as a part of a double feature program.

9. A first run exhibitor defendant, licensee of a copyrighted motion picture photoplay, has the legal right to contract with his licensor that the granted right of first run exhibition of such motion picture photoplay, shall not be impaired or destroyed by a subsequent exhibition of such motion picture photoplay at an admission price of less than 25¢ or as a part of a double feature program.

10. A first run exhibitor defendant as the licensee of copyrighted motion picture photoplays has the legal right to request, to urge, and to obtain for its protection from its licensor, a distributor defendant, an agreement to attach to its license contract any condition that has a reasonable relation to the reward of its copyright.

11. Any restraint of interstate commerce imposed by the attaching of any such condition to a license agreement is a restraint within the monopoly of the copyright and without the Sherman Anti-Trust Law.

12. The agreed statement of facts and the undisputed evidence show that each of the provisions as to subsequent run admission price and against double featuring is a condition attached to a license agreement that has a direct and positive relation to the reward of the copyright.

13. The agreed statement of facts and the undisputed evidence show that each of the provisions as to subsequent run admission price and against double featuring included by a distributor defendant in subsequent run license agreements at the instance of or by agreement with the first run licensee, had a reasonable relation to the protection of the value of the granted right of first run exhibition.

[fol. 147] 14. The agreed statement of facts and undisputed evidence show that there was an impelling business

reason for each distributor, acting independently, to attach such conditions to its license agreement, and there is no evidence from which the Court could find or legally infer that there was a conspiracy, combination and agreement among the several distributors in violation of the Sherman Anti-Trust Law to include either of said conditions.

15. The agreed statement of facts and undisputed evidence show that the inclusion of either or both of such provisions in license agreements by the several distributors did not unreasonably restrain commerce in violation of the Sherman Anti-Trust Act.

16. The Court erred in its decree in perpetually enjoining the corporate defendants from continuing in force such provisions in their respective license agreements with subsequent run exhibitors.

17. The Court erred in perpetually enjoining and restraining the defendants, Paramount Pictures Distributing Company, RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, their respective officers, agents, representatives and employes, from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films released and distributed by them in the cities above named requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more and prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

18. The Court erred in perpetually enjoining and restraining the defendants, Vitagraph, Inc., and Metro-Gold-[fol. 148] wyn-Mayer Distributing Corporation, their officers, agents, representatives, and employes, from enforcing or attempting to enforce said provisions in their license agreements with subsequent run exhibitors in reference to subsequent run admission price.

19. The Court erred in perpetually enjoining each of the defendants, Paramount Pictures Distributing Company,

Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Film Corporation of Texas, from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas and New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc. (this latter company not having made any such agreements since 1934-1935), Karl Hoblitzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to admission price to be charged by said subsequent run exhibitors for such motion picture films, or as to double featuring, as a result of any combination, conspiracy or agreements, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, or any of them, or between the said distributor defendants, and any of them, and the said exhibitor defendants, and any of them.

20. The Court erred in enjoining Interstate Circuit, Inc., its officers agents, representatives and employes, and the individual defendants from enforcing or attempting to enforce any provision in license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films released and distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring.

21. The Court erred in enjoining Texas Consolidated Theatres, Inc., from continuing in the combination, conspir- [fol. 149] acy and agreement described in the findings of fact and conclusions of law, and from entering into or becoming a party to any like or similar combination, conspiracy and agreement, because Texas Consolidated Theatres, Inc., never made any contract in reference to either of the restrictions referred to, except with Paramount Pictures Distributing Company, Inc., and it was not a party to any conspiracy.

22. The Court erred in enjoining Interstate Circuit, Inc., from enforcing or attempting to enforce any provision in its license agreement with any distributor defendant requiring said distributor defendant to impose upon subse-

quent run exhibitors of motion picture films the restrictions as to night adult lower floor admission price or against double featuring.

23. The Court erred in enjoining Interstate Circuit, Inc., from making any contract in reference to price restriction or against double featuring with any distributor defendant.

