

CLEVELAND V. VIACOM, INC.: IMPLICATIONS FOR THE DISSEMINATION OF MOVIES IN A DIGITALLY NETWORKED WORLD

By Daniel Castro

The motion picture industry has a history of anticompetitive practices.¹ Since the early days of the motion picture industry, movie producers and distributors have sought absolute control of the industry by dominating the production, distribution, and exhibition of movies.² In 1948, the United States Supreme Court held that such control of the industry was anticompetitive and forced major movie studios to separate the exhibition aspect of the industry from its production and distribution aspects.³ The emergence of home videos introduced an entirely new market, where video retailers became key players in the distribution of movies to the public.

In *Cleveland v. Viacom, Inc.*, the Fifth Circuit analyzed output revenue-sharing agreements between movie studios and large chain video retailers, addressing the antitrust issues that emerge when a movie studio oligopoly uniformly refuses to deal with small independent retailers on similar terms as large chain video retailers.⁴ According to the court, because the small independent retailers were unable to offer the studios a deal similar to that of the large chain video retailers, the studios' uniform refusal to deal was not illegal.

The implications of *Cleveland*, however, become increasingly significant as the movie industry moves further along its digital evolution. Namely, as technology for disseminating movies over digital networks becomes more secure and affordable, the online movie distribution market will grow, and an increasing number of potential online movie distributors will emerge. In addition, as the technology becomes more secure and affordable, the competitive gap between small and large online movie distributors will likely shrink. The popularity of online movie distribution, coupled with lower prices stemming from competition, may then be seen

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1. See generally Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE J. ON REG. 317 (2004).

2. See generally Ralph Cassady, Jr., *Monopoly in Motion Picture Production and Distribution: 1908-1915*, 32 S. CAL. L. REV. 325 (1959).

3. Unites States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

4. Cleveland v. Viacom, Inc., 73 Fed. Appx. 736 (5th Cir. Aug. 25, 2003), cert. denied, 520 U.S. 1219 (2004).

as a viable threat to the existing video retail industry. Indeed, renting physical copies of movies may soon be obsolete in light of technology that instead allows users to obtain digital copies at home.

This Note examines the implications of *Cleveland* on the movie industry within a digital marketplace. In particular, the Note examines the likelihood of digital technology sufficiently evolving to the point where small retailers may offer studios a deal legally similar to that of large retailers such as Blockbuster Inc. Part I begins by giving a background of the in-home movie market. Part II then provides a legal background of section 1 of the Sherman Act, the Robinson-Patman Act, and the First Sale Doctrine. Next, Part III provides a summary of *Cleveland*. Part IV discusses the online movie distribution market, the impediments potential online distributors will face in the future, and possible solutions to these impediments. Finally, this Note concludes in Part V that the reduced costs involved in digitally distributing movies will enable small retailers to enter this marketplace and that studios will ultimately have to distribute their movies via these retailers.

I. BACKGROUND OF THE IN-HOME MOVIE MARKET

The rental home video market emerged in the 1980s and was largely influenced by consumers' desire to rent a video for temporary viewing, as opposed to purchasing ownership at a much higher price. According to this business model, video retailers would purchase videos and rent them to the public by invoking their first sale rights.⁵ Currently, home videos comprise the largest category of copyrighted works widely disseminated by rental.⁶

Despite the popularity of rental videos, the market has experienced difficulties. For example, during the mid-1990s, many video retailers had insufficient copies of "new release" titles available to accommodate customer demand. As a result, customers were often unable to rent popular movies which were in most demand, which translated to a loss in potential profits to video retailers.

5. The first sale doctrine is the right to resell, rent, or lend copies of copyrighted works to individual purchasers. See 17 U.S.C. § 109(a) (2000) ("[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

6. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 587-88 (2003).

