

# If *Per Se* Is Dying, Why Not in TV Tying? A Case for Adopting the Rule of Reason Standard in Television Block-Booking Arrangements

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*“[W]e should not abdicate that role [under the Sherman Act] by formulation of per se rules with no justification other than the enhancement of predictability and the reduction of judicial investigation. . . .”*<sup>1</sup>

## INTRODUCTION

On July 2, 1890, Congress passed the Sherman Act<sup>2</sup> in response to an industrial society that was prospering as a result of new inventions.<sup>3</sup> These inventions greatly contributed to the growth of the new economy and to the growth of large trusts that had begun to dominate that new economy.<sup>4</sup> While the primary purpose of the Sherman Act was to combat trusts,<sup>5</sup> the language of the Act extended to other types of arrangements that had the potential of restraining trade.<sup>6</sup> In fact, after the trust-busts in the oil and

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<sup>1</sup> United States v. Topco Assocs., 405 U.S. 596, 622 (1972) (Burger, C. J., dissenting).

<sup>2</sup> Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (2001)).

<sup>3</sup> See *Violations of Antitrust Act of 1890: Hearing on H.R. Con. Res. 139, H.R. Con. Res. 29, and H.R. Con. Res. 813 Before the House Comm. on Rules*, 62nd Cong. 4 (1911) (statement of Rep. Augustus Stanley, Member, House Comm. on Rules).

<sup>4</sup> See Howard L. Peck, *The Sherman Antitrust Law From Its Legal and Economic Standpoint: Is It Effective* 1 (1912) (unpublished L.L.B. dissertation, Yale Law School) (on file with Yale Law School).

<sup>5</sup> *Id.* at 6.

<sup>6</sup> 15 U.S.C. § 1 (1994) (providing that “[e]very contract, combination in the form of trust

tobacco industries with which the Sherman Act is most often associated,<sup>7</sup> the Supreme Court had the opportunity to test the breadth of Section 1 and found that it curbed intellectual property rights.<sup>8</sup>

When enacting the Copyright Act of 1909,<sup>9</sup> Congress had two policies in mind: to provide an incentive to authors to reap the fruits of their labor, and to facilitate public dissemination of those works.<sup>10</sup> Thus, a tension exists between encouraging inventions by granting authors a copyright or patent monopoly while at the same time ensuring that this monopoly does not restrain trade.<sup>11</sup> Nowhere is this tension more visible than in a tying arrangement involving intellectual property.<sup>12</sup>

Generally, a tying arrangement occurs where a party will sell one product only if the buyer also purchases another product.<sup>13</sup> Many of the tying cases involving intellectual property have been

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or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”)

<sup>7</sup> See, e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

<sup>8</sup> *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912) (stating that “[r]ights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an [sic] universal license against positive prohibitions.”); see also *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 158 (1948) (declaring that “the copyright laws, like the patent statutes, make reward to the owner a secondary consideration.”).

<sup>9</sup> Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (repealed 1976).

<sup>10</sup> H.R. Rep. No. 2222, at 7 (1909) (stating that “[t]he enactment of the copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.”).

<sup>11</sup> See WARD S. BOWMAN, JR., *PATENT AND ANTITRUST LAW, A LEGAL AND ECONOMIC APPRAISAL* 1 (1973); see also LAURENCE I. WOOD, *PATENTS AND ANTITRUST LAW* 31 (1942).

<sup>12</sup> See *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 667 (1944) (quoting *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912) (White, C.J., dissenting)) (stating that “[s]uch a vast power to multiply monopolies at the will of the patentee would carve out exceptions to the Antitrust laws which Congress has not sanctioned.”).

<sup>13</sup> See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461 (1992) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958)); *Fields Prod. Inc. v. United Artists Corp.*, 318 F. Supp. 87, 88 (S.D.N.Y. 1969).

brought under Section 1 of the Sherman Act.<sup>14</sup> Although cases litigated under the Act during the Act's first twenty years had the misfortune of facing an interpretation that invalidated all restraints of trade,<sup>15</sup> in 1911 the Court adopted the rule of reason standard by construing the language in Section 1 as forbidding only unreasonable restraints.<sup>16</sup>

Under the rule of reason standard, courts balance all the competitive harms and benefits of a particular business arrangement before labeling it an unreasonable restraint of trade.<sup>17</sup> However, once experience with a particular type of arrangement enables a court to predict that the rule of reason would condemn it, that arrangement is considered to be illegal *per se* under the Sherman Act.<sup>18</sup>

The *per se* standard presumes that certain business arrangements are illegal because of their pernicious effect on trade without inquiry as to the arrangement's harm or redeeming virtue.<sup>19</sup> However, even if a court has typically categorized certain business arrangements as *per se* violations of Section 1 of the Sherman Act<sup>20</sup>, the inquiry often does not end there.<sup>21</sup> The *per se* standard,

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<sup>14</sup> See, e.g., *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 445-46 (1940); *Int'l Bus. Mach. Corp. v. United States*, 298 U.S. 131 (1936); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). Although this note focuses on cases brought under Section 1 of the Sherman Act, Section 3 of the Clayton Act also prohibits tie-in sales that may substantially restrain trade. See 15 U.S.C. § 14 (1997).

<sup>15</sup> See WOOD, *supra* note 11, at 28.

<sup>16</sup> See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

<sup>17</sup> See *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) (explaining that the reasonableness of a particular restraint involves consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption).

<sup>18</sup> See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982).

<sup>19</sup> See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

<sup>20</sup> *Id.* (stating that "[a]mong the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.>").

<sup>21</sup> See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 18 (1983) (stating that any inquiry must focus on whether distributors are selling "two separate products that may be tied together, and if so, whether they have used their market power to force the tying product"); *Bd. of Regents v. Nat'l Collegiate Athletic Ass'n*, 707 F.2d 1147, 1154 (10th Cir. 1983) (considering a least restrictive means test and business justification a *per se* illegal price fixing arrangement); Todd J. Anlauf, *Severing Ties With the Strained Per*

therefore, potentially enables courts to evaluate all business arrangements with the same costs as the rule of reason standard.<sup>22</sup> As a result, courts evaluating business arrangements that are categorized as illegal *per se* have saved little time on the docket. Moreover, relegating an arrangement to the *per se* category has restricted market growth in areas where the particular arrangement may not have caused an unreasonable restraint of trade.

Recognizing this Scylla and Charybdis of Section 1 analysis, the Supreme Court recently released vertical price-fixing from the chains of *per se* illegality in *State Oil Co. v. Khan*.<sup>23</sup> Although *State Oil* did not deal with tying arrangements involving intellectual property, its holding reaffirms the Court's recent willingness to withdraw vertical arrangements from *per se* illegality.<sup>24</sup> Indeed, this landmark decision has already led to a call for the rule of reason standard in block-booking, a tying arrangement that has been just as entrenched in *per se* illegality as vertical price-fixing had once been.<sup>25</sup>

Block-booking occurs when a distributor of visual programming ties or licenses one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the same distributor.<sup>26</sup> This special tying arrangement potentially violates Section 1 by forcing an exhibitor to accept features the exhibitor would otherwise not choose, thereby denying other exhibitors access to these features and depriving all distributors of an opportunity to license their features to the

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*Se Test for Antitrust Tying Liability: The Economic and Legal Rationale For A Rule of Reason*, 23 HAMLINE L. REV. 476, 491 (2000) (stating that even where the Supreme Court deploys the strict *per se* rule, some business justifications have been entertained by the court).

<sup>22</sup> See Anlauf, *supra* note 21, at 491 (explaining that “[a] business justification factor imputed into tying arrangement analysis may be closely analogous to the rule of reason approaches adopted in other areas of antitrust law such as monopolization”) (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)).

<sup>23</sup> 522 U.S. 3, 22 (1997).

<sup>24</sup> *Id.* at 10 (explaining that the majority of commercial arrangements subject to the antitrust laws are evaluated under the rule of reason standard).

<sup>25</sup> See, e.g., *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp.*, No. 97 Civ. 5499, 2000 U.S. Dist. LEXIS 2604, at \*1 (S.D.N.Y. Mar. 8, 2000).

<sup>26</sup> See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156 (1948).

coerced exhibitor.<sup>27</sup> Although the Supreme Court began applying the *per se* standard to tying arrangements outside of the context of block-booking,<sup>28</sup> the opportunity to extend this standard to block-booking arrangements arose in *United States v. Paramount Pictures, Inc.*<sup>29</sup>

*Paramount Pictures*, involving block-booking in the motion picture industry,<sup>30</sup> illustrates the Court's attempt to prevent a licensing practice in an industry dominated by five major movie distributors who were accused of engaging in other anti-competitive behavior at that time.<sup>31</sup> While the Court appreciated the narrow scope of its holding,<sup>32</sup> this case has been cited as a clear declaration of block-booking's illegality under the Sherman Act.<sup>33</sup> Because the Supreme Court has extended the rule of reason standard to various business arrangements in the name of free enterprise,<sup>34</sup> the Court should revisit the issue of block-booking in light of the special circumstances of the television industry.

This note examines the current *per se* illegal status of block-booking in the television industry. Although block-booking

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<sup>27</sup> See *Fields Prod. Inc. v. United Artists Corp.*, 318 F. Supp. 87, 88 (S.D.N.Y. 1969).

<sup>28</sup> The majority of these cases involve patent law. See *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (determining that it is unreasonable, *per se*, to foreclose competitors from any substantial market by tying arrangements); *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305-06 (1949) (stating that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition").

<sup>29</sup> 334 U.S. 131 (1948).

<sup>30</sup> See *id.* at 156.

<sup>31</sup> See *id.* at 140-41.

<sup>32</sup> *Id.* at 159 (stating that "[w]e do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.").

<sup>33</sup> See, e.g., *United States v. Loew's, Inc.*, 371 U.S. 38, 39 (1962); *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp.*, No. 97 Civ. 5499, 2000 U.S. Dist. LEXIS 2604, at \*1 (S.D.N.Y. Mar. 8, 2000).

<sup>34</sup> See, e.g., *Cont'l Television, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (overruling *Schwinn* and its *per se* invalidation of vertical restraints in the franchise system); see also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31-32 (1984) (holding that a particular tying arrangement, traditionally a *per se* violation, is not inherently anti-competitive where the seller does not have market power).

arrangements run the risk of unreasonably restraining trade,<sup>35</sup> this note argues that that risk is substantially lessened in the television industry.

Part I of this note addresses the most recent case to evaluate a block-booking arrangement in the television industry and examines the general rationale behind *per se* illegality in block-booking arrangements. Part I then presents other cases involving the bulk licensing of intellectual property, to which the Court has refused to attach *per se* illegality, as a model for how block-booking might also be released from the *per se* category. Part II examines the arguments both for and against continuing to evaluate block-booking arrangements under the *per se* standard. Finally, Part III argues that block-booking arrangements in the television industry are not sufficiently anti-competitive to warrant a *per se* standard of illegality. Part III concludes that relying on the rule of reason standard to evaluate block-booking agreements would enhance competition in the television industry.