24. The Court erred in denying the motion of each of the defendants for judgment dismissing the case at the conclusion of all the evidence, for the reasons stated upon the record in support of each of said motions.

25. The Court erred in finding that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, Inc., and that they agreed and conspired with each other and with Interstate Circuit, Inc., to impose the restrictions requested by Interstate Circuit, Inc., upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, because there was no evidence showing such agreement and conspiracy or evidence from which it could be legally inferred that there was such an agreement and conspiracy.

26. The Court erred in considering the failure of the distributor defendants to call as witnesses any of the superior officials of distributor defendants from outside the State of Texas as a basis for the Court's finding that the distributor defendants agreed and conspired among themselves to take [fol. 150] uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon subsequent run exhibitors.

27. The Court erred in using as a basis for its finding that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon subsequent run exhibitors in the four cities named, a similarity of the provisions of the various distributors' contracts in reference to the restrictions requested by Interstate Circuit.

28. The finding of fact of the trial court to the effect that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon all subsequent run exhibitors in the cities named, is not supported by the evidence, but is contrary to the evidence.

Appellants further state that only the following parts of the record as filed in this Court are deemed necessary to be printed for the consideration of the points set forth above:

Title of Paper	Record Page
1. Printed Copy of Record, Form of Appeal to United States Supreme Court	....
2. Findings of Fact and Conclusions of Law requested by Petitioner	....
3. Memorandum in support of Findings requested by Petitioner	....
4. Findings of Fact and Conclusions of Law requested by Defendants	....
5. Memorandum in support of Findings requested by Defendants	....

[fol. 151]

6. Findings of Fact and Conclusions of Law of the District Court	....
7. Defendants' Objections to Court's Findings of Fact and Conclusions of Law	....
8. Order overruling Objections to the Court's Findings of Fact and Conclusions of Law	....
9. Order of Court refusing Findings of Fact and Conclusions of Law requested by Defendants	....
10. Final Decree of Trial Court	....
11. Petition for Appeal	....
12. Assignments of Error	....
13. Order allowing Appeal	....
14. Statement showing Jurisdiction of this Court under Equity Rule 12	....
15. Notice of Appeal and Proof of Service thereof	....

The printed record should also show that the original record on file contains:

1. Bonds on appeal approved by the Court on July 6th, 1938;
2. Citation on appeal;
3. Order of Court extending term in reference to this appeal;
4. Clerk's Certificate in due form.

Dated August 8th, 1938.

Thompson, Knight, Baker, Harris & Wright, Jno. R. Moroney, Geo. S. Wright, Counsel for Appellants, Interstate Circuit, Inc., et al.

[fol. 152] Received carbon copy of Statement of Points to be relied upon and Designation of Parts of the Record to be printed, pursuant to Rule 13 of the Rules of the Supreme Court of the United States, in the appeal of Paramount Pictures Distributing Company, et al., this 9th day of August, 1938.

N. A. Townsend, Acting Solicitor General, Counsel for Respondent.

[fol. 153] [File endorsement omitted.]

[fol. 154] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 270

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed August 12, 1938

Come now the appellants, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation, and Twentieth Century-Fox Film Corporation of Texas, and state that the points upon which they intend to rely in this Court in this case are as follows:

1. The Court erred in holding that the defendants, Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in license agreements for motion picture films released and distributed by them, beginning with the exhibition season of 1934-1935 and for each season subsequent thereto, with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, provisions requiring that said motion picture films so released and distributed by them that had been shown in the same [fol. 155] city first run at a night adult lower floor admission price of 40¢ or more should not be exhibited by said subsequent run exhibitors for less than a night adult lower floor admission price of less than 25¢ and should not be exhibited as a part of a double feature program, have engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

2. The Court erred in holding that the defendant, Vitagraph, Inc., by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, beginning with the exhibition season of 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

3. The Court erred in holding that defendant, Metro-Goldwyn-Mayer Distributing Corporation, by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth and San An-

tonio, beginning with the exhibition season of 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

4. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendants [fol. 156] Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Twentieth Century-Fox Film Corporation of Texas, is illegal and void.

5. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendant, Vitagraph, Inc., is illegal and void.

6. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendant, Metro-Goldwyn-Mayer Distributing Corporation, is illegal and void.

7. The Court erred in holding that the provision against double featuring, so included in subsequent run license agreements by defendants, Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, is illegal and void.

8. A distributor defendant as the owner of a copyrighted motion picture photoplay has the legal right:

(a) To attach to its license agreement with a first run exhibitor, its licensee, any condition that has a reasonable relation to the reward of its copyright. The reward of the copyright of a distributor is measured by the amount of its license fees;

(b) To so attach such a condition for its protection as licensor, for the protection of the licensee, the first run exhibitor, or for the mutual protection of the licensor and the licensee;

(c) To attach to its license agreement with subsequent run exhibitor in the same city with its first run licensee any condition that has a reasonable relation to the reward of its [fol. 157] copyright, for its protection, for the protection of the first run exhibitor, or for the mutual protection of the first run exhibitor and the distributor;

(d) To contract with its first run licensee that the granted right of first run exhibition of a motion picture photoplay should not be impaired or destroyed by a subsequent exhibition at an admission price of less than 25¢ or as a part of a double feature program.

9. A first run exhibitor defendant, licensee of a copyrighted motion picture photoplay, has the legal right to contract with his licensor that the granted right of first run exhibition of such motion picture photoplay, shall not be impaired or destroyed by a subsequent exhibition of such motion picture photoplay at an admission price of less than 25¢ or as a part of a double feature program.

10. A first run exhibitor defendant as the licensee of copyrighted motion picture photoplays has the legal right to request, to urge, and to obtain for its protection from its licensor, a distributor defendant, an agreement to attach to its license contract any condition that has a reasonable relation to the reward of its copyright.

11. Any restraint of interstate commerce imposed by the attaching of any such condition to a license agreement is a restraint within the monopoly of the copyright and without the Sherman Anti-Trust Law.

12. The agreed statement of facts and the undisputed evidence show that each of the provisions as to subsequent run admission price and against double featuring is a condition attached to a license agreement that has a direct and positive relation to the reward of the copyright.

13. The agreed statement of facts and the undisputed evidence show that each of the provisions as to subsequent run admission price and against double featuring included by a

distributor defendant in subsequent run license agreements [fol. 158] at the instance of or by agreement with the first run licensee, had a reasonable relation to the protection of the value of the granted right of first run exhibition.

14. The agreed statement of facts and undisputed evidence show that there was an impelling business reason for each distributor, acting independently, to attach such conditions to its license agreement, and there is no evidence from which the Court could find or legally infer that there was a conspiracy, combination and agreement among the several distributors in violation of the Sherman Anti-Trust Law to include either of said conditions.

15. The agreed statement of facts and undisputed evidence show that the inclusion of either or both of such provisions in license agreements by the several distributors did not unreasonably restrain commerce in violation of the Sherman Anti-Trust Act.

16. The Court erred in its decree in perpetually enjoining the corporate defendants from continuing in force such provisions in their respective license agreements with subsequent run exhibitors.

17. The Court erred in perpetually enjoining and restraining the defendants, Paramount Pictures Distributing Company, RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, their respective officers, agents, representatives and employes, from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films released and distributed by them in the cities above named requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited [fol. 159] in the same city for a night adult lower floor admission price of 40¢ or more and prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

18. The Court erred in perpetually enjoining and restraining the defendants, Vitagraph, Inc., and Metro-Goldwyn-Mayer Distributing Corporation, their officers, agents,

represen--tives, and employes, from enforcing or attempting to enforce said provisions in their license agreements with subsequent run exhibitors in reference to subsequent run admission price.

19. The Court erred in perpetually enjoining each of the defendants, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Film Corporation of Texas, from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas and New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc. (this latter company not having made any such agreements since 1934-1935), Karl Hoblitzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to admission price to be charged by said subsequent run exhibitors for such motion picture films, or as to double featuring, as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, or any of them, or between the said distributor defendants, and any of them, and the said exhibitor defendants, and any of them.