In 1997, Blockbuster responded to this problem by entering into long-term output revenue sharing contracts with various major movie studios. By dealing directly with the studios and bypassing the distributors, Blockbuster was able to obtain videos for lower upfront payments in exchange for a percentage of their revenues. It agreed to purchase all titles a studio released, regardless of performance or perceived popularity. As a result, it significantly increased its volume of new releases and subsequently distanced itself from the independent retailers in the video rental market.

In August 2001, five of the seven largest movie studios⁷ announced their joint plan to offer Internet users digitized movies through a service called Moviefly.⁸ This service, which has been renamed Movielink, allows customers to download movies from the Internet.⁹ These movies may be downloaded approximately two months after they are released on video, and must be viewed within a 24-hour period.¹⁰

Approximately two months after the movies are released on video, customers may also order them on a pay-per-view basis from the customers' local cable service or satellite provider.¹¹ Similar to the Movielink business model, movies ordered via pay-per-view must be viewed during a 24-hour viewing period. And similar to renting movies from a video store, customers may rewind and fast-forward these movies as they desire.¹²

II. LEGAL BACKGROUND

This Note primarily focuses on three legal issues. The first two issues involve interpreting the two laws under which the plaintiffs' antitrust claims were brought in *Cleveland*: section 1 of the Sherman Act and price discrimination under the Robinson-Patman Act. The third issue involves the first sale doctrine, which is the copyright law that enables video retailers to rent copyrighted movies.

7. Metro-Goldwyn-Mayer ("MGM"), Paramount Pictures, Sony Pictures Entertainment, Universal Studios, and Warner Brothers.

8. See Gary Gentile, *Studios in Video on Demand Venture*, AP ONLINE, Aug. 16, 2001, available at 2001 WL 26180234.

9. See Movielink, <http://www.movielink.com> (last visited Mar. 4, 2005).

10. Ron Grover, *Video-on-Demand, Hollywood Style*, BUS. WK. ONLINE, Aug. 21, 2001, at http://www.businessweek.com/bwdaily/dnflash/aug2001/nf20010821_006.htm.

11. *Id.*

12. See Comcast, <http://www.comcast.com/Benefits/CableDetails/Slot6PageOne.asp> (last visited Mar. 4, 2005).

A. Concerted Action Under Section 1 of the Sherman Act

Under section 1 of the Sherman Act, it is illegal to enter into a contract or conspiracy in restraint of trade or commerce.¹³ Despite the statute's admonition that every concerted trade restraint is illegal, judicial interpretation of the statute has limited its scope by implementing a "standard of reason."¹⁴ Nevertheless, the statutory requirement of concerted action remains a fundamental threshold burden for any antitrust plaintiff. Concerted action requires an antitrust plaintiff to prove the defendant conspired either horizontally with a competitor, or vertically with a firm involved in a different stage of production than the defendant. In fact, courts have held that unilateral conduct simply cannot be deemed a violation of section 1 of the Sherman Act, no matter how anticompetitive.¹⁵ Courts have further held that unless the competitive process is harmed by a single buyer's particular purchasing agreement, no conspiracy to monopolize may be inferred.¹⁶

B. Price Discrimination Under the Robinson-Patman Act

Under the Robinson-Patman Act, it is unlawful for a seller to either directly or indirectly discriminate in price between different purchasers of similar commodities.¹⁷ The application of this statute may occur in either of two situations. First, it may apply where the discrimination substantially lessens competition or tends to create a monopoly.¹⁸ Second, it may apply where the effect may be substantially "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either."¹⁹

According to the Supreme Court, "price discrimination" under the Robinson-Patman Act is defined as being merely a difference in price.²⁰ This difference in price, however, also includes discount prices that are theoretically available to all, but functionally not.²¹ Indeed, according to

13. 15 U.S.C. § 1 (2000).

14. See *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

15. See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

16. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

17. 15 U.S.C. § 13(a) ("It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality.").

18. *Id.*

19. *Id.*

20. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960).