## I.

The stigma that results when courts relegate a business arrangement to the *per se* category decreases the chance that such an arrangement will be upheld, even if the arrangement did not necessarily cause a restraint of trade. A recent example of how the *per se* stigma stifled competition where a block-booking arrangement would have enhanced competition occurred in *MCA Television Ltd. v. Public Interest Corp.*<sup>36</sup>

Public Interest Corporation (PIC) was a Florida corporation that owned and operated television station WTMV-TV in Lakeland, Florida.<sup>37</sup> MCA owned and licensed syndicated television

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<sup>35</sup> See, e.g., *Pape Television Co. v. Associated Artists Prod. Corp.*, 277 F.2d 750, 752 (1960).

<sup>36</sup> 171 F.3d 1265, 1279 (11th Cir. 1999).

<sup>37</sup> *Id.* at 1268.

programs.<sup>38</sup> PIC alleged that MCA's conditioning its licensing of several first-run television shows on the willingness of PIC to license another first-run series called *Harry and the Hendersons* (hereinafter "*Harry*") constituted an illegal tying arrangement.<sup>39</sup> PIC agreed to this arrangement, but it would not have chosen to license *Harry* had it not been a condition to licensing the other shows.<sup>40</sup> When PIC fell behind on the cash portion of the *Harry* contract, MCA sued PIC for breach of contract and copyright infringement.<sup>41</sup> PIC appealed the district court's finding for MCA and MCA cross-appealed the court's determination that MCA's conditioning of the initial contracts on PIC's licensing of *Harry* constituted an antitrust violation in the form of block-booking.<sup>42</sup> The Eleventh Circuit refused to remove the *per se* stigma in this arrangement between an independent network and MCA, a distributor and licensor of copyrighted features.<sup>43</sup> MCA argued that in *State Oil Co. v. Khan*,<sup>44</sup> the Supreme Court overruled the *per se* standard of illegality in the context of vertical maximum price-fixing and provided dicta that would permit courts to evaluate other vertical arrangements under the rule of reason standard.<sup>45</sup> However, the Eleventh Circuit halted that wave of change by refusing to apply the rule of reason standard in *MCA*.<sup>46</sup>

The rationale for maintaining a *per se* approach to prevent anti-competitive effects is the same in every tying arrangement. First, sellers who engage in tying arrangements force buyers to forego the purchase of a substitute for the tied product.<sup>47</sup> This forced purchase of the tied product denies market access to other suppliers

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1269.

<sup>40</sup> *Id.* at 1268.

<sup>41</sup> *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1268-69 (11th Cir. 1999).

<sup>42</sup> *Id.* at 1269.

<sup>43</sup> *Id.* at 1277-78.

<sup>44</sup> 522 U.S. 3 (1997).

<sup>45</sup> *Id.* at 10 (explaining that the majority of commercial arrangements subject to the antitrust laws are evaluated under the rule of reason standard).

<sup>46</sup> *See, e.g., MCA Television*, 171 F.3d at 1277-78 (rejecting plaintiff's assertion that in *State Oil* the Supreme Court held that the correct standard to be applied when assessing the legality of tying arrangements is the rule of reason standard).

<sup>47</sup> *See Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 605 (1953).

of that product.<sup>48</sup> While these anti-competitive effects are most likely to occur where the seller has “sufficient economic leverage” in the market of the tying product to induce his customers to take the tied product along with the tying item,<sup>49</sup> the Supreme Court has found “sufficient economic leverage” where the tying product is unique.<sup>50</sup> An example of uniqueness arises in the case of copyrighted materials packaged in a television block-booking arrangement,<sup>51</sup> as illustrated in *MCA*.

The rationale for finding sufficient economic leverage in cases involving copyrighted products derives from patent law cases<sup>52</sup> and the Copyright Act itself.<sup>53</sup> Courts have always feared that the copyright or patent holder may tie an inferior product to the product under copyright or patent protection, thus shielding the inferior program from having to stand on its own merits in the marketplace.<sup>54</sup> Similarly, the holder of the copyrighted monopoly

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<sup>48</sup> See *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947); see also *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957) (stating that “[a] wholesaler who compels a retailer to buy an unwanted inventory as a condition to acquisition of needed articles exacts a ‘quota’ from the retailer and excludes sales by competing wholesalers in the statutory sense.”).

<sup>49</sup> See *United States v. Loew’s Inc.*, 371 U.S. 38, 48 (1962) (affirming *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)).

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* (agreeing with the district court’s determination that a copyrighted film block-booked for television use is ‘in itself a unique product’ with sufficient economic power to impose an appreciable restraint on free competition).

<sup>52</sup> See, e.g., *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 456 (1940) (stating that a patentee may not “condition his license so as to tie the use of the patented device or process to the use of other devices, processes or materials which lie outside of the monopoly of the patented license.”). See also *Mercoind Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 491 (1942).

<sup>53</sup> 17 U.S.C. § 101 (2001).

<sup>54</sup> See, e.g., *Motion Pictures Patent Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917) (finding that conditioning the sale of a patented projector on use of the patentee’s films constituted an illegal tie in); see also *B.B. Chemical Co. v. Ellis*, 314 U.S. 495 (1941) (declaring that a firm that owned the patented process for reinforcing shoe insoles could not supply shoe manufacturers with the unpatented materials needed to utilize the process); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1941) (holding illegal under the Sherman Act a tying arrangement conditioning machine leases on the purchase of salt tablets).

who distributes features in a block-booking arrangement extends that monopoly beyond the Copyright Act's intended protection.<sup>55</sup>

Although preventing the extension of a copyright or patent monopoly was the rationale for relegating block-booking to the *per se* category of illegality,<sup>56</sup> another case to address copyrighted materials in a bulk sale context illustrates a permissive stance toward exploitation of the copyright, thus distinguishing copyrighted works from their patented counterparts.<sup>57</sup> In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*<sup>58</sup> the Court carved out an exception to the *per se* standard in cases involving the block sale of copyrighted materials<sup>59</sup> in the form of a blanket license.<sup>60</sup> The Court examined the special conditions of the music industry to sidestep the strict *per se* approach.<sup>61</sup> A blanket license involves a tying arrangement whereby composers and publishers join an organization to set one price for a bundle of goods without the opportunity for individual negotiation of each

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<sup>55</sup> See *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (stating that even where all the films of the package are of equal quality, the requirement that all be taken if one is desired increases the market for some and adds to the monopoly of the copyright); see also *Pape Television Co. v. Associated Artists Prod. Corp.*, 277 F.2d 750, 753 (1960) (stating that enlargement of the copyright principle is condemned in reliance on the principle which forbids the owner of a patent to condition its use on the use of other patented or unpatented materials). The rationale is the same even in the context of tying arrangements not involving copyrighted or patented materials. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984) (stating that if power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures).

<sup>56</sup> See *Paramount Pictures*, 334 U.S. at 157 (explaining that the district court condemned the enlargement of the copyright by relying on the principle which forbids the patent owner to condition its use on the purchase or use of other patented or unpatented materials).

<sup>57</sup> See, e.g., *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (holding that the issuance of blanket licenses by ASCAP and BMI is not *per se* unlawful under the antitrust laws).

<sup>58</sup> 441 U.S. 1 (1979).

<sup>59</sup> See *id.*

<sup>60</sup> Blanket licenses give licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term.

<sup>61</sup> See *Broadcast Music*, 441 U.S. at 20 (stating that the blanket license "accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use."); see also *id.* (stating that "individual sales transactions in the industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers.").

song.<sup>62</sup> However, because the members of the organizations<sup>63</sup> in *Broadcast Music*<sup>64</sup> could individually license performances to television networks and the organizations could not insist on the blanket license,<sup>65</sup> the Court found that television networks had a genuine economic choice.<sup>66</sup> This economic choice, together with the special circumstances of the music industry,<sup>67</sup> enabled the Court to deny application of the *per se* rule.<sup>68</sup> The Court's inquiry into the nature of the music industry in *Broadcast Music* has set a precedent for discriminating against the *per se* approach in copyrighted materials depending on an industry's circumstances.<sup>69</sup>

In two cases involving a practice specific to the motion picture industry, the industry in which block-booking was first condemned,<sup>70</sup> courts have permitted the exploitation of the copyright in sales involving the licensing of feature films.<sup>71</sup> Both

<sup>62</sup> *Columbia Broad. Sys., Inc. v. American Soc'y of Composers*, 400 F. Supp. 737, 741 (S.D.N.Y. 1975) (stating that ASCAP was organized as a "clearinghouse" for copyright owners and users to solve problems associated with the licensing of music).

<sup>63</sup> ASCAP and BMI.

<sup>64</sup> *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

<sup>65</sup> *Id.* at 11.

<sup>66</sup> *Id.*

<sup>67</sup> *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

<sup>68</sup> *See Broadcast Music*, 441 U.S. at 20 (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)) (stating that the blanket license, as we see it, is not a "naked restraint of trade with no purpose except the stifling of competition.").

<sup>69</sup> *See, e.g., Nynex Corp. v. Discon Inc.*, 525 U.S. 128 (1998) (holding that the *per se* group boycott rule does not apply to a single buyer's decision to buy from one seller rather than from another in the telecommunications industry). *Compare Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 349-51 (1982) (stating that *per se* treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it), *with White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (explaining that we need to know more about the actual impact of these arrangements on competition before deciding whether they should be classified as *per se* violations of the Sherman Act), *and Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) (indicating that the Court will not adopt a *per se* standard where the economic impact of certain practices is not immediately obvious).

<sup>70</sup> *See United States v. Paramount Pictures*, 334 U.S. 131, 159 (1948).

<sup>71</sup> *Three Movies of Tarzana v. Pac. Theatres, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (stating that clearances that a movie theater received from its distributor encouraged interbrand competition by forcing competitors to find alternative subrun movies to exhibit and promote); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1372 (3d Cir. 1996) (permitting the practice of exclusively licensing films to exhibitors in a prescribed area, also known as clearances).

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the Third and Ninth Circuits upheld clearances<sup>72</sup> in *Orson, Inc. v. Miramax Film Corp.*<sup>73</sup> and *Thee Movies of Tarzana v. Pacific Theatres Inc.*<sup>74</sup>

In the motion picture industry, film distributors grant clearances by licensing films to theaters for exhibition for a given amount of time.<sup>75</sup> In *Orson*<sup>76</sup> and *Thee Movies of Tarzana*,<sup>77</sup> the license was exclusive so that the film was not licensed to other exhibitors for a specific duration.<sup>78</sup> Because this practice provided the film distributor who held the copyright with the opportunity to discriminate among theaters,<sup>79</sup> the practice was arguably an exploitation of the copyright monopoly contra to the patent cases relied upon to reject block-booking in *Paramount Pictures*.<sup>80</sup> Moreover, the power to exploit the copyright monopoly and thereby restrain trade was potentially greater in an exclusive contract.

An exclusive contract that gave certain theaters first preference in the release of films was more dangerous than a block-booking arrangement. A film's profitability is directly related to the length of its run, with a first run producing greater box office profits than subsequent runs. However, the *Orson* court had no reason to

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<sup>72</sup> *Orson*, 79 F.3d at 1362; *Thee Movies of Tarzana*, 828 F.2d at 1399 (stating that “[i]n the motion picture industry, film distributors license films to theaters for exhibition for a given amount of time. Frequently, the license is exclusive, providing that during its duration, the film will not be licensed to other exhibitors in a prescribed area. Such licenses are called ‘clearances.’”).

