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State Regulation of Motion Picture Distributors

I. Introduction

The motion picture distribution industry is controlled by a small number of major distributors who license their films to numerous independent exhibitors.¹ These exhibitors include owners of individual local theaters and regional theater chains. Licensing arrangements between the economically powerful distributors and the relatively less economically powerful theater owners have become the focus of protective trade regulation statutes in a number of states.² In their least restrictive form, the state statutes prohibit the distribution practice of "blind bidding," a procedure that requires exhibitors to bid on films without seeing the completed product.³ The more restrictive state statutes regulate the entire bidding process and restrict the distributors' ability to negotiate the most favorable terms for guarantees and advances.⁴

1. In 1978, the following major producer-distributors controlled 94% of the motion picture distribution market: Avco Embassy Pictures Corp., Buena Vista Distribution Co., Inc., Columbia Pictures Industries, Inc., Metro Goldwyn Mayer, Inc. (not currently a distributor), Paramount Pictures Corp., Twentieth Century Fox Films Corp., United Artists Corp., Universal Pictures Division of Universal City Studios, Inc., Universal Film Exchanges Inc., Warner Bros., Inc., Warner Bros. Distributing Corp. The remainder of the market consists of foreign and small independent domestic distributors. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 413 (S.D. Ohio 1980), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982).

2. Motion pictures are not sold to exhibitors. The copyrighted motion pictures are licensed to theater owners who bid or negotiate for exhibition rights. Motion pictures are high risk, high profit enterprises, in part, because of the difficulty in predicting public acceptance and box office revenues. Distributors attempt to share the financial risk with exhibitors by obtaining as favorable terms as possible. *Id.* at 415. See *infra* note 24 for a list of the states that have enacted legislation regulating motion picture distribution.

3. Typically, some months prior to completion and release of a film, potential exhibitors are sent information about the plot, actors, script, and director. Bids are solicited from the exhibitors on the basis of the information supplied. Whether the information supplied is adequate for the exhibitors to make an informed assessment of the film's box office potential is a matter of much controversy. See *infra* notes 47-50 and accompanying text.

4. A guarantee is a minimum payment that the exhibitor agrees to make to the dis-

As more states enacted prohibitions against blind bidding of motion pictures, litigation by distributors challenging state regulation of the industry has increased.⁵ This comment examines the regulation of bidding practices in the industry, beginning with the landmark Supreme Court decision in *United States v. Paramount Pictures Inc.*,⁶ the state statutes,⁷ particularly those of Ohio, Pennsylvania, and Utah, that have been the subject of litigation; and the court decisions in *Allied Artists Pictures Corp. v. Rhodes*,⁸ *Associated Film Distribution Corp. v. Thornburgh*,⁹ and *Warner Bros. Inc. v. Wilkinson*.¹⁰ This comment concludes that state regulation of motion picture distribution, as it applies to the regulation of the bidding process, is a valid exercise of state power, does not infringe upon the distributors' constitutional rights of free expression, and is not preempted by federal copyright law. A different result may be reached, however, where a state statute restricts the terms of licensing agreements, thus potentially imposing undue burdens on interstate commerce.¹¹

II. Background

Regulation of blind bidding has had an erratic history. In 1940, under threat of antitrust litigation, five of eight major dis-

tributor regardless of the subsequent box office revenues. It is essentially a device for shifting financial risk from the distributor to the exhibitor. The guarantee assures the distributor a minimum return regardless of public acceptance of the film at the box office. An advance is a refundable pre-payment of the distributors share of anticipated box office revenues. See *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 418.

5. In 1979, seven states had enacted statutes regulating motion picture distribution. As of August 1982, eighteen states had such legislation. See *infra* notes 24, 26. By July 1982, three district court and two circuit court cases had been decided on the issue of blind bidding. See *infra* notes 51-133 and accompanying text for a discussion of the cases.

6. 334 U.S. 131 (1948).

7. See *infra* notes 24, 26 and accompanying text for a description of the state statutes.

8. 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982).

9. 520 F. Supp. 971 (E.D. Pa. 1981), *remanded*, 683 F.2d 808 (3d Cir. 1982).

10. 533 F. Supp. 105 (D. Utah 1981).