21. *FTC v. Morton Salt Co.*, 334 U.S. 37, 42 (1948).

the Supreme Court, the legislative history of the Robinson-Patman Act clearly shows Congress's intent to prevent large buyers from securing a competitive advantage over small buyers simply based on the large buyers' superior purchasing power.²² A price discrimination claim under the Robinson-Patman Act, therefore, could be described as focusing primarily on the rivals of both the discriminating seller and the buyer receiving lower prices, rather than the ultimate consumer of the product.

C. First Sale Doctrine

Under the first sale doctrine, a copyright owner ceases to have control of a particular copyrighted work after the owner's first transfer of that copy.²³ As a result, anyone who *legally* purchases copies of a copyrighted work is free to resell, rent, or lend those copies. For the video rental industry, this doctrine thus provides a legal shelter under which renters can operate.

The emergence of digital networks, however, created a new landscape for interpreting the first sale doctrine in which users can readily forward copyrighted works they may have legally obtained from the copyright owner. In 1995, a presidential task force formed to research this issue determined that such conduct was not permitted under the first sale doctrine. And although Congress has considered creating a "digital first sale doctrine," nothing has actually passed.²⁴ Instead, Congress has adopted a "wait and see" approach because of the inherent uncertainties involved with rapid technological advances in e-commerce and encryption.²⁵ This policy remains in effect today.

III. CASE SUMMARY

A. Facts and Procedural History

Several independent video retailers sued home video affiliates of the seven major Hollywood movie studios, including Blockbuster Inc. ("Blockbuster") and its parent company Viacom Inc. ("Viacom").²⁶ The

22. *Id.* at 43.

23. 2 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.12 (2004).

24. *Id.*; Reese, *supra* note 6, at 581-83.

25. Congress adopted this policy in 2001 under the recommendation of the United States Copyright Office. Reese, *supra* note 6, at 581-83.

26. The defendants are Buena Vista Home Entertainment, Inc.; Columbia Tri-Star Home Video, Inc.; Metro-Goldwyn-Mayer Home Entertainment, Inc.; Paramount Home Video, Inc.; Time Warner Entertainment Company, L.P.; and Twentieth Century Fox Home Entertainment, Inc. (collectively "studios").

plaintiffs alleged that Blockbuster conspired with the studios to deny independent retailers long-term output revenue-sharing agreements equivalent to its own.²⁷ As a result, the plaintiffs alleged that the defendants violated antitrust and price discrimination statutes.²⁸ The issues presented by the *Cleveland* decision include whether disparate pricing agreements between media producers and retailers are violations of antitrust laws where 1) small independent retailers lack the resources to enter into agreements similar to those negotiated by large chain retailers, and 2) there is little evidence of any bad faith intent to exclude small independent retailers from entering into agreements similar to those negotiated by large chain retailers.

Defendants moved for judgment as a matter of law at the close of plaintiffs' case-in-chief. This motion was granted by the district court in 2001,²⁹ and later affirmed by the appellate court in an unpublished opinion in 2003.³⁰ Plaintiffs' petition for certiorari to the United States Supreme Court was subsequently denied in 2004.³¹

B. The Fifth Circuit's Analysis

The statutory basis of plaintiffs' antitrust violation claim was section 1 of the Sherman Act.³² In its review, the Fifth Circuit conceded that it should consider all evidence in the light most favorable to the nonmovant, which were the plaintiffs.³³ The court also, however, insisted that antitrust cases such as this one require "the range of permissible inferences [to be] limited by particular principles of antitrust law."³⁴ In particular, the court held that inferences of a conspiracy cannot be supported by evidence of conduct that is equally consistent with both permissible competition and an illegal conspiracy.³⁵ Accordingly, since direct evidence of a conspiracy was lacking, the court required plaintiffs to present sufficient circumstantial evidence which would exclude the possibility of independent action.³⁶

The court rejected plaintiffs' argument that Blockbuster's plan to increase its market share was proof of a conspiracy. According to the court,

27. 73 Fed. Appx. 736, 739 (5th Cir. Aug. 25, 2003).