<sup>73</sup> 79 F.3d 1358 (3d Cir. 1996).

<sup>74</sup> 828 F.2d 1395 (9th Cir. 1987).

<sup>75</sup> See *Orson*, 79 F.3d at 1362.

<sup>76</sup> 79 F.3d 1358.

<sup>77</sup> 828 F.2d 1395.

<sup>78</sup> *Id.*

<sup>79</sup> *Thee Movies of Tarzana v. Pac. Theatres, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987) (quoting *Naumkeag Theatres Co., Inc. v. New England Theatres Inc.*, 345 F.2d 910, 912 (1st Cir. 1965)) (stating that “[t]he whole system of runs and clearances discriminates between competing exhibitors.”).

<sup>80</sup> See *United States v. Paramount Pictures*, 334 U.S. 131, 157 (1948) (citing *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940)); *Mercoird Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944) *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942).

believe that the rule of reason standard could not adequately sanction or condemn the practice.<sup>81</sup>

The *Paramount Pictures* Court also addressed the issue of clearances, finding the particular arrangement an unreasonable restraint of trade,<sup>82</sup> but refused to relegate the practice to *per se* illegality.<sup>83</sup> Indeed, the Court's decision to refrain from categorizing clearances as *per se* illegal in 1948<sup>84</sup> enabled other courts to permit the practice where it enhanced competition.<sup>85</sup>

Because the Supreme Court has previously tailored Sherman Act jurisprudence to the circumstances of an industry<sup>86</sup> and recognized that exploiting a copyright may not always result in unreasonable restraints of trade,<sup>87</sup> block-booking may no longer warrant *per se* illegality under Section 1 of the Sherman Act.<sup>88</sup> On the other hand, the Court's recent declaration of the usefulness of the *per se* standard for arrangements not formally removed from the category,<sup>89</sup> indicates that block-booking may forever remain stigmatized as illegal *per se*.<sup>90</sup>

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<sup>81</sup> *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996).

<sup>82</sup> *Paramount Pictures*, 334 U.S. at 147 (agreeing with the District Court that the evidence supported the finding of a conspiracy to restrain trade by imposing unreasonable clearances).

<sup>83</sup> *Id.* at 145 (stating that “[t]he Department of Justice maintained below that clearances are unlawful *per se* under the Sherman Act. But that is a question we need not consider, for the District Court ruled otherwise and that conclusion is not challenged here.”).

<sup>84</sup> *Id.*

<sup>85</sup> *See Orson*, 79 F.3d at 1367; *see also These Movies of Tarzana*, 828 F.2d at 1399.

<sup>86</sup> *See e.g.*, *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

<sup>87</sup> *See Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996).

<sup>88</sup> *See Peck, supra* note 4, at 6.

<sup>89</sup> *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (reaffirming that some forms of restraint on trade have such limited potential for pro-competitive benefit and such predictable and pernicious anti-competitive effect, that they are deemed unlawful *per se*).

<sup>90</sup> *But see id.* at 4 (reasoning that “[s]tare decisis is not an inexorable command, particularly in the area of antitrust law, where there is a competing interest in recognizing and adapting to changed circumstances and the lessons of accumulated experience.”).

*A. Block-Booking Should Continue to be Evaluated under a Per Se Approach.*

“Where a plaintiff proves conduct that falls within a *per se* category, nothing more is needed for liability; the defendant’s power, illicit purpose and anticompetitive effect are all said to be irrelevant.”<sup>91</sup> For a practice to warrant *per se* illegality, a court must have enough experience with a particular practice to know that the alternative rule of reason standard would condemn it.<sup>92</sup> While only a few business practices have made it into the *per se* category,<sup>93</sup> the costs savings pursuant to the *per se* standard are greater than the loss of any benefits that might potentially result from these arrangements should they prove to be reasonable.<sup>94</sup> Thus, with the exception of price-fixing arrangements to which the *per se* standard no longer applies,<sup>95</sup> the Supreme Court has guarded its duty under the Sherman Act by refusing to lift tying arrangements from *per se* status.<sup>96</sup>

The Supreme Court created the *per se* standard for tying arrangements in *Int’l Salt Co. v. United States*<sup>97</sup> because tying arrangements pose an unacceptable risk of stifling competition by foreclosing entry to the market in the tied product.<sup>98</sup> Even in its more recent tying analysis,<sup>99</sup> the Court has articulated that the *per se* standard reflects congressional concern about the anti-

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<sup>91</sup> *Addamax Corp. v. Open Software Found. Inc.*, 152 F.3d 48, 51 (1st Cir. 1998); *see, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>92</sup> *See Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 349-50 (1982).

<sup>93</sup> *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (explaining that price fixing, division of markets, group boycotts, and tying arrangements have all been declared *per se* illegal).

<sup>94</sup> *See Maricopa*, 457 U.S. at 344 n.14 (citing F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 438-43 (1970)).

<sup>95</sup> *See State Oil Co. v. Khan*, 522 U.S. 3, 18 (1997).

<sup>96</sup> *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (reasoning that “[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an acceptable risk of stifling competition and therefore are unreasonable ‘per se.’”).

<sup>97</sup> 332 U.S. 392, 396 (1947).

<sup>98</sup> *See Jefferson Parish*, 466 U.S. at 10-12.

<sup>99</sup> *See id.* at 11-20.

competitive character of tying arrangements.<sup>100</sup> Thus, any attempt to evaluate these arrangements under the rule of reason must be cautiously made.

Although circuit courts bravely evaluating tying arrangements beyond the strict *per se* approach are split on the exact analysis,<sup>101</sup> it is clear that no court has evaluated the practice under a full rule of reason standard.<sup>102</sup> The reluctance of courts to adopt the rule of reason for tying arrangements reflects the degree to which these arrangements potentially restrain trade.<sup>103</sup> At the very least, officially keeping tying arrangements in the *per se* category causes courts to proceed with added caution.<sup>104</sup>

One area in which the tying arrangement has great potential to unreasonably restrain trade is in the block-booking arrangement.<sup>105</sup> As previously noted, the result of the block-booking arrangement is to extend the copyright monopoly.<sup>106</sup> Indeed, the Supreme Court has dealt with enough patent monopolization cases<sup>107</sup> and motion

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<sup>100</sup> *Id.* at 10 (citing H.R. Rep. No. 627, at 10-13 (1914)).

<sup>101</sup> *Compare* Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964) (requiring the distributor to receive a direct economic benefit from sales of a tied product to violate Section 1 of the Sherman Act), *with* Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514, 1516-17 (2d Cir. 1989) (rejecting the direct benefit test and requiring five elements including: a tying and tied product; actual coercion by the seller for the buyer to accept the tied product; sufficient economic leverage in the tying product; anti-competitive effects in the tied market; and involvement of a "not insubstantial amount" of interstate commerce in the tied market).

<sup>102</sup> *See, e.g.,* White v. Rockingham Radiologists, Ltd., 820 F.2d 98 (4th Cir. 1987); Carl Sandburg Vill. Condo. Ass'n v. First Condo. Dev. Co., 758 F.2d 203, 210-11 (7th Cir. 1985); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705 (11th Cir. 1984).

<sup>103</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6-7 (1958) (reasoning that tying agreements serve little purpose beyond the suppression of competition).

<sup>104</sup> *See, e.g.,* Yentsch v. Texaco, Inc., 630 F.2d 46, 58 (2d Cir. 1980) (recognizing considerable logic for using the direct economic benefit criterion even though the court did not have occasion to adopt the requirement); *see also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984) (indicating that it is far too late to remove certain tying arrangements from the *per se* standard).

<sup>105</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (stating that "[e]ven where all the films included in the package are of equal quality, the requirements that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have.").

<sup>106</sup> *See id.*

<sup>107</sup> *See, e.g.,* *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947); *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944) (hereinafter *Mercoid II*);

picture block-booking cases<sup>108</sup> for lower courts to declare with certainty that television block-booking is also an unreasonable restraint of trade.<sup>109</sup> When a television programming distributor forces a television exhibitor<sup>110</sup> to accept an inferior program in a tying arrangement, he or she impedes other distributors from bidding for that exhibitor's time slot<sup>111</sup> while obtaining an above market price for the inferior tied product.<sup>112</sup> In the case of the small network,<sup>113</sup> tying results in a clear absence of economic choice.<sup>114</sup> The small network must forego the opportunity to exhibit a superior program from another distributor in the tied program's time slot.<sup>115</sup> Since television program tying is bound to

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*Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944) (hereinafter *Mercoid I*); *B.B. Chemical Co. v. Ellis*, 314 U.S. 495 (1942); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

<sup>108</sup> See *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Paramount Pictures*, 334 U.S. 131.

<sup>109</sup> See, e.g., *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999); *Pape Television Co. v. Associated Artists Prod. Corp.*, 277 F.2d 750 (5th Cir. 1960); *Six W. Retail Acquisition Inc. v. Sony Theatre Mgmt. Corp.*, No. 97 Civ. 5499, 2000 U.S. Dist. LEXIS 2604, at \*1 (S.D.N.Y. Mar. 8, 2000); see also *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982) (stating that "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.").

<sup>110</sup> See, e.g., *MCA Television*, 171 F.3d at 1265; *Pape Television*, 277 F.2d at 750.

<sup>111</sup> See *Fields Prod. v. United Artists Corp.*, 318 F. Supp 87, 88 (S.D.N.Y. 1969) (explaining that in the motion picture industry, block-booking has been found to deprive competing distributors of an opportunity to license their own movies to the coerced theaters).

<sup>112</sup> See *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 605 (1953) (stating that by "conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the tied product's merits and insulates it from the competitive stresses of the open market.").

<sup>113</sup> See *MCA Television*, 171 F.3d at 1268 (explaining that Public Interest Corporation was a Florida corporation that owned and operated television station WTMV-TV in Lakeland, Florida); *Pape Television*, 277 F.2d at 751 (stating that Pape Television also ran a station in Alabama).

<sup>114</sup> See *Broadcast Music, Inc., v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 2 (1979) (indicating that the positive aspect of the ASCAP blanket license was that it offered the applicant a genuine economic choice). See also *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1372 (3d Cir. 1996) (indicating that alternative sources of supply negated the anti-competitive effects of the movie clearances).

<sup>115</sup> See, e.g., *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1279 (11th Cir. 1999) (stating that in determining the coercive use of the distributor's copyright, the court would not rely on the fact that the exhibitor found the programs that it wanted appealing,

result in such an unreasonable restraint of trade,<sup>116</sup> the Supreme Court, addressing television block-booking, would likely reaffirm its holding in *Paramount Pictures*<sup>117</sup> that block-booking is *per se* illegal under Section 1 of the Sherman Act.<sup>118</sup> Indeed, the unique nature of the copyright monopoly<sup>119</sup> and policy behind that monopoly requires the Court to reaffirm its initial position.<sup>120</sup>

That the syndicated licensor reaps added benefits by tying products that he did not create is further reason to continue with the *per se* standard. Although Congress grants the copyright monopoly to encourage the public dissemination of useful works,<sup>121</sup> a copyright holder does not serve the public interest by offering to license a work without regard to the quality of the copyright.<sup>122</sup> Because block-booking results in the forcing of an inferior film by attaching it to a quality film, the rationale of disseminating useful works is compromised.<sup>123</sup>

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but to the fact that it found the unwanted programs unappealing).