11. *But cf. Note, Blind Bidding and the Motion Picture Industry*, 92 HARV. L. REV. 1128 (1979) (prohibiting blindbidding is not appropriate since there is no compelling state interest, and prohibition of blind bidding would only make the industry less efficient).

tributors signed a consent decree¹² stipulating that they would not blind bid films nor offer to license more than five motion pictures in a single group, a practice known as block booking.¹³ The decree further provided that if the three remaining distributors did not sign a similar consent decree by June 1, 1942, the agreement binding the original five distributors would lapse. The remaining three distributors did not sign by the specified date and the decree prohibiting blind bidding and block booking lapsed.¹⁴

In subsequent antitrust litigation against all eight distributors, the United States Supreme Court, in *United States v. Paramount Pictures*,¹⁵ sustained the trial court's finding that illegal price fixing conspiracies existed horizontally between distributors and vertically between distributors and exhibitors.¹⁶ The Court required the distributors to divest themselves of theater ownership to the extent that they were involved in the conspiracies. As a result, the vertical integration of distributors and exhibitors ended.¹⁷

In addition to separating the distribution and exhibition

12. *United States v. Paramount Pictures*, 66 F. Supp. 323, 331 (S.D.N.Y. 1946).

13. The Supreme Court defined block booking as "the practice of licensing, or offering for license, 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 during a given period." *United States v. Paramount Pictures*, 334 U.S. 131, 156 (1948).

14. *United States v. Paramount Pictures*, 66 F. Supp. at 333.

15. 334 U.S. 131 (1948), *on remand*, 85 F. Supp. 881 (S.D.N.Y. 1949).

16. Price fixing among distributors was established by evidence of express agreements. Price fixing between distributors and exhibitors was inferred from the patterns of price fixing in the trial record. The Supreme Court held that such price fixing combinations were per se violations of the Sherman Act. Citing *United States v. General Electric*, 272 U.S. 476 (1926), the distributors argued that because the owner of a patent could fix the price at which a licensee must sell a patented article, the owner of a copyrighted motion picture should have the same privilege. The Supreme Court disagreed and distinguished *General Electric* from *Paramount*. In *General Electric* a single patent was at issue. In *Paramount* the distributors were attempting to regiment an entire industry through price fixing, a practice the Supreme Court had previously held illegal in *United States v. Gypsum Co.*, 333 U.S. 364, 400 (1948).

17. Today the distribution and exhibition segments of the industry are separate. The Motion Picture Association of America and the National Association of Theater Owners are trade organizations that represent and lobby for distributors and exhibitors respectively. See generally Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 S. CAL. L. REV. 150 (1958) (reviewing the increased competition resulting from the *Paramount* decision and concluding that it was healthy for the industry, leading to better quality motion pictures).

segments of the industry, the *Paramount* decision and subsequent decree prohibited the practice of "block booking": the licensing of one film on the condition that the exhibitor will also agree to exhibit other films offered by the distributor in a given period.¹⁸ Block booking was declared illegal because exhibitors could not bid for a single film on its own merits, and because such practice "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."¹⁹ Blind bidding was an integral part of block booking, for exhibitors were unable to view some motion pictures in the block of films before having to bid.

The decree that prohibited block booking, however, did not totally prohibit blind bidding. Blind bidding was regulated to the extent that exhibitors could reject 20% of films licensed when blind bidding for two or more films.²⁰ There was no restriction on the blind bidding of single films. As a result, blind bidding increased until 1968, when the Justice Department and the major distributors entered into an agreement limiting to three the number of films that could be blind bid each year.²¹ When the agreement expired in 1975, the Justice Department was moving toward deregulation of the motion picture industry. Thus, continued federal regulation of blind bidding practices through consent decrees was not pursued.²² Consequently, blind bidding rapidly increased; by 1977, 60% (United Artists) to 91%

18. The *Paramount* trial court found that block booking was a common industry practice. Generally, exhibitors only had a description of the block of films for which they had contracted. *United States v. Paramount Pictures*, 66 F. Supp. at 348-49.

19. *United States v. Paramount Pictures*, 334 U.S. at 157, (quoting *United States v. Paramount Pictures*, 66 F.Supp. at 349). Finding that the exclusive rights granted by the Copyright Act did not include extending the right to other works whether or not they were copyrighted, the Supreme Court sustained the prohibition against block booking. *Id.*

20. Blind bidding was not directly addressed in the *Paramount* decision. The trial court decree provided, however, that exhibitors could reject 20% of blind bid films. "Blind-selling [bidding] does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse." *Id.* at 157 n.11. The Supreme Court approved the provision allowing exhibitors to reject 20% of blind bid films. *Id.*

21. *United States v. Paramount Pictures*, No. 87-273 (S.D.N.Y. filed August 14, 1968, renewed June 1, 1971).