28. *Id.*

29. *Cleveland v. Viacom*, 166 F. Supp. 2d 535 (W.D. Tex. 2001).

30. *Cleveland v. Viacom*, 73 Fed. Appx. 736 (5th Cir. Aug. 25, 2003).

31. *Cleveland v. Viacom*, 520 U.S. 1219 (2004).

32. 15 U.S.C. § 1 (2000).

33. *Cleveland*, 73 Fed. Appx. at 739.

34. *Id.* (citing *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 762 (5th Cir. 2002)).

35. *Id.*

36. *Id.*

a company's ambitious desire to significantly increase its market share cannot support an inference of conspiracy without proof that it intends to achieve these goals via illegal means.³⁷ The court further held that, despite plaintiffs' evidence of Blockbuster requesting a "special deal" from Fox's vice-president, an exclusive deal was never made and an inference of conspiracy would be premature.³⁸

The court also rejected plaintiffs' argument that a conspiracy may be inferred from the studios' parallel conduct. In particular, the court held that plaintiffs cannot establish an inference of conspiracy by simply showing that the studios followed similar courses of action, without providing evidence that these acts stemmed from an agreement as opposed to each studios' independent business judgment.³⁹ According to plaintiffs' expert testimony, the studios' conduct was contrary to their economic self-interest. Plaintiffs argued that "because the studios received greater revenues under the terms of their deals with Blockbuster, they likewise would have received greater revenues under similar deals with distributors serving independents."⁴⁰ The court subsequently rejected this testimony, holding that it ignored key differences between independent retailers and large video chains such as Blockbuster.⁴¹

Plaintiffs' price discrimination claim was brought under the Robinson-Patman Act.⁴² According to the court, however, this statute only applies where customers are otherwise purchasing on like terms and conditions.⁴³ Here, the court found the studios' transactions with Blockbuster and plaintiffs to be dissimilar. Namely, the court found Blockbuster's purchasing agreement with the studios readily distinguishable from agreements entered into by plaintiffs because Blockbuster's agreement required Blockbuster to 1) commit to long-term contracts and 2) purchase a studio's entire output.⁴⁴ According to the court, this distinction is so significant that the disparity in price cannot support a claim of price discrimination.⁴⁵

37. *Id.* at 740-41.

38. *Id.* at 740.

39. *Id.*

40. *Id.* at 741.

41. *Id.*

42. See 15 U.S.C. § 13 (2000). The plaintiffs also claimed the price discrimination was in violation of the California Unfair Trade Practices Act. CAL. BUS. & PROF. CODE §§ 16750(a), 17078-17080 (West 1997), 17203 (West Supp. 2005).

43. *Cleveland*, 73 Fed. Appx. at 741 (citing *FTC v. Borden*, 383 U.S. 637, 643 (1966)).

44. *Id.*

45. *Id.*

IV. DISCUSSION

This Note attempts to foreshadow the significance of *Cleveland* in a future era of digital networks. In so doing, it examines how the court's original analysis fits within the framework of a digital marketplace where small website operators can offer movie studios the same deal as the Blockbusters of the world. Furthermore, this Note examines the likely options for the movie studios and the new antitrust considerations with which they will inevitably have to deal. Section A provides some background with respect to the studios' attempts to vertically integrate the online movie distribution market. Section B discusses the impediments potential online distributors will face in the future. Section C offers possible solutions to these impediments.