*See also* Paddock Publ'n Inc. v. Chicago Tribune Co., 103 F.3d 42, 47 (7th Cir. 1996) (noting that *Babylon 5*, a television program, "appeared exclusively on WPWR-TV (Channel 50) in Chicago and almost all other shows are exhibited exclusively on one channel per locale, and sticking with that station for their entire original production run, even though individual stations or producers may not have had market power.").

<sup>116</sup> *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (explaining that virtually all business agreements restrain trade to some extent; Section 1, therefore, has been construed to make illegal only those contracts that constitute unreasonable restraints of trade); *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948) (stating that "[a] restraint may be unreasonable either because an otherwise reasonable restraint is accompanied by a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*.").

<sup>117</sup> 334 U.S. 131 (1948).

<sup>118</sup> *See MCA Television Ltd.*, 171 F.3d at 1278 (reasoning that the Supreme Court has twice declared that block-booking contracts are among those economic arrangements that will "always merit a finding of *per se* illegality.").

<sup>119</sup> *See* *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 619 (1977) (stating that the copyright monopolies in *Paramount Pictures* and *Loew's* "represented tying products that the court regarded as sufficiently unique to give rise to a presumption of economic power.").

<sup>120</sup> *See* *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401-02 (1968) (stating that courts must take the Copyright Act as they find it and only Congress may "accommodate various competing considerations of copyright, communications and antitrust policy.").

<sup>121</sup> *See* H.R. Rep. No. 2222, at 7 (1909).

<sup>122</sup> *See* *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

<sup>123</sup> *See* *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

Moreover, the second rationale of the Copyright Act, to induce creative genius through copyright protection,<sup>124</sup> is not served in the typical block-booking arrangement. Because film distributors are assigned all the rights to content for film production<sup>125</sup> or because the content of a film is made through work-for-hire agreements,<sup>126</sup> the creators are already compensated for their work by the time the feature is involved in a block-booking arrangement.<sup>127</sup> Enabling a licensor to engage in block-booking and reap the benefits of the copyright monopoly<sup>128</sup> would therefore not encourage creative genius where the licensor was not the creator in the first place. Thus, preventing the block-booking arrangement does not discourage creation, since the creators of film content have already been compensated.<sup>129</sup> Because the block-booking arrangement does not further the policies of the Copyright Act,<sup>130</sup> the antitrust laws should be broadly interpreted to prevent this type of arrangement.<sup>131</sup> On the other hand, impeding a licensor's ability to distribute programming on its own terms may result in fewer purchases from screenwriters by distributors.<sup>132</sup> Thus, any attempt

<sup>124</sup> See H.R. Rep. No. 2222, at 7 (1909).

<sup>125</sup> See Judith A. Silver, *A Bad Dream: In Search of a Legal Framework For Copyright Infringement Claims Involving Digital Imagery in Motion Pictures*, 35 IDEA 407, 411 (1995).

<sup>126</sup> See Karen L. Gulick, *Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 56 (1994) (explaining that work-for-hire agreements join the efforts of director, choreographer, and screenwriter at the expense of the production company who in return is designated as author of the work for copyright purposes).

<sup>127</sup> See *id.*

<sup>128</sup> See Gulick, *supra* note 126.

<sup>129</sup> See *Fields Prod. v. United Artists Corp.*, 318 F. Supp. 87, 88 (S.D.N.Y. 1969).

<sup>130</sup> See *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (reasoning that “[i]t is said that the reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other.”).

<sup>131</sup> See LAWRENCE I. WOOD, *PATENTS AND ANTITRUST LAW* xiv (1942) (stating that the antitrust laws are directed to the public welfare and “wherever possible those laws should be given the widest possible latitude.”).

<sup>132</sup> See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS REPORT* 8 (1989) (discussing how the application of competition laws to licensing agreements may indirectly affect the incentives to create by influencing market structure).

to regulate television block-booking could adversely affect the market for innovation,<sup>133</sup> contrary to the policy of the Copyright Act.<sup>134</sup>

Even if television programming is not sufficiently unique to provide the Supreme Court with an adequate basis for applying the *Paramount Pictures* holding<sup>135</sup> to television block-booking arrangements, an outright rejection of the *per se* approach is still not justified under a *State Oil Co. v. Khan* analysis.<sup>136</sup> *State Oil* dealt specifically with vertical price-fixing arrangements.<sup>137</sup> In a vertical price-fixing arrangement, the supplier sets the prices at which distributors may sell their products, restraining their ability to sell in accordance with their own judgment.<sup>138</sup> Although the Supreme Court held vertical maximum price-fixing to be illegal *per se* in *Albrecht v. Herald Co.*,<sup>139</sup> the *State Oil* Court acknowledged that an outright ban on price discrimination actually prompted suppliers to enter the distribution market.<sup>140</sup> With the rationale behind *Albrecht* eliminated,<sup>141</sup> the Court declared that mere precedent did not justify continuing a strict *per se* standard on price-fixing<sup>142</sup> where a rule of reason analysis would suffice.<sup>143</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> See H.R. Rep. No. 2222, at 7 (1909).

<sup>135</sup> See *United States v. Paramount Pictures*, 334 U.S. 131, 159 (1948).

<sup>136</sup> 522 U.S. 3, 22 (1997) (stating that the rule of reason analysis can effectively identify anti-competitive conduct in vertical price-fixing arrangements as in most commercial arrangements subject to antitrust law).

<sup>137</sup> *Id.* (noting that while the inquiry in overruling *Albrecht* involved consideration of the antitrust laws in all vertical arrangements, *State Oil* was the first time since *Albrecht* that the Court confronted a maximum price-fixing arrangement).

<sup>138</sup> See *Kiefe Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). See also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (stating that all business combinations formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce are illegal *per se*).

<sup>139</sup> 390 U.S. 145 (1968).

<sup>140</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 16 (1997) (quoting 7 PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ¶ 1635, at 395 (Supp. 1989)) (stating that “[t]he ban on maximum resale price limitations declared in *Albrecht* in the name of ‘dealer freedom’ has actually prompted many suppliers to integrate forward into distribution, thus eliminating the very independent trader for whom *Albrecht* professed solicitude.”).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 20 (stating that “[i]n the area of antitrust law, there is a competing interest, well-

While *State Oil* overruled *Albrecht's per se* approach for vertical price-fixing,<sup>144</sup> the decision does not stand for a rejection of *per se* illegality in the context of block-booking.<sup>145</sup> In fact, the inhibiting result of *Albrecht* on dealer freedom whereby distributors enter the market instead of controlling prices,<sup>146</sup> is not an issue in block-booking. As *Broadcast Music*<sup>147</sup> illustrates, the business of providing copyrighted materials is strictly organized along the lines of composers, distributors, and exhibitors. Moreover, safeguards exist to prevent vertical integration in the motion picture<sup>148</sup> and television industries.<sup>149</sup> Thus, the fear that distributors would vertically integrate by entering the exhibiting market was not the rationale for applying the *per se* standard in block-booking. While the possibility that a small television network will face competition from larger network conglomerates always exists,<sup>150</sup> antitrust law is primarily concerned with protecting interbrand competition.<sup>151</sup> Thus, as long as the *per se*

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represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience.").

<sup>143</sup> *Id.* at 22 (reasoning that "[i]n our view, rule of reason analysis will effectively identify those situations in which vertical maximum price fixing amounts to anticompetitive conduct.").

<sup>144</sup> *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

<sup>145</sup> *See, e.g., MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1277-78 (11th Cir. 1999) (stating that *State Oil* does not stand for a rejection of the *per se* standard in any context other than in vertical maximum price-fixing).

<sup>146</sup> *See State Oil Co. v. Khan*, 522 U.S. 3, 4 (1997) (noting that "*Albrecht's* theoretical justifications for its *per se* rule [was] that vertical maximum price fixing could interfere with dealer freedom. . .").

<sup>147</sup> 441 U.S. 1, 9 (1978).

<sup>148</sup> *Southway Theatres Inc. v. Georgia Theater Co.*, 672 F.2d 485, 488 (5th Cir. 1982) (stating that "[a]lthough the motion picture industry was once vertically integrated, court decrees have forced distributors and producers to divest themselves of ownership in theatres.").

<sup>149</sup> *See Schurz Communications v. Fed. Communications Comm'n*, 982 F.2d 1043, 1045 (7th Cir. 1992) (explaining that for twenty years, F.C.C. regulations have prevented the ABC, NBC, and CBS networks from syndicating programs).

<sup>150</sup> *See, e.g., Carol Matlack, Welcome to the Real World*, BUS. WK., December 4, 2000, at 54, 55 (stating that antitrust authorities have cleared the way for Vivendi's takeover of Seagram Co., creating the world's second largest media group and putting pressure on media giant AOL Time Warner).

<sup>151</sup> *See Continental Television Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) (explaining that interbrand competition is the competition among the manufacturers of the same generic product and is the primary concern of antitrust law. In contrast, intrabrand competition is the competition between the distributors of the product of a

rejection of block-booking arrangements continues to stimulate competition among distributors of television programming,<sup>152</sup> there is no economic reason to extend *State Oil* to television block-booking arrangements.<sup>153</sup>

While the economic reasons that existed in *State Oil* for rejecting the *per se* approach<sup>154</sup> in vertical price-fixing arrangements are not present in television block-booking arrangements,<sup>155</sup> the legal reasoning differs as well. While precedent consistently labels block-booking arrangements as illegal *per se*,<sup>156</sup> the major cases involving vertical price-fixing vary in both facts and result.<sup>157</sup> The Court has justified these

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particular manufacturer). When interbrand competition exists, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product. *See State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997) (quoting *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-42 (1987)) (explaining that the Court's "recent decisions recognize the possibility that a vertical restraint imposed by a single manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition"); *see also Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) (stating that the primary purpose of the antitrust laws is to protect interbrand competition).

<sup>152</sup> *See United States v. Loew's, Inc.*, 371 U.S. 38, 48-49 (1962) (indicating that the adverse effects of illegal block-booking contracts included foreclosing other distributors being from selling to the stations).

<sup>153</sup> *Compare MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1278 (11th Cir. 1999) (reasoning that block-booking contracts will always merit *per se* illegality), *with State Oil*, 522 U.S. at 15 (concluding that vertically imposed maximum prices no longer merit *per se* treatment).

<sup>154</sup> *See State Oil*, 522 U.S. at 15-18.

<sup>155</sup> *See id.* at 16-17.

<sup>156</sup> *See Loew's*, 371 U.S. 38; *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Pape Television Co. v. Associated Artists Prod. Co.*, 277 F.2d 750 (5th Cir. 1960); *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp.*, No. 97 Civ. 5499, 2000 U.S. Dist. LEXIS 2604, at \*1 (S.D.N.Y. Mar. 8, 2000).

