in the dignity of an adversary proceeding, it is submitted that a rebirth of the "*reasonable* product interchangeability" concept is needed.[45]

STUART R. ROSS

Antitrust—Sherman Act—Tie-in Contracts.—*United States v. Loew's, Inc.*[1]—In 1957, the United States brought separate actions under Section 4 of the Sherman Act[2] against six major distributors[3] of pre-1948 motion picture films which had been released for television exhibition. The defendants in each suit were charged with having engaged in "block booking"[4] in violation of Section 1 of the Sherman Act.[5] The Government sought injunctive relief prohibiting each defendant from refusing to sell or license feature films to television stations on an individual basis as well as such other relief as might be necessary for the restoration of competition. The district court entered separate decrees enjoining each distributor from conditioning the purchase or license of the right to exhibit any feature film upon the purchase or license of any other film and from entering into an agreement wherein the price differential between a desired film and a block of films was such that it had the effect of illegal block booking.[6] On appeal the film distributors, with the exception of National Telefilm, challenged

[45] It should be pointed out that two months following the Commission's divestiture order, Reynolds petitioned the Commission to reopen the proceeding for purposes of adducing new and additional evidence. Reynolds sought to introduce evidence that a division of Kaiser Aluminum & Chemical Corp. and a division of R. J. Reynolds Tobacco Co. had expanded their florist foil activities since the close of hearings in October 1958. Reynolds hoped to show that these new entries, having competitive strength comparable to Reynolds, reinforced its argument that the acquisition of Arrow had not had the effect of a probable lessening of competition or a tendency toward a monopoly.

In denying the petition (Matter of Reynolds Metals Co., FTC Docket 7009, Opinion of Commission on Petition to Reopen Proceeding (March, 1960)) the Commission held, *inter alia*, that "Even though subsequent events may show that future competitive conditions are not as anticipated, this would not make legal that which was illegal, nor relieve the respondent of the consequences of its action, unlawful as of the time of trial." In an article entitled "Significant New Commission Developments" (17 A.B.A. Antitrust Section 274, 276), Hon. Edward T. Tait, Commissioner, FTC, points out that "Broadly speaking, the Reynolds petition also raises serious questions in balancing the rights of a respondent as to after-discovered evidence with the necessity for some end to litigation."

[1] 83 Sup. Ct. 97 (1962).

[2] 26 Stat. 209 (1890), 15 U.S.C. § 4 (1958).

[3] The distributors were Loew's, Inc., C & C Super Corp., Screen Gems, Inc., Associated Artists Productions, Inc., National Telefilm Associates, Inc. and United Artists Corporation.

[4] The complaints defined "block booking" as the licensing of feature films to television stations in a block whereby the licensing of one feature film is conditioned upon the licensing of one or more other feature films.

[5] Section 1 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958), provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

[6] 189 F. Supp. 373 (S.D.N.Y. 1960).

the finding of illegality and the granting of injunctive relief even assuming the contracts were illegal. The Government asserted that the district court erred in refusing to prohibit contracts for the licensing of a block of films which result from the temporary refusal to negotiate for individual films pending endeavors to dispose of a block of films and in refusing to provide other adequate relief. The Supreme Court agreed with the merits of the district court's decision as to the issues presented in the film distributors' appeal. The Court, however, vacated the judgments and remanded the causes to the lower court for further proceedings in conformity with the following modifications: (1) the distributors must offer their films on an individually priced basis; (2) the price differential between individual films and film packages may not exceed legitimate cost justifications; (3) a distributor may temporarily refuse to deal with a station only to the extent necessary for the expeditious conclusion of negotiations simultaneously entered into with competing stations.