A. Studios Seek to Vertically Integrate the Online Movie Distribution Market

The studios have historically been reluctant to distribute their movies over the Internet because of the threat posed by illegal piracy.⁴⁶ The emergence of Movielink, however, reveals a desire of the studios to cautiously embrace this new market through vertical integration. In particular, the studios hope this venture will enable them to set the technical and security standards necessary for the online movie market to safely flourish.⁴⁷ Having learned from their music industry counterparts, the studios hope Movielink deters consumers from engaging in illegal piracy by providing them with a legitimate way to obtain movies over the Internet.⁴⁸

The threat posed by legal file-sharing ventures has also expedited the emergence of Movielink.⁴⁹ CenterSpan Communications, for example, plans to provide a legal version of a Napster-like software service that enables users to share movies online.⁵⁰ Fortunately for the studios, third par-

46. See Gentile, *supra* note 8.

47. See Grover, *supra* note 10.

48. Laura Rich, *Analysis: Hollywood Braces for "Napsterization"*, CNN.COM TECH PAGE, Jan. 10, 2001, at <http://asia.cnn.com/2001/TECH/computing/01/10/hollywood.napsterization.idg/index.html>.

49. See *id.*

50. CenterSpan acquired this software from Scour, Inc. in a court-supervised bankruptcy auction following Scour's copyright infringement litigation against members of the Motion Picture Association of America (MPAA), the Recording Industry of America (RIAA), and the National Music Publishers' Association (NMPA). Carey D. Ramos, *The Security of Music and Motion Pictures Distributed on the Internet: Legal Background and Developments*, in *MUSIC ON THE INTERNET: UNDERSTANDING THE NEW RIGHTS AND SOLVING NEW PROBLEMS* 402 (PLI Patents, Copyrights, Trademarks, and Literary Property Course, Handbook Series No. G0-00PP, 2001).

ties such as CenterSpan currently lack the technology necessary to make such ventures profitable. By launching Movielink, however, the studios clearly want to get a head start.

1. Prospects of Movies Being Widely Disseminated over the Internet

Despite having the legality of its revenue sharing agreements challenged in *Cleveland*, Blockbuster ultimately prevailed because it negotiated deals with the various studios that the independent retailers could not match. Today, however, the possibility of disseminating movies via the Internet is a significant threat to Blockbuster's current business model. Such technology may eventually eliminate demand for large retail chains that rent tangible copies of movies. Indeed, the convenience of either downloading a movie from a studio website or ordering it via pay-per-view may soon supersede the convenience of going to a local Blockbuster.

Although Blockbuster has already taken steps towards ascertaining its share of this new technology's market share, it is struggling to obtain a firm foothold in it. Blockbuster executives, for example, have openly expressed their commitment to "delivering movies to people at home however they want to receive them" and have already begun negotiating deals with studios.⁵¹ Some of these negotiations have failed, however, including a failed negotiation with its corporate cousin Paramount Studios in which an insider is quoted as saying, "Hollywood isn't about to give Blockbuster another blank check."⁵² Although Blockbuster did secure limited video-on-demand rights from Universal Pictures, it failed in its efforts to start an Internet venture with Enron.⁵³ Even if Blockbuster were to negotiate a deal with a particular movie studio to distribute movies online, it would still have to compete with independent websites that may offer studios the same deal.

Current technological conditions also make it difficult for the online movie distribution market to emerge. In particular, the number of homes currently equipped with high-speed Internet connections has not yet reached a level where sustaining a movie distribution site would be profitable. Nevertheless, the studios are optimistic that the popularity of broadband Internet access will continue to rapidly grow and eventually make their Movielink joint venture profitable.

51. Konrad Gatien, *Internet Killed the Video Star: How In-House Internet Distribution of Home Video Will Affect Profit Participants*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 909, 923-24 (2003).