22. Note, *Blind Bidding in the Motion Picture Industry*, 92 HARV. L. REV. 1128, 1136 n.36 (1979).

(Columbia) of first run films were being blind bid.²³

With federal deregulation, the economic and risk sharing struggle between distributors and exhibitors continued in state legislatures. Lobbying efforts by the National Association of Theater Owners has helped enact statutes prohibiting blind bidding in eighteen states.²⁴ Most state statutes, in addition to prohibiting blind bidding, regulate the motion picture bidding process to insure "fair and open bidding procedures."²⁵

III. The Statutes Regulating Motion Picture Distribution

The eighteen state statutes regulating motion picture distribution all have similar provisions.²⁶ Essentially all are trade regulation statutes aimed at insuring fair competition, preventing abuses in the bidding process, and correcting the perceived disparity in bargaining power between distributors and exhibitors.

23. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 417 (S.D. Ohio 1980), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982).

24. The following states have enacted statutes regulating the distribution of motion pictures. (The list of states differs slightly from those listed in *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d at 659 n.2. New York, Oklahoma, and Missouri statutes were not found. Information received verbally from the National Association of Theater Owners indicated that New York and Oklahoma do not have blind bidding statutes. Oregon has a blind bidding statute that was not noted in the opinion. A blind bidding statute in Missouri became effective August 13, 1982.)

STATE	CODIFICATION
Alabama	ALA. CODE § 8-18 (Supp. 1981).
Georgia	GA. CODE ANN. § 10-1-290 (1981).
Idaho	IDAHO CODE §§ 18-7701-7708 (Supp. 1982).
Louisiana	LA. REV. STAT. ANN. § 37:2901 (West Supp. 1982).
Maine	ME. REV. STAT. ANN. tit. 10, § 1901 (Supp. 1981-82).
Massachusetts	MASS. GEN. LAWS ANN. ch. 93F, § 1-4 (West Supp. 1982).
Missouri	Statute effective August 13, 1982.
New Mexico	N.M. STAT. ANN. § 57-5 (1978).
Ohio	OHIO REV. CODE ANN. § 1333.05-.07 (Page 1979 & Supp. 1981).
N. Carolina	N.C. GEN. STAT. § 75C (1981).
Oregon	OR. REV. STAT. § 646.890 (1981).
Pennsylvania	PA. STAT. ANN. tit. 73, § 203 (Supp. 1982).
S. Carolina	S.C. CODE ANN. § 39-5 (Law. Co-op. Supp. 1981).
Tennessee	TENN. CODE ANN. § 69-801 (Supp. 1981).
Utah	UTAH CODE ANN. § 13-13 (Supp. 1981).
Virginia	VA. CODE § 59.1-255 (1982).
Washington	WASH. REV. CODE ANN. § 19.58 (Supp. 1982).
W. Virginia	W. VA. CODE § 47-11D (1980).

25. See, e.g., GA. CODE ANN. § 10-1-291 (1981).

26. The following chart illustrates the general provisions of the state statutes:

Four types of regulation have been adopted by the states: (1) prohibition of blind bidding; (2) prohibition of advances to the distributor by the exhibitor prior to the showing of the picture; (3) prohibition of guarantees to the distributor if he shares in box office receipts; and (4) limitations on the length of run of any exclusive or exclusive multiple first runs of a motion picture.

Three state statutes, to date, have received judicial review: Ohio's statute²⁷ in *Allied Artists Pictures Corp. v. Rhodes*,²⁸ Pennsylvania's statute²⁹ in *Associated Film Distribution Corp. v. Thornburgh*,³⁰ and Utah's statute³¹ in *Warner Bros., Inc. v. Wilkinson*.³² Of these three statutes litigated to date, Pennsylvania's statute³³ is the most comprehensive. Pennsylvania prohib-

State	Prohibits Blind Bids	Regulates Bid Process	Restricts Guarantees	Restricts Advances
Alabama	X	X		
Georgia	X			
Idaho	X		X	X
Louisiana	X	X		
Maine	X	X		
Massachusetts	X	X		
New Mexico	X	X		
N. Carolina	X	X		
Ohio	X	X	X	
Penn.	X	X	X	X
S. Carolina	X	X		
Tennessee	X			
Utah	X	X	X	
Virginia	X	X		
Washington	X	X		
W. Virginia	X	X		

27. OHIO REV. CODE ANN. § 1333.05-.07 (Page 1979 & Supp. 1981).

28. 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd in part, remanded in part*, 679 F. 2d 656 (6th Cir. 1982).

29. PA. STAT. ANN. tit. 73, § 203 (Purdon Supp. 1982).

30. 520 F. Supp. 971 (E.D. Pa. 1981), *remanded*, 683 F. 2d 808 (3d Cir. 1982).

31. UTAH