The development of the law of tie-in contracts[7] is the result of another endeavor to prevent interference with freedom of choice in the market place. These contracts were first declared illegal as a matter of patent law where a seller, enjoying a lawful monopoly over a patented product, would sell that product only on the condition that the buyer also purchase some other product.[8] This undesirable expansion of government granted monopolies led to the existence of a patent misuse doctrine wherein the patentee of a tying product was denied relief against an admitted infringer of his patent. Subsequently, both Section 3 of the Clayton Act[9] and Section 1 of the Sherman Act were used to prohibit tie-in contracts involving nonpatented as well as patented products.[10] It became clear that if not prohibited, the existence of a strong or relatively inelastic demand for one product could easily be used to effect a similar demand for another product by merely refusing to sell one unless the other is also purchased or leased. To the extent such contracts force buyers into giving up the purchase of substitutes for the tied product or destroy the free access of competing suppliers of the tied product to the consumer market, they are clearly anti-competitive and in violation of our anti-trust laws. Due to the large number of economic variables that must be taken into consideration, however, the standards by which either one of these illegal restraints are to be determined do not admit of precise or mechanical definition. Consequently, phrases such as "market dominance,"[11] "economic power"[12] and "product uniqueness"[13] of the tying

[7] A tie-in exists whenever the vendor or lessor of product X conditions the sale or lease of such product on the purchase or lease of Y. X is called the tying product and Y the tied product.

[8] See, e.g., Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).

[9] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

[10] International Salt Co. v. United States, 332 U.S. 392 (1947); Standard Oil Co. v. United States, 337 U.S. 293 (1949).

[11] In Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608 (1953), the Court discussed the requisite economic power under both Section 3 of the Clayton Act and Section 1 of the Sherman Act, stating that it is enough to satisfy the Clayton Act if a substantial volume of commerce in the tied product is restrained, but that the seller must enjoy a monopolistic position in the market for the tying product if

product have been used or implied in the formulation of standards by which the legality of a challenged contract is judged.

In the instant case four of the defendants strongly urged that no license of feature films could be held to violate the Sherman Act since no defendant had dominant economic power in the market. The film distributors pointed out that fierce competition existed in the industry, and that all feature films constituted less than eight per cent of television's total programming (which the defendants alleged to be the relevant market). Thus, the recurring questions as to (1) the necessary degree of economic power in the tying product and (2) whether the requisite power may be inferred from the exclusive right of a copyright were again before the Court. In *United States v. Paramount Pictures, Inc.*,[14] the Court held that a refusal to license one or more copyrights unless another copyright is accepted is illegal. There the Court pointed out some of the anti-competitive effects of block booking:

> 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. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement 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. As the District Court said, the result is to add to the

illegality is to be found under the Sherman Act. Thus, it would appear that the Court required more in the way of market dominance in order to find illegality under Section 1 of the Sherman Act.

[12] In International Salt Co. v. United States, supra note 10, the Court invalidated agreements under which the company required its lessees of patented salt dispensing machines to purchase from it the salt used in the machines. Such agreements, which affect annual salt sales of $500,000, were illegal because "it is unreasonable, *per se*, to foreclose competitors from any substantial market." Id. at 396. Referring to *International Salt* in Standard Oil Co. v. United States, 337 U.S. 293, 305 (1949), the Court said, "It was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition." In the later case of Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 11 (1958), the Court stated:

> While there is some language in the *Times-Picayune* opinion which speaks of 'monopoly power' or 'dominance' over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a 'not insubstantial' amount of interstate commerce is affected).

[13] The Court in Northern Pac. Ry. Co. v. United States, supra note 12, stated that it makes little difference whether the tying product is patented or nonpatented. In a footnote it stated that "Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight." Id. at 10 n.8. The Court seems to be saying that the requisite economic power may originate from the "distinctiveness" of a tying product which is wholly unprotected by a patent.

[14] 334 U.S. 131 (1948).

> monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.[15]

In the *Paramount* case, the illegal block booking involved the distribution of films to theaters whereas *Loew's, Inc.* concerned distributions to television stations. The defendants sought to distinguish the instant case by contending that feature films are reasonably interchangeable with all other television programming, and that in view of the fact that feature films comprised less than eight per cent of the television market, there is insufficient economic power to make any tie-in agreement illegal. The degree of economic power over a copyright film, however, is not necessarily reflected by its share of the market. It is apparent that there is an appreciable demand for a minimum number of good feature films to appear on television. Since for every good film there are a number of inferior films, it would appear that the extent of interchangeability between good feature films and all other television programming is significantly limited, and from this fact alone a considerable amount of economic power in certain feature films is self evident. The Court made short work of the defendants' argument, pointing out that the requisite economic power is presumed when the tying product is patented or copyrighted.[16] In addition, it noted that on the facts there was sufficient economic power in the good feature films (as demanded by *Northern Pac. Ry. Co. v. United States*[17]) to find an illegal tie-in.