52. *Id.*

53. *Id.*

Experts agree that these conditions may occur relatively soon. According to some analysts, the number of homes with high-speed Internet connections is expected to grow from two million in 2000, to approximately 47 million in 2005.⁵⁴ By the year 2009, experts predict that approximately 107 million Internet users will have broadband connections (approximately 90% of all Internet users).⁵⁵ Furthermore, according to reports from the Federal Communications Commission (FCC), the number of Internet users watching Internet videos has been steadily increasing over the past few years.⁵⁶

The need to establish a secure technological standard is also critical to making online movie distribution a reality.⁵⁷ Indeed, without a common technological standard, the industry may never emerge because of compatibility issues. The irony of developing such a standard, however, is that it would require the cooperation and agreement of all the major studios. In fact, according to some studio executives who were involved in launching Movielink, the opportunity to set the technical and security standards of the industry partially motivated them to take part in the joint venture.⁵⁸

2. *Movielink Business Model Inconsistent with Paramount?*

As mentioned previously, the Supreme Court in *Paramount* forced the major movie studios to separate the exhibition aspect of the industry from its production and distribution aspects. One of the concerns alleged by the government in *Paramount* was the apparent favoritism exhibited by the major studios of each other over smaller independent studios.⁵⁹ Namely, the government alleged that the major studios were exhibiting only movies produced by the major studios and licensing first run movies only amongst themselves, rather than to independent theatres.⁶⁰

54. Mary Rasenberger & M. Lorraine Ford, *Untangling the Web of Rights to Film and Video: Before Putting Such Content On-Line, Clear It for Use on the Internet*, N.Y.L.J., Sept. 18, 2000, at S3.

55. *Id.*

56. *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, CS Docket No. 00-132, at 49, ¶ 107 (Fed. Communications Comm'n 2001), available at <http://hraunfoss.fcc.gov/edocs/public/attachmatch/FCC-01-1A1.pdf>.

57. Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041, 1042-43 (1996).

58. Grover, *supra* note 10.

59. United States v. Paramount Pictures, Inc., 334 U.S. 131, 161-62 (1948).

60. *Id.*

The Movielink business model will inevitably be scrutinized by anti-trust regulators as being inconsistent with *Paramount*. By allowing the studios to control not only the production of movies, but also all aspects of distribution and pricing, consumers are left vulnerable to monopolistic prices stemming from a lack of competition. Indeed, other than the post-*Paramount* distribution channels of the movie industry, true competition is noticeably lacking.

With these antitrust concerns in mind, the studios have taken affirmative steps towards circumventing these problems. Most importantly, they have agreed to offer a nonexclusive license to any potential distributor with a service that complies with the Movielink partners' security and anti-piracy provisions.⁶¹ Therefore, the door is theoretically open for third-party vendors to launch their own distribution sites, so long as they obtain a license from the studios. Regardless of whether Movielink is ever found to violate antitrust law though, it is clear that third-party distributors will always play *some* role in the online movie market, either competing against the studios, or against each other.

B. Future Impediments for Small Online Movie Distributors

According to the holding in *Cleveland*, a plaintiff's claim under section 1 of the Sherman Act requires direct evidence of a conspiracy. Namely, these claims require evidence of explicit collusion amongst the studios. Tacit collusion, however, provides a legal loophole in which studios may achieve the same objective without violating any antitrust laws. Indeed, while legal scholars have identified the act of communication as the distinguishing feature between explicit and tacit collusion, economists view the two as being essentially the same.⁶² Therefore, so long as each member of the studio cartel has an "understanding" of how other members will react, no formal communication is ever needed.⁶³

Technological barriers to entry may also be significant for potential online distributors. As discussed previously, the threat of piracy gives studios added leverage to develop a highly sophisticated technological standard. But the more sophisticated a standard becomes, the more expensive it is to abide by it. Therefore, in order to limit the number of potential competitors, the studios may simply tacitly agree to an overly sophisticated standard.

61. *Id.*

62. Ian Ayers, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 296-97 (1987).

63. *Id.* at 297.

Such a strategy would parallel the facts in *Cleveland* in that the independent retailers in *Cleveland* lacked the financial resources to offer the same deal as Blockbuster. In the future, small potential online distributors may lack the technological resources to offer the same deal as larger ones.