<sup>157</sup> *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1950) (holding all business combinations formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce illegal *per se*); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (holding illegal agreements under which manufacturers or suppliers set the minimum resale prices to be charged by their distributors); *Compare White Motor Co. v. United States*, 372 U.S. 253 (1963) (determining that too little was known about the competitive impact of a manufacturer's assignment of exclusive territories to its distributors to treat it as *per se* unlawful), *with United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (holding that a supplier's imposition of territorial rights or franchises on the distributor was so obviously destructive of competition as to be *per se* illegal), *and Albrecht v.*

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variations by emphasizing subtle factual distinctions in cases<sup>158</sup> while overlooking *stare decisis*.<sup>159</sup> By contrast, since *Paramount Pictures*<sup>160</sup> the courts have steadfastly held block-booking to be illegal *per se*.<sup>161</sup>

The rationale for holding motion picture block-booking illegal *per se* in *Paramount Pictures* was to prevent improper extensions of the copyright monopoly.<sup>162</sup> The *Paramount Pictures* decision relied upon the judicial history of patent law to buttress its rejection of block-booking arrangements.<sup>163</sup> In light of the long-

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Herald Co., 390 U.S. 145 (1968) (holding that vertical maximum price-fixing constituted a *per se* violation of the Sherman Act). *But see* *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (overruling *Schwinn* and rejecting a *per se* rule in the context of vertical nonprice restrictions) and *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht* and holding that vertical maximum price-fixing would be evaluated under the rule of reason standard).

<sup>158</sup> See, e.g., *GTE Sylvania*, 433 U.S. at 51 n.19 (declining to comment on *Albrecht*'s *per se* treatment of vertical maximum price restrictions, noting that the issue "involved significantly different questions of analysis and policy"); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 n.18 (1982) (noting that the restraint was more defensible because it was vertical rather than horizontal); *White Motor Co.*, 372 U.S. at 261 (stating that too little was known about the competitive impact of a manufacturer's assignment of exclusive territories to its distributors to be treated as *per se* unlawful).

<sup>159</sup> Cf. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (stating that *stare decisis* reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right"); *but see* *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (commenting that "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles and contributes to the actual and perceived integrity of the judicial process."). Compare *Ill. Brick Co. v. Ill.*, 431 U.S. 720, 736 (1977) (expressing reluctance to overrule decisions involving statutory interpretation), with *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (stating that the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act).

<sup>160</sup> 334 U.S. 131 (1948).

<sup>161</sup> See, e.g., *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1278 (11th Cir. 1999).

<sup>162</sup> *Paramount Pictures*, 334 U.S. 131, 157 (1948) (agreeing with the district court's finding that block-booking "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first.>").

<sup>163</sup> 334 U.S. at 157 (citing *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 459 (1940)) (stating "[t]hat enlargement of the monopoly of the copyright was condemned below in reliance on the principle that forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials."); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944); *Morton Salt Co. v. G.S. Suppiger Co.*, 314

standing patent precedent<sup>164</sup> and the courts' clear rejection of block-booking arrangements,<sup>165</sup> television block-booking arrangements warrant a *per se* approach.<sup>166</sup> Thus, unlike the vertical price-fixing cases,<sup>167</sup> the Supreme Court could not rely on inconsistent precedent<sup>168</sup> to change its *per se* approach in this unusual tying arrangement.<sup>169</sup> On the other hand, the present Supreme Court has relinquished long-standing doctrine in the past<sup>170</sup> and could once again apply policy over precedent in addressing the issue of block-booking.<sup>171</sup>

In light of consistent precedent for adhering to the *per se* approach in television block-booking arrangements,<sup>172</sup> the approach should continue to be applied in the name of judicial efficiency.<sup>173</sup> Although antitrust law warrants innovation through

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U.S. 488, 491 (1942).

<sup>164</sup> See, e.g., *Morton Salt*, 314 U.S. 488.

<sup>165</sup> See *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Pape Television Co. v. Associated Artists Prod. Corp.*, 277 F.2d 750 (5th Cir. 1960); *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, No. 97 Civ. 5499, 2000 U.S. Dist. LEXIS 2604, at \*1 (S.D.N.Y. Mar. 8, 2000).

<sup>166</sup> See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401-02 (1968) (stating that courts must take the Copyright Act as they find it and only Congress may accommodate the competing considerations of copyright, communications and antitrust policy).

<sup>167</sup> See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>168</sup> See, e.g., *Three Movies of Tarzana*, 828 F.2d at 1399.

<sup>169</sup> See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 9 (1984) (stating that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *per se*.").

<sup>170</sup> See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985) and rejecting the long-standing principle that public school teachers on parochial school premises are assumed to inculcate religious doctrine).

<sup>171</sup> One example of the Court's placement of policy over precedent occurred in the context of public aid to parochial schools. See *Mitchell v. Helms*, 530 U.S. 793 (2000) (declaring that anti-Catholic sentiment has existed in this country for far too long).

<sup>172</sup> See *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1278 (11th Cir. 1999).

<sup>173</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (stating that "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles."). Cf. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732-33 (1988) (stating that "[o]f course the common law, both in general and as embodied in the Sherman Act, does not lightly assume that the economic realities

common law rather than static application of rigid rules,<sup>174</sup> innovation in technology increases lawsuits.<sup>175</sup> A *per se* rule would not only alleviate clogged dockets,<sup>176</sup> but also ensure that interbrand competition thrives in the media marketplace in accordance with the spirit of antitrust law.<sup>177</sup> This would entail giving a small local network like PIC the choice to exhibit programming without the limitations of a block-booking arrangement. On the other hand, because of innovation in the television industry,<sup>178</sup> the *per se* standard for block-booking may have become an antiquated rule in the television context.<sup>179</sup> Block-booking may be the only method by which a financially challenged network can procure programming. In block-booking agreements, the licensor foregoes cash payment in exchange for the station's

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underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error. It is relevant, therefore, whether the common law of restraint of trade ever prohibited as illegal *per se* an agreement of the sort made here, and whether our decisions under section 1 of the Sherman Act have ever expressed or necessarily implied such a prohibition.”)

<sup>174</sup> See *Bus. Elecs.*, 485 U.S. at 732 (stating that restraint of trade in violation of § 1 of the Sherman Act “invokes the common law itself and not merely the static content that the common law had assigned to the term in 1890.”); see also *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 392 (1967) (Stewart, J., dissenting) (stating that “the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today.”).

<sup>175</sup> See, e.g., *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983) (acknowledging the public interest in making television broadcasting more available yet reasoning that standard should be the same whether public or private); *Microsoft v. United States*, 87 F. Supp. 2d 30 (D.D.C. 2000); *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48 (1<sup>st</sup> Cir. 1998); Carol Matlack, *Welcome to the Real World*, *BUS. WK.*, Dec. 4, 2000, at 54, 55 (stating that to win European antitrust approval, Vivendi had to promise that Vivendi Universal's content would be freely available to competing distributors after the takeover).

<sup>176</sup> Steven E. Feldman et al., *Mandatory Disclosure and Rocket Dockets: Accelerating the Processes of Litigation*, 456 *PLI/Pat.* 269, 283 (Nov. 1996) (stating that “[s]ection 471 of the Civil Justice Reform Act requires that each United States District Court implement a Civil Justice Expense and Delay Reduction Plan to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”).

<sup>177</sup> See *Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents*, 468 U.S. 85, 88 n.36 (1984).

<sup>178</sup> See *Turner Broad. v. Fed. Communications Comm'n.*, 910 F. Supp. 734 (D.D.C. 1995).

<sup>179</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) (stating that “this court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.”).

willingness to accept a program he might not desire.<sup>180</sup> Continuing with the *per se* approach to block-booking arrangements could therefore foreclose the small, independent competitor offering alternatives to viewers that opt out of cable. Thus, the *per se* approach more easily enables large conglomerates to dominate the market.<sup>181</sup> In light of these possible effects of applying the *per se* approach, using the rule of reason to evaluate block-booking arrangements might enhance competition in the television industry.

### *B. The Per Se Standard Should not Apply to Block-Booking Arrangements*

The Supreme Court has stated that only the most anti-competitive arrangements deserve the strict *per se* approach,<sup>182</sup> and that the number of arrangements warranting this approach has declined with time.<sup>183</sup> Tying arrangements,<sup>184</sup> especially those arrangements which expand a copyright holder's monopoly over his copyright,<sup>185</sup> have traditionally warranted the *per se* approach. However, in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*,<sup>186</sup> the Supreme Court acknowledged the circumstances under which *per*

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<sup>180</sup> See *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1268 (11th Cir. 1999).

<sup>181</sup> See *id.* In *MCA*, Public Interest Corporation was a typical public television network.

<sup>182</sup> See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (stating that only those arrangements having a pernicious effect on competition and lacking any redeeming virtue should be classified as *per se* violations of the Sherman Act); see also *State Oil*, 522 U.S. at 10 (noting the court's own reluctance to adopt *per se* rules).

<sup>183</sup> *State Oil*, 522 U.S. at 21 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-32 (1988)) (stating that although economic realities underlying earlier decisions may not have changed, different types of agreements may amount to restraints of trade in varying times and circumstances); see also *id.* (reasoning that "it would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was.").

<sup>184</sup> Besides block-booking, examples of tying arrangements include franchisor restrictions of a franchisee, distributor's territorial restrictions of a retailer, and maximum price setting agreements.

<sup>185</sup> See *United States v. Loew's, Inc.*, 371 U.S. 38, 47 (1962) (stating that "[w]here a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other.").

<sup>186</sup> 466 U.S. 2 (1984).

se illegality is inappropriate.<sup>187</sup> *Jefferson Parish* involved a hospital tying arrangement of surgical operations and anesthesiologist services.<sup>188</sup> Although *Jefferson Parish* did not involve the tie-in of intellectual property, the Court's elaborate inquiry into the market for the hospital's services to patients<sup>189</sup> reflected a rule of reason approach.<sup>190</sup> The Court examined whether the price, quality, supply or demand for the tying or tied product had been adversely affected.<sup>191</sup> Because an elaborate inquiry<sup>192</sup> led the Court to find that this tying arrangement failed to unreasonably restrain trade,<sup>193</sup> a precedent for upholding other tying arrangements now exists.

Applying the Court's criteria for upholding the tying arrangement in *Jefferson Parish*<sup>194</sup> to the Court's decision to hold block-booking illegal *per se* in *Paramount Pictures*<sup>195</sup> indicates that a similar arrangement would not always unreasonably restrain trade. The *Paramount Pictures* Court never addressed whether the price, quality, supply or demand for the tying or tied product had been adversely affected,<sup>196</sup> and instead relied heavily on the patent law cases.<sup>197</sup> Furthermore, the *Paramount Pictures* Court was concerned about the vertical combination of producing, distributing, and exhibiting motion pictures among the five major motion picture producers. This vertical combination further compounded the anti-competitive effects of the block-booking arrangement.<sup>198</sup> The special circumstances of the motion picture

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<sup>187</sup> See *id.* at 18 (explaining that when the seller lacks the requisite market power to force customers to purchase an unwanted product, a plaintiff can only prove an antitrust violation by presenting evidence of an unreasonable restraint on competition in the relevant market).

<sup>188</sup> See *Jefferson Parish*, 466 U.S. at 18.