In the appeal of C & C Super Corp., the Court considered the question of whether block booking can be excused under the doctrine of business justification. The defendant purchased the telecasting rights in some 742 films. It did so with a bank loan obtained only through the guarantee of International Latex Corp. Latex demanded and secured an agreement from the defendant that the films would not be sold without obtaining in return a commitment from television stations to show a minimum number of Latex spot advertisements in conjunction with the films. The defendant took the position that block booking was merely the result of two legitimate business motives—Latex's desire for a saturation advertising campaign and the defendant's wish to buy a large film library. The two cases[18] relied on by the defendant are readily distinguishable. In those cases tie-in agreements were permitted because the tying and tied products were so related that attainment of the lawful purpose of the tying product required it to be used in conjunction with the tied product. In the defendant's situation, however, there was no such product dependence, and since it is established that contractual obligations can not supersede statutory imperatives, the defense of business justification was rejected.

With respect to the scope of the district court's decrees, the Government urged that the decrees would allow the unlawful purpose of block booking

---

15 Id. at 158.

16 International Salt Co. v. United States, supra note 10; United States v. Paramount Pictures, Inc., supra note 14.

17 Supra note 12.

18 Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961); Jerold Electronics Corp. v. United States, 187 F. Supp. 545 (E.D. Pa. 1960); For a discussion of these cases, see Note, 3 B.C. Ind. & Com. L. Rev. 317 (1962).

to continue. A distributor could continue to refuse to deal except in blocks of films as long as it had other customers with whom it might negotiate. Moreover, the price differential between one film and a block of films was not specifically limited to cost justification. This, the Government contended, would create serious enforcement problems. Also under the district court's decree the distributors would be allowed to continue their common practice of quoting only block prices and would be required to quote an individual price only upon request. The Court, although noting that some of the practices discussed above when viewed alone may not require injunctive relief, provided for additional redress in an effort to prevent any recurrence of the illegal acts. Television stations may now expect individually quoted prices which may not exceed prices of films offered in packages other than for legitimate cost justifications. Thus, the quality of films appearing on television should improve through the rightful operation of free competition.

C. RONALD RUBLEY

Bankruptcy—Section 70c—*Lewis* Case Extended.—*Pacific Fin. Corp. v. Edwards*.[1]—At the date of bankruptcy, April 1, 1960, bankrupt had in his possession an automobile which had been sold to him under a conditional sales contract[2] that was dated October 10, 1959.[3] The purchaser acknowledged delivery of the automobile in the contract. A statute of the state of Washington, where the transaction took place, provides that conditional sales of personal property, when the property is put in the possession of the vendee, shall be absolute as to all bona fide subsequent creditors if within ten days after the taking possession by the vendee a memorandum of the sale is filed.[4] The contract was filed on November 12, 1959. Since $2,616.40 remained unpaid at the date of bankruptcy, Edwards, the trustee in bankruptcy, sought to avoid the contract under his status as lien creditor provided in Section 70c of the Bankruptcy Act.[5] The referee in bankruptcy decreed that the contract was null and void as to the trustee. After an affirmance of the referee's order in the district court, Finance appealed to the Court of Appeals for the Ninth Circuit. HELD: The phrase "upon

1 304 F.2d 224 (9th Cir. 1962).

2 The contract, which was signed by bankrupt and Strato Motors, was immediately assigned and transferred by Strato Motors to Pacific Finance Corporation (hereinafter referred to as Finance).

3 By a mutual mistake of the parties thereto the contract was dated October 10, 1959, but the true date of its execution was November 10, 1959 and Finance sought reformation to this effect. Decisions of the Supreme Court of Washington, however, preclude reformation of such contract on the ground of a mutual mistake if such reformation will affect the rights of bona fide general creditors.

4 Wash. Rev. Code § 63.12.010 (1961).

5 Bankruptcy Act § 70c, 66 Stat. 429 (1952), 11 U.S.C. § 110(c) (1958) reads in part:

> The trustee, as to all property . . . upon which a creditor of the bankrupt could have obtained a lien . . . at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon . . . whether or not such a creditor actually exists.