The lack of a first sale doctrine will be another significant hurdle for potential online distributors to overcome. Unlike before, where retailers would purchase tangible copies of movies, retailers would now only be purchasing a license to access the servers of each studio. Therefore, because an actual purchase is never made, the first sale doctrine does not apply. As a result, the studios are able to control all copies of their copyrighted works.

The same technology that enables small distributors to potentially offer the studios the same deal as large distributors may also, in the end, be the reason why small distributors fail. For example, if we assume that technology will evolve to where a significant number of individuals can comply with the standards set forth by the industry, the market may become so saturated with competitors that most will fail. This ironic fate would stem from the *perfect competition* scenario towards which antitrust law is designed to gravitate.⁶⁴

C. Possible Solutions

The *Cleveland* court's rejection of plaintiffs' vertical and horizontal theories of concerted action in violation of section 1 of the Sherman Act,⁶⁵

64. PHILLIP AREEDA ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 5 (6th ed. 2004).

A market economy will be perfectly competitive if the following conditions hold:

- 1) Sellers and buyers are so numerous that no one's actions can have a perceptible impact on the market's price, and there is no collusion among buyers and sellers.
- 2) Consumers register their subjective preferences among various goods and services through market transactions at fully known market prices.
- 3) All relevant prices are known to each producer, who also knows of all input combinations technically capable of producing any specific combination of outputs and who makes input-output decisions solely to maximize profits.
- 4) Every producer has equal access to all input markets and there are no artificial barriers to the production of any product.

Id. (footnotes omitted).

65. 15 U.S.C. § 1 (2000).

as well as its rejection of plaintiffs' allegation of price discrimination under the Robinson-Patman Act,⁶⁶ reveal a general reluctance of the judiciary to resolve the problem of tacit collusion in oligopolies. In *Rebel Oil*,⁶⁷ for example, the Ninth Circuit refused to rule on this issue despite explicitly recognizing that oligopolies may use this jurisprudential gap to engage in acts that would otherwise be prohibited by the Sherman Act. In particular, the court in *Rebel Oil* felt that Congress, and not the judiciary, was authorized to fill this gap.⁶⁸

This reasoning is flawed, however, because antitrust law in the United States is primarily driven by judicial interpretation of broadly written legislative statutes.⁶⁹ In fact, some scholars suggest that the legislative intent of drafting the Sherman Act with extremely broad and vague sentences may have been "little more than a legislative command that the judiciary develop a common law of antitrust."⁷⁰ With this in mind, the judiciary should feel authorized to equate tacit collusion with explicit collusion without having to wait for a cue from Congress.

In addition, judicial bodies outside the United States have recognized the threat posed by shared monopolies and have taken affirmative steps towards enforcing their anticompetition laws when appropriate.⁷¹ For example, in a case known as *Magill*, the European Commission (EC) inferred that individuals were refusing to license their intellectual property in an attempt to prevent the creation of a comprehensive product.⁷² *Magill* involved television listings of various programs that were exclusively published by networks in the United Kingdom and Ireland.⁷³ Each of these networks individually refused to license their proprietary listings to Magill, who was seeking to publish all program listings in one guide.⁷⁴

66. *Id.* § 13.

67. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995).

68. *Id.*

69. See PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ch. 1, ¶ 103d (2d ed. 2002) ("[M]ore than a century of judicial interpretation has now largely preempted contrary indications in the legislative history. Congress can amend the Sherman Act any time it wishes, but in more than a century has rarely done so, and then largely to correct technical deficiencies.").

70. AREEDA ET AL., *supra* note 64, at 3; see also AREEDA & HOVENKAMP, *supra* note 69, ch. 1, ¶ 103d.

71. Brian A. Facey & Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey*, 70 ANTITRUST L.J. 513, 539-43 (2002).

72. Case 241/91 P, *Radio Telefis Eireann v. Commission*, 1995 E.C.R., I-743, ¶¶ 47, 58, 104, [1995] 4 C.M.L.R. 718, 730-33 (1995).