<sup>189</sup> *Id.* at 31 (stating that "there is no evidence that the price, the quality, or the supply or demand for either the 'tying product' or the 'tied product' involved in this case has been adversely affected.").

<sup>190</sup> *Id.* at 18-22.

<sup>191</sup> *Id.* at 18.

<sup>192</sup> *Id.* at 26-32.

<sup>193</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 32 (1984).

<sup>194</sup> *Id.*

<sup>195</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-59 (1948).

<sup>196</sup> See *Jefferson Parish*, 466 U.S. at 31.

<sup>197</sup> See *id.* at 21 n.30.

<sup>198</sup> See *Paramount Pictures*, 334 U.S. at 140-41.

industry caused a restraint of interstate trade in the distribution and exhibition of films.<sup>199</sup> While adding a block-booking arrangement to this vertical combination would have unreasonably restrained trade,<sup>200</sup> the Court's finding of *per se* illegality was too broad. At the very least, the Court has relinquished its disdain for vertical arrangements,<sup>201</sup> a condition that led to the *Paramount Pictures* holding.<sup>202</sup> Thus, the Court should again address its standard for block-booking under *State Oil*.

The *State Oil* Court indicated that the concerns inducing the *Albrecht* Court to find vertical maximum price fixing illegal *per se*<sup>203</sup> no longer justified this harsh standard.<sup>204</sup> The Court further noted the lack of cases directed against the type of conduct condemned in *Albrecht*.<sup>205</sup> Applying *State Oil*'s rationale to block-booking, a court could clearly identify how and when a block-booking arrangement would result in an unreasonable restraint of trade.<sup>206</sup> Furthermore, the infrequency with which the Court has addressed block-booking<sup>207</sup> and the fact that these suits were never brought by a private party, may indicate the extent to which block-booking facilitates transactions with exhibitors. Continuing with a *per se* standard could increase transaction costs where a block-

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<sup>199</sup> *See id.* at 141.

<sup>200</sup> *See id.*

<sup>201</sup> *See, e.g.,* Cont'l Television, Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling *Schwinn*); *see also* *Albrecht v. Herald Co.*, 390 U.S. 145, 152-54 (1968) (vertical maximum price-fixing is a *per se* antitrust violation); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (overruling *Albrecht*).

<sup>202</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 143-44 (1948).

<sup>203</sup> *State Oil*, 522 U.S. at 16-18 (observing that the justifications for applying the *per se* standard to vertical maximum price-fixing in *Albrecht* included interference with dealer freedom, restriction on dealers' ability to offer essential or desired services and a disguise for minimum price-fixing schemes).

<sup>204</sup> *Id.* at 15 (stating that "it [is] difficult to maintain that vertically-imposed maximum price fixing could harm consumers or competition to the extent necessary to justify [its] *per se* invalidation.").

<sup>205</sup> *Id.* at 18-19.

<sup>206</sup> *See, e.g.,* *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 159 (1948) (suggesting that films may be sold in blocks or groups without a requirement to purchase more than one film).

<sup>207</sup> To date, the Supreme Court has only addressed block-booking in two cases. *See id.*; *see also* *United States v. Loew's, Inc.*, 371 U.S. 38, 47 (1962).

booking arrangement might be in the parties' best interests.<sup>208</sup> On the other hand, despite the *State Oil* Court's thorough analysis of arrangements warranting the *per se* standard, block-booking was not mentioned.<sup>209</sup> This oversight could indicate that the vertical block-booking arrangement is a beast of its own, best analyzed in accordance with other tying cases involving intellectual property.<sup>210</sup>

While the Supreme Court's finding that block-booking arrangements are illegal *per se* rests in part on the principle that a copyright holder may not expand his monopoly,<sup>211</sup> this rationale is weak in the television block-booking context. The patent law cases,<sup>212</sup> on which the copyright tying case relies,<sup>213</sup> focus on preventing a distributor from exploiting the uniqueness of his invention.<sup>214</sup> Although the Eleventh Circuit recently relied on precedent prohibiting copyright exploitation<sup>215</sup> and found the television block-booking arrangement in *MCA* illegal *per se*,<sup>216</sup> the facts of that case<sup>217</sup> indicate that this precedent does not carry the same weight in television block-booking as in patent law or other tying cases.<sup>218</sup>

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<sup>208</sup> For example, *Albrecht* gave rise to litigation between distributors and publishers in the newspaper industry. See *State Oil Co. v. Khan*, 522 U.S. 3, 16 (1997) (citing P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW*, at 599-614 (Supp. 1996)).

<sup>209</sup> See *id.* at 10-22.

<sup>210</sup> See *B.B. Chemical Co. v. Ellis*, 314 U.S. 495 (1941); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1941); *Motion Pictures Patent Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

<sup>211</sup> See *Paramount Pictures*, 334 U.S. at 157-58.

<sup>212</sup> See e.g., *B.B. Chemical*, 314 U.S. 495 (1941); *Morton Salt*, 314 U.S. 488 (1941); *Motion Pictures*, 243 U.S. 502 (1917).

<sup>213</sup> See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-59 (1948).

<sup>214</sup> *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (stating that "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

<sup>215</sup> See *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1276-79 (11th Cir. 1999).

<sup>216</sup> See *id.*

<sup>217</sup> See *infra* Part I.

<sup>218</sup> See *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305-06 (1949).

First, the danger of a creator attempting to exploit his monopoly by receiving the same price for an inferior program through tying is absent where, as in *MCA*, the distributor is not the creator, but a licensor of the program.<sup>219</sup> Second, the television block-booking arrangement bears a greater resemblance to the *Broadcast Music* blanket licensing arrangement,<sup>220</sup> or the film clearances in *Orson*, which the Court refused to declare illegal *per se*.<sup>221</sup>

The Supreme Court's refusal to find the blanket license illegal *per se* in *Broadcast Music*<sup>222</sup> resulted from an examination into the television network industry.<sup>223</sup> The Court found that the blanket license offered by ASCAP and BMI was more efficient than individual negotiations between networks and composers.<sup>224</sup> This efficiency, coupled with individual negotiations if the smaller networks so desired,<sup>225</sup> led the Court to find that the blanket license

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<sup>219</sup> *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390, 398 (1968) (stating that while the television broadcaster does less than the motion picture exhibitor because he only supplies electronic signals, courts have nonetheless treated broadcasters as exhibitors).

<sup>220</sup> *See Columbia Broad. Sys. Inc. v. American Soc'y of Composers*, 400 F. Supp. 737, 741 (S.D.N.Y. 1975). The blanket license gives licensees the right to perform any and all of the compositions owned by the members as often as the licensees desire for a stated term. Radio and television broadcasters are the largest users of the blanket license. Fees are ordinarily a percentage of total revenues or a flat dollar amount and do not ordinarily depend on the amount or type of music used. Thus, the broadcast network may in fact receive music in the blanket license that it otherwise might not desire or that is not worth the flat rate. The blanket license has been considered a "clearinghouse" for copyright owners and users to solve the problems associated with music licensing.

<sup>221</sup> *See Orson Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1370-72 (3d Cir. 1996).

<sup>222</sup> 441 U.S. 1 (1979).

<sup>223</sup> *Id.* at 14-15 (stating that "[t]he extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.") (quoting Mem. for U.S. as *Amicus Curiae* on Pet. for Cert. in *K-91, Inc. v. Gershwin Publ'g Corp.*, O.T. 1967, No. 147, at 10-11 (1979)).

<sup>224</sup> *Id.* at 20 (explaining that "[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner.").

<sup>225</sup> *See id.* at 12 (acknowledging that "there are no practical impediments preventing direct dealing by the television networks if they so desire.").

did not warrant *per se* illegality.<sup>226</sup> The fact that networks were forced to purchase some songs that they otherwise might not desire was a small disadvantage in light of the conveniences conferred by the blanket license.<sup>227</sup>

Just as the blanket license insures that smaller networks are not shut out of the bidding process for the works of various composers and publishers,<sup>228</sup> block-booking in the television industry enhances the attractiveness of a small exhibitor with little bargaining power to a powerful distributor commonly engaged in the practice.<sup>229</sup> Although the television block-booking arrangement may cause a network to accept a program the network would not otherwise exhibit,<sup>230</sup> the arrangement enables the smaller network to remain competitive. Without block-booking, the distributor may find other takers in the vast television industry.<sup>231</sup> Because many exhibitors depend upon the same distributor to remain in business, the Supreme Court will be inhibiting free enterprise should it continue to apply a *per se* standard to television block-booking. As *Broadcast Music* illustrates, the Supreme Court has previously recognized that

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<sup>226</sup> See *id.* at 24 (declaring that the blanket license “should be subject to a more discriminating examination under the rule of reason.”).

<sup>227</sup> See *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 22 (1979); see also E. Scott Johnson, *Considering the Source-Licensing Threat to Performing Rights in Music Copyrights*, 6 U. MIAMI ENT. & SPORTS L. REV. 1, 10 (1989) (noting that “[c]onvenience is the key to the blanket license. For certain music users, such as nightclubs and restaurants, a blanket license is virtually imperative [because] [i]t is practically impossible for such users to predict their musical requirements far enough in advance to procure all the individual licenses needed to present variety entertainment.”).

<sup>228</sup> See *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 21 (1979) (explaining that ASCAP provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses).

<sup>229</sup> See *Schurz Communications v. Fed. Communications Comm’n*, 98 F.2d 1043, 1047 (7th Cir. 1992) (highlighting the fact that with the repeal of the F.C.C. rules, ABC, NBC, and CBS are now permitted to syndicate programming).

<sup>230</sup> See *MCA Television v. Pub. Interest Corp.*, 171 F.3d 1265, 1268 (11th Cir. 1999).

<sup>231</sup> See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 402 (1968) (examining whether an entrepreneur who erected television antennas syndicating broadcasts of copyrighted materials did not violate the Copyright Act because of due regard to changing technology).

special needs of certain industries cannot be addressed by a sweeping rule such as the *per se* standard.<sup>232</sup>

In the case of clearances,<sup>233</sup> the Court refused to apply the *per se* standard despite recognition that clearances had dangerous potential and similarities to the then *per se* illegal practice of price-fixing.<sup>234</sup> Lower courts addressing clearances today have recognized the pro-competitive effects that the practice has in the motion picture industry.<sup>235</sup> Although clearances also exploit the copyright monopoly by exclusively licensing a copyrighted feature, thereby advantaging some exhibiting theaters and disadvantaging others,<sup>236</sup> courts have used the rule of reason to identify where this exclusive licensing actually restrains trade.<sup>237</sup> A similar approach should apply to block-booking. On the other hand, when a distributor exclusively licenses a film as a clearance, he is not tying that film to any other copyrighted feature, in violation of cases indicating that tying intellectual property is illegal *per se*.<sup>238</sup> Overcoming this precedent could prove to be difficult.

Although the Supreme Court has stated that the benefits of a sweeping *per se* rule lie in the judicial efficiency created once experience shows the anti-competitiveness of an arrangement,<sup>239</sup>

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<sup>232</sup> See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (declaring that professional baseball qualifies for an antitrust exemption given baseball's unique characteristics and needs).

<sup>233</sup> See generally *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1370 (3d Cir. 1996) (providing a general discussion of what clearances are).