20. The Court erred in enjoining Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants from enforcing or attempting to enforce any provision in license agreements with each or any [fol. 160] of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films released and distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring.

21. The Court erred in enjoining Texas Consolidated Theatres, Inc., from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law, and from entering into or becoming a party to any like or similar combination, conspiracy and agreement, because Texas Consolidated Theatres, Inc., never made any contract in reference to either of the restrictions referred to, except with Paramount Pictures Dis-

tributing Company, Inc., and it was not a party to any conspiracy.

22. The Court erred in enjoining Interstate Circuit, Inc., from enforcing or attempting to enforce any provision in its license agreement with any distributor defendant requiring said distributor defendant to impose upon subsequent run exhibitors of motion picture films the restrictions as to night adult lower floor admission price or against double featuring.

23. The Court erred in enjoining Interstate Circuit, Inc., from making any contract in reference to price restriction or against double featuring with any distributor defendant.

24. The Court erred in denying the motion of each of the defendants for judgment dismissing the case at the conclusion of all the evidence, for the reasons stated upon the record in support of each of said motions.

25. The Court erred in finding that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, Inc., and that they agreed and conspired with each other and with Interstate Circuit, Inc., to impose the restrictions requested by Interstate Circuit, Inc., upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, because there was no evidence showing such agreement and conspiracy or evidence from which it could be legally inferred that action upon the proposals [fol. 161] made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon subsequent run exhibitors.

27. The Court erred in using as a basis for its finding that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon subsequent run exhibitors in the four cities named, a similarity of the provisions of the various distributors' contracts in reference to the restrictions requested by Interstate Circuit.

28. The finding of fact of the trial court to the effect that the distributor defendants agreed and conspired among

themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon all subsequent run exhibitors in the cities named, is not supported by the evidence, but is contrary to the evidence.

Appellants further state that only the following parts of the record as filed in this Court are deemed necessary to be printed for the consideration of the points set forth above:

[fol. 162] Title of Paper — Record Page

1. Printed Copy of Record, Form of Appeal to United States Supreme Court ....
2. Findings of Fact and Conclusions of Law Requested by Petitioner ....
3. Memorandum in support of Findings requested by Petitioner ....
4. Findings of Fact and Conclusions of Law requested by Defendants ....
5. Memorandum in support of Findings requested by Defendants ....
6. Findings of Fact and Conclusions of Law of the District Court ....
7. Defendants' Objections to Court's Findings of Fact and Conclusions of Law ....
8. Order overruling Objections to the Court's Findings of Fact and Conclusions of Law ....
9. Order of Court refusing Findings of Fact and Conclusions of Law requested by Defendants ....
10. Final Decree of Trial Court ....
11. Petition for Appeal ....
12. Assignments of Error ....
13. Order allowing Appeal ....
14. Statement showing Jurisdiction of this Court under Equity Rule 12 ....
15. Notice of Appeal and Proof of Service thereof ....

The printed record should also show that the original record on file contains:

1. Bonds on appeal approved by the Court on July 6th, 1938;
2. Citation on appeal;

3. Order of Court extending term in reference to this appeal;
4. Clerk's Certificate in due form.

Dated, August 8, 1938.

Thompson, Knight, Baker, Harris & Wright, Thos. D. Thatcher, Geo. S. Wright. Counsel for Appellants, Paramount Pictures Distributing Company, Inc., et al.

[fol. 163] Received carbon copy of Statement of Points to be relied upon and Designation of Parts of the Record to be printed, pursuant to Rule 13 of the Rules of the Supreme Court of the United States, in the appeal of Interstate Circuit, Inc., et al., this 9th day of August, 1938.

N. A. Townsend, Acting Solicitor General, Counsel for Respondent.

[fol. 164] [File endorsement omitted.]

Endorsed on cover: File Nos. 42,754, 42,755. Northern Texas, D. C. U. S. Term No. 269. Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, et al., appellants, vs. The United States of America. Term No. 270. Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., et al., Appellants, vs. The United States of America. Filed August 12, 1938. Term Nos. 269, O. T., 1938, 270, O. T., 1938.