73. *Id.* ¶ 24-30, [1995] 4 C.M.L.R. at 726-28.

74. *Id.*

The Court of Justice held each network liable for jointly monopolizing "television guides by excluding all competition . . . [and] den[ying] access to the basic information which is the raw material indispensable for the compilation of such a guide."⁷⁵

Some scholars suggest that antitrust agencies such as the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are actually better equipped than either Congress or the judiciary to regulate the dissemination of copyrighted work over the Internet.⁷⁶ In particular, it is suggested that because these agencies have both the authority and experience to initiate programs that monitor fair competition and protect fair use, their involvement is ideal.⁷⁷ The DOJ, for example, may play an active role in scrutinizing the studios' efforts to further expand their market power, much as they did with Microsoft under the Clinton and Bush administrations.⁷⁸ Similarly, the FTC's inquiries into Intel and CD price-fixing⁷⁹ may foreshadow the agency's future role in monitoring licensing agreements between the studios and potential online movie distributors.

By working together, the DOJ and FTC may also take advantage of their respective institutional competences. For example, because the FTC can sue under the Federal Trade Commission Act,⁸⁰ the FTC has much more discretion to protect consumers from the unfair and deceptive conduct of the studios. In fact, an FTC investigation may be initiated by letters from consumers or businesses and followed by either an "attempt to obtain voluntary compliance by entering into a consent order with the company . . . [or] an administrative complaint."⁸¹ The DOJ, on the other hand, is more familiar with traditional antitrust analysis and may more readily investigate the market structure of the movie industry.⁸²

Ideally, this DOJ investigation would be coupled with a public FTC investigation focused on consumer protection to create leverage against the studios.⁸³ The agencies may then use this leverage to induce the stu-

75. *Id.* ¶ 56, [1995] 4 C.M.L.R. at 791.

76. See Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 549 (2002).

77. *Id.*

78. *See id.*

79. See Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH L.J. 535 (2001).

80. 15 U.S.C. § 45 (2000).

81. FTC, *How the FTC Brings an Action*, at <http://www.ftc.gov/ftc/action.htm> (last visited Dec. 16, 2004).

82. See generally United States Department of Justice, at <http://www.usdoj.gov> (last visited Jan. 16, 2005).

83. See Fagin et al., *supra* note 76.

dios to offer more favorable licensing agreements to prospective online movie distributors. This leverage may also be used to give prospective online movie distributors a voice in the standard-setting process, as well as to force the studios to disclose and limit their digital rights management techniques.

V. CONCLUSION

The adjudication following the *Cleveland* decision will have a significant effect on the mass commercial distribution of motion pictures. Other large video movie retailers will inevitably try to emulate the Blockbuster business model to take advantage of their smaller competitors' inability to offer the studios similar deals. Rumors regarding the industry, however, suggest that the number of these large video retailers may be shrinking.⁸⁴ Higher prices resulting from this reduction in competition, coupled with advances in digital network technology, may lead to the eventual demise of the video retail industry. If so, we will likely revisit *Cleveland* within the context of a digital marketplace, where small retailers offer the studios a deal similar to that of large retailers. Moreover, because the economic results associated with particular antitrust policies are generally unpredictable, only time will tell whether the *Cleveland* decision will truly be in the best interest of the individual consumer and, more importantly, society as a whole.

84. See Associated Press, *Hollywood Video Seeks Merger to Challenge Rival Blockbuster*, ABCLOCAL.COM MONEYSCOPE, Jan. 13, 2005 (discussing Hollywood Video's announcement of a proposed merger with Movie Gallery, Inc., as well as Blockbuster's continued efforts to acquire Hollywood Video), at http://abclocal.go.com/ktrk/business/011305_APbusiness_hollywood.html.