<sup>234</sup> *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 148 (1948) (stating that "[c]learances have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors. The District Court could therefore have eliminated clearances completely for a substantial period of time, even though, as it thought, they were not illegal *per se*.").

<sup>235</sup> See *Orson*, 79 F.3d at 1372 (finding that the clearances promoted interbrand competition by requiring the Roxy to seek out and exhibit other distributors' films).

<sup>236</sup> See *id.* (conceding that the clearances "reduced intrabrand competition by disallowing the Roxy from showing on a first-run basis any Miramax film that the Ritz had selected").

<sup>237</sup> See *id.* at 1371 (stating that clearances are subject to rule of reason treatment as vertical non-price restraints of trade).

<sup>238</sup> See *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1941); *Motion Pictures Patent Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

<sup>239</sup> See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982) (stating that

the requisite experience is difficult to achieve in media industries such as television that are constantly changing. Since the advent of cable television, courts have been forced to reexamine their holdings in an effort to keep pace with change.<sup>240</sup> While a merger or affiliation with a major network may be efficient for the small network,<sup>241</sup> a conglomerate could lead to a monopoly in violation of Section 2 of the Sherman Act.<sup>242</sup> The terms of a block-booking arrangement, while running the risk of being unfavorable to a network, may also increase competition by keeping that network in business. A court applying a *per se* standard without looking into a particular industry's circumstances would undoubtedly eliminate cases on the judicial docket.<sup>243</sup> However, economic efficiency should not be sacrificed in the name of judicial efficiency.

### III. REASON SHOULD RULE IN TELEVISION BLOCK-BOOKING

In *State Oil*, a landmark case in the Supreme Court's Sherman Act jurisprudence, the Court noted the necessity of reevaluating the *Albrecht* standard of *per se* illegality in the context of vertical price fixing<sup>244</sup> in light of post-*Albrecht* decisions.<sup>245</sup> Since *Paramount*

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*per se* treatment is justified "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.").

<sup>240</sup> See, e.g., *Schurz Communications v. Fed. Communications Comm'n*, 982 F.2d 1043, 1055-57 (7th Cir. 1992) (ordering the F.C.C. to readdress its restrictions on the major networks).

<sup>241</sup> See *id.* at 1053 (discussing the fact that many weak independent stations have become affiliates of the new major network, Fox).

<sup>242</sup> 15 U.S.C. § 2 (2001) (providing that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.").

<sup>243</sup> The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation surrounding "effect" or "purpose" of a practice is often extensive and complex. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); see also *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982) (stating that for the sake of litigation efficiency, "we have tolerated the invalidation of some agreements that a full blown inquiry might have proved to be reasonable.").

<sup>244</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (stating that "[a] review of this Court's decisions leading up to and beyond *Albrecht* is relevant to our assessment of the continuing validity of the *per se* rule established in *Albrecht*.").

<sup>245</sup> See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (holding that vertical maximum price-fixing constituted a *per se* violation of the Sherman Act); *United States v. Arnold*,

*Pictures*,<sup>246</sup> the Supreme Court has not addressed the appropriate standard to be applied in television block-booking arrangements. Because *MCA* illustrates the stifling effect that this decision has had on television block-booking arrangements,<sup>247</sup> the Supreme Court should re-address this issue in light of post-*Paramount Pictures* decisions.<sup>248</sup> The alternative of continuing with the *per se* standard would only sacrifice the benefits that some arrangements would otherwise create.<sup>249</sup>

*A. Evaluating the Television Block-Booking Arrangement under the Rule of Reason Standard would Serve the Public Interest.*

Although tying arrangements were declared illegal *per se* in *International Salt*,<sup>250</sup> some forty years later in *Jefferson Parish*<sup>251</sup> the Court's elaborate inquiry into a tying arrangement was considered a full rule of reason approach.<sup>252</sup> Although the Court refused to reject the notion that some tying arrangements might so stifle competition as to be illegal *per se*,<sup>253</sup> the Court willingly considered the pro-competitive effects of the hospital's

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Schwinn & Co., 388 U.S. 365 (1967) (holding that a supplier's imposition of territorial rights or franchises on the distributor was so obviously destructive of competition as to be *per se* illegal) *White Motor Co. v. United States*, 372 U.S. 253 (1963) (determining that too little was known about the competitive impact of a manufacturer's assignment of exclusive territories to its distributors to be treated as *per se* unlawful). *But see* *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (overruling *Albrecht* and holding that vertical maximum price-fixing would be evaluated under the rule of reason standard); *Continental T.V. Inc., v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (overruling *Schwinn* and rejecting a *per se* rule in the context of vertical nonprice restrictions).

<sup>246</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

<sup>247</sup> *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1279 (11th Cir. 1999) (stating that "unless and until the Supreme Court explicitly overrules [*Paramount*] and [*Loew's*], we must adhere to the rule they establish.").

<sup>248</sup> *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984); *see also State Oil*, 522 U.S. at 22.

<sup>249</sup> *See Jefferson Parish*, 466 U.S. at 35 (O'Connor, J., concurring) (reasoning that "[t]he time has therefore come to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have.").

<sup>250</sup> 332 U.S. 392, 398 (1947).

<sup>251</sup> 466 U.S. at 29.

<sup>252</sup> *See Anlauf, supra* note 21, at 492-93 (discussing how use of the separate demand test in *Jefferson Parish* resulted in the court's adoption of a full rule of reason standard).

<sup>253</sup> *See Jefferson Parish*, 466 U.S. at 9.

arrangement wherein the hospital tied anesthesiological services to surgical care.<sup>254</sup> As a result, the hospital's defense that its tying of services reduced costs to patients overcame the presumption of *per se* illegality.<sup>255</sup> Should the Court continue to accept defenses that a particular arrangement promotes consumer interest under a rule of reason analysis,<sup>256</sup> more tying arrangements would be upheld, including television block-booking.

Applying a consumer best interest defense to the *MCA* case indicates that the Eleventh Circuit may have found the television block-booking arrangement to have merit in that instance. The Eleventh Circuit rejected *MCA*'s argument that PIC desired the block-booking arrangement not because the arrangement was unique but rather, because PIC had no money and *MCA* offered the licenses for barter.<sup>257</sup> The block-booking arrangement decreased the costs to PIC as a consumer of distributor programming.

PIC's lack of funds suggests that there may have been no alternative programming from other distributors. The resulting consequence of one less independent television network at a time when high cost cable companies were accused of monopolizing the market<sup>258</sup> would have reduced competition.<sup>259</sup> Thus, had the Eleventh Circuit considered a business justification for the block-booking arrangement under the rule of reason as did the Supreme

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<sup>254</sup> See *Jefferson Parish*, 466 U.S. at 25.

<sup>255</sup> See Anlauf, *supra* note 21, at 493 (citing *Jefferson Parish*, 466 U.S. at 25 n.42).

<sup>256</sup> See *id.* at n.137 (discussing how consideration of a goodwill defense is new to tying analysis under the Sherman Act).

<sup>257</sup> See *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1278 (11th Cir. 1999).

<sup>258</sup> See Laura Land Sigal, *Challenging The Telco-Cable Cross Ownership Ban: First Amendment and Antitrust Implications For the Interactive Information Highway*, 22 *FORDAHM URB. L.J.* 207, 238 (1994) (noting that "cable television remains the dominant medium for providing consumers with multiple channels of video programming.").

<sup>259</sup> See *id.* at 239 (explaining that through ownership of the cable connection, cable operators have control over most of the television programming channeled into a home enabling the cable operator to easily block out competitors).

Court in *Jefferson Parish*,<sup>260</sup> the court would have found that the block-booking arrangement enhanced competition in *MCA*.

Because the Sherman Act is meant to regulate only those arrangements involving substantial volumes of commerce,<sup>261</sup> whether the block-booking arrangement in *MCA* would have stifled competition should be assessed beyond whether the arrangement was in PIC's best interest.<sup>262</sup> Examining the consequences of the *MCA* arrangement on a broad scale indicates that the arrangement's effects would have served the interests of all television programming consumers, including viewers.

As noted earlier in this section, PIC's restricted funding likely limited the network's ability to choose among program distributors, even to the point that foregoing *MCA*'s arrangement might have resulted in no programming at all. In light of this limitation, the notion that television stations forced to accept block-booking arrangements are denied access to features marketed by other distributors<sup>263</sup> is seriously undermined. In a time where television viewers opting out of multi-channel operators are already limited in their choices,<sup>264</sup> the independent television broadcast market needs as many competitors as possible.<sup>265</sup> If block-booking arrangements assist some independent broadcasters in providing viewing alternatives in the marketplace,<sup>266</sup> then courts should consider the possibility of

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<sup>260</sup> See Anlauf, *supra* note 21, at n.137.

<sup>261</sup> See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (citing *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 501-02 (1969)).

<sup>262</sup> See *id.* (stating that "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law.>").

<sup>263</sup> See, e.g., *United States v. Loew's, Inc.*, 371 U.S. 38, 48-49 (1962).

<sup>264</sup> See Sigal, *supra* note 258, at 238-39.

<sup>265</sup> See *Schurz Communications Inc. v. Fed. Communications Comm'n*, 982 F.2d 1043, 1051 (7th Cir. 1992) (stating that the F.C.C. sought to increase diversity in the television marketplace when enacting the 1970 F.C.C. rules).

<sup>266</sup> For example, one may infer that prior to *MCA*'s lawsuit against PIC, PIC benefited from the block-booking arrangement; otherwise, it would not have entered into a contract with *MCA* in the first place. Moreover, it may have found the arrangement desirable because it complained only in a counterclaim to *MCA*'s action for breach of contract and copyright infringement.

assistance before rejecting these arrangements.<sup>267</sup> Because only a rule of reason standard in accordance with *Jefferson Parish* would recognize a ‘best interest’ defense, the rule of reason should become the relevant standard in television block-booking arrangements.

C. *A Rule of Reason Standard can Best Identify when Television Block-Booking Arrangements Stimulate Interbrand Competition, a Primary Concern of Antitrust Law.*

In rejecting a *per se* standard for vertical maximum price-fixing, the *State Oil* Court noted that the primary purpose of the Sherman Act is to stimulate interbrand competition.<sup>268</sup> The Court further reasoned that maximum price-fixing, to the extent that it lowers prices for a product,<sup>269</sup> actually enhances competition among suppliers.<sup>270</sup> Moreover, the Court found that the fears<sup>271</sup> behind holding maximum price-fixing illegal *per se*<sup>272</sup> could not be accurately predicted in every situation.<sup>273</sup> Because a *per se* standard assumes that the effects of vertical maximum price-fixing

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<sup>267</sup> See *Loew's*, 371 U.S. at 51. In *Loew's*, the distributor argued that the block-booking arrangement was a by-product of the television station's requiring a loan in which the guarantor required a minimum number of ads. Since the television station could not telecast all the ads without a large number of films over which to spread the ads, a block-booking arrangement was necessary to facilitate the transaction. Without considering the merit of the argument, the Court rejected it because the antitrust laws cannot be avoided by claiming a business justification. Inherent in this argument, however, is the assumption that the arrangement restrains rather than facilitates competition.

<sup>268</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

<sup>269</sup> See *id.* at 7. State Oil had allegedly prevented retailers from raising prices higher than its suggested price and collected the excess through rebates.

<sup>270</sup> See *id.* at 15 (stating that “[c]utting prices in order to increase business often is the very essence of competition”) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

<sup>271</sup> See *id.* at 14-16 (explaining that these fears include predatory pricing, restrictions on dealer freedom, diminished incentives for provision of services, and a mask for minimum price setting, which is illegal *per se*).

<sup>272</sup> See *Albrecht*, 390 U.S. at 145.

<sup>273</sup> See *State Oil Co.*, 522 U.S. at 14-16.

are always illegal,<sup>274</sup> the Court decided that the rule of reason standard would identify an illegal arrangement.<sup>275</sup>

Because block-booking may increase interbrand competition under certain circumstances, a sweeping *per se* rule is not necessary. The rule of reason standard would better identify when there is a reduction in competition. The television industry maintains two levels of suppliers: the licensors of programming like MCA, who supply to the broadcast networks, and the broadcast networks who supply to television viewers.<sup>276</sup> Thus, any analysis as to whether interbrand competition is increased must be evaluated at both levels.

Because block-booking ties an inferior television program to a bundle of competitive programs,<sup>277</sup> the distributor is able to obtain an above market price for the lesser program.<sup>278</sup> To the extent that the arrangement enables the distributor to operate profitably,<sup>279</sup> the arrangement would ensure the presence of multiple distributors. More distributors would translate into more leverage for networks and less probability that a contract could be forced on a financially challenged network such as MCA, because a distributor would know that a network could go elsewhere.

Furthermore, where the block-booking arrangement is exchanged on a barter basis because the scheme includes less desirable programming,<sup>280</sup> the block-booking arrangement has the effect of lowering broadcast networks' costs. This reduction in costs could be passed on to consumers in the form of increased programming offerings. As a result, more networks would

<sup>274</sup> See *Albrecht*, 390 U.S. at 165-66 (Harlan, J., dissenting).

<sup>275</sup> See *State Oil Co.*, 522 U.S. at 17.

<sup>276</sup> *Schurz Communications v. Fed. Communications Comm'n*, 982 F.2d 1043, 1045 (7th Cir. 1992) (reasoning that "[t]he networks can just as well be viewed as sellers of a distribution service as they can be as buyers of programs.").

<sup>277</sup> See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

<sup>278</sup> See, e.g., *United States v. Loew's, Inc.*, 371 U.S. 38, 52 (1962) (stating that any final judgment against the block-booking program distributors must prohibit non-cost justified differentials in price between a film when sold individually and when sold in a package).

<sup>279</sup> See *Paramount Pictures*, 334 U.S. at 159 (rejecting Columbia Pictures' argument that restricting block-booking would impair its ability to operate profitably).

<sup>280</sup> See *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1268 (11th Cir. 1999).

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continue to broadcast, thereby increasing interbrand competition.<sup>281</sup> The *per se* standard would never include such an in-depth analysis. Because the rule of reason would take such benefits into account and punish block-booking arrangements that did not stimulate interbrand competition, the rule of reason test is best suited for the complicated circumstances of block-booking arrangements.

*D. The Rule of Reason Standard will Adequately Identify Any Exploitation of the Copyright Monopoly because the Risk for Misuse of the Copyright Act is Diminished in Television Block-Booking.*

While the Court has stated that the assumption of market power is still present in the instance of a television film,<sup>282</sup> the Court has not addressed the issue in the context of a television series.

The television industry has changed tremendously since *Loew's*, when the Supreme Court held block-booking to be illegal *per se*.<sup>283</sup> At that time, just three networks (ABC, CBS, and NBC) dominated the market by producing, exhibiting, and syndicating the programming.<sup>284</sup> Today there is a large market of independent syndicators, like MCA.<sup>285</sup> "Many syndicated programs are reruns, broadcast by independent stations of series first shown on the major networks."<sup>286</sup> While the number of small independent networks has increased fivefold since 1970, the number of

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<sup>281</sup> See, e.g., *Paddock Publ'ns Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45-47 (7th Cir. 1996) (rejecting the Chicago Herald newspaper's argument that a mixture of exclusive contracts and other factors that endure despite short contract terms, hampers the growth of small rivals even though each market is competitive).

<sup>282</sup> See *Loew's*, 371 U.S. at 48 (stating that "[a] copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen.").

<sup>283</sup> See *id.* at 50.

<sup>284</sup> See, e.g., *Schurz Communications, Inc. v. Fed. Communications Comm'n*, 982 F.2d 1043, 1045 (7th Cir. 1992) (explaining how the FCC financial interest and syndication rules prevented ABC, NBC, and CBS from syndicating programs because they already held too much market power).

<sup>285</sup> See *id.* at 1046.

<sup>286</sup> See *id.* at 1045.

programming producers has decreased by forty percent in the last two decades.<sup>287</sup> That PIC, an independent network with limited funds, could obtain a unique, first-run series through a block-booking arrangement with a syndicated licensor, is significant. The inherent assumption for condemning block-booking in *Loew's* was that the attachment of an inferior tied product caused the exploitation of the copyrights on the features in the rest of the package. Because the market of syndicating first-run series for independent networks is slim,<sup>288</sup> MCA's tying of a first-run series in a package with other first-run series could be viewed as an equalization, not an exploitation of copyright, especially since the majority of independent stations mainly broadcast reruns.<sup>289</sup>

Even if the ability to syndicate a program as a rerun indicates the program's success<sup>290</sup> and thus would be superior to tying a first-run series that might flop, the future success of a series is not known at the point of licensure. Thus, any attempt to label the series as inferior is speculative at best. The tied program in *MCA, Harry*, ran for two and a half years.<sup>291</sup> No evidence indicated that PIC would have stopped broadcasting *Harry* had MCA not sued for copyright infringement. MCA sued and PIC cross-appealed on the grounds of a block-booking violation only after PIC failed to pay the cash portion of its contract.<sup>292</sup> From the perspective of the present-day television industry,<sup>293</sup> *Harry* was a success as a first-run series.

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<sup>287</sup> See *id.* at 1046.

<sup>288</sup> See *id.*

<sup>289</sup> Cf. *Schurz Communications, Inc. v. Fed. Communications Comm'n*, 982 F.2d 1043, 1051 (7th Cir. 1992).

<sup>290</sup> *Id.* at 1045 (stating that “[v]ery few series are sufficiently successful in their initial run to be candidates for syndication. Independent stations like to air five episodes each week of a rerun series that originally had aired only once a week or less, so unless a series has a first run of several years—which few series do—it will not generate enough episodes to sustain a rerun of reasonable length.”).

<sup>291</sup> See *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1268 (11th Cir. 1999).

<sup>292</sup> See *id.* at 1268-69.

<sup>293</sup> See, e.g., *Schurz Communications*, 982 F.2d at 1046 (stating that most television entertainment programs are money losers).

Given that most television programs are not money-makers,<sup>294</sup> the measure of a program's profitability should be distinguished from its desirability. Where a distributor ties a feature because it is unprofitable, the distributor is clearly exploiting the copyright of the other features in the package.<sup>295</sup> The risk of exploitation is more acute in motion picture block-booking where licensing arrangements generally provide distributors with a percentage of gross box office profits and guaranteed minimums, regardless of the film's success.<sup>296</sup> By contrast, distributors in the television industry are generally compensated through a fixed rate of advertising,<sup>297</sup> cash, or bartering.<sup>298</sup> Thus, it is less probable that a distributor can exploit a copyrighted work in the television industry because capitalization and compensation are sought in the form of advertising during program viewing.

Even where the program is undesirable from the exhibitor's perspective,<sup>299</sup> acceptance of the block-booking arrangement reflects freedom of contract more than the exploitation of copyright.<sup>300</sup> To the extent that MCA's block-booking arrangement was unattractive to PIC, it had the incentive to seek out other program distributors.<sup>301</sup> In this respect, the television

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<sup>294</sup> *See id.*

<sup>295</sup> *See, e.g.,* United States v. Loew's, Inc., 371 U.S. 38, 41-43 (1962) (discussing how research indicated that the films tied would have been sold separately for much less).

<sup>296</sup> *See* Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 488 (5th Cir. 1982); *but see* Associated Film Distrib. Corp. v. Thornburgh, 614 F. Supp. 1100, 1103 (E.D. Pa. 1985) (stating that "[t]raditionally, terms under negotiated licenses are not firm. If a picture bombs, the distributor may renegotiate the terms downward.").

<sup>297</sup> *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 447 n.28 (1984) (stating that "[t]he traditional method by which copyright owners capitalize upon the television medium is predicated upon the assumption that compensation for the value of displaying the works will be received in the form of advertising revenues.").

<sup>298</sup> *See* MCA Television Ltd. v. Pub. Interest Corp., 171 F.3d 1265, 1268 (11th Cir. 1999).

<sup>299</sup> *See* Sony Corp., 464 U.S. 417. The court should have made this distinction in *MCA*.

<sup>300</sup> *But see* Loew's, 371 U.S. at 47 (reasoning that "the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other.").

<sup>301</sup> *See* Thee Movies of Tarzan v. Pacific Theatres, Inc., 828 F.2d 1395, 1399 (9th Cir. 1987) (stating that clearances that a movie theater received from its distributor encouraged interbrand competition by forcing competitors to find alternative subrun movies to exhibit and promote); *see also* Paddock Publ'ns Inc. v. Chicago Tribune Co.,

block-booking arrangement stimulated competition among distributors of television programming.<sup>302</sup> Furthermore, even if PIC did not have the means to pursue another program distributor and had to accept the terms of the block-booking arrangement, this single instance of thwarting would not be enough to impair competition in the entire market.<sup>303</sup> If, however, a particular block-booking arrangement threatened a substantial volume of commerce,<sup>304</sup> a court could effectively safeguard these policies under the rule of reason's balancing approach.<sup>305</sup>

### CONCLUSION

The Supreme Court has slowly expanded the rule of reason standard to accommodate business arrangements formerly relegated to *per se* illegality. Vertical maximum price-fixing is the most recent of the arrangements to be set free of the *per se* stigma. As *MCA* illustrates, courts are hesitant to extend the rule of reason to vertical tying arrangements, at least in the television block-booking context. However, permitting television block-booking where it enables diverse programming and greater options for viewers is of great importance in this age of high price, all or nothing cable operators. The rule of reason test can adequately punish where the greatest effect of block-booking would be an unreasonable restraint of trade.

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103 F.3d 42, 46-47 (7th Cir. 1996) (distinguishing between exclusive dealing and exclusive distributorships and upholding the distributorship in the newspaper industry because none of the newspapers had promised by contract to obtain all news from a single source).

<sup>302</sup> See *Paddock Publ'ns*, 103 F.3d at 47.

<sup>303</sup> See *Jefferson Parish*, 466 U.S. at 18.

<sup>304</sup> See *id.* at 2.

<sup>305</sup> See *id.* at 40 n.10 (1984) (O'Connor, J., concurring) (reasoning that "[t]he examination of the economic advantages of tying may properly be conducted as part of the rule of reason analysis, rather than at the threshold of the tying inquiry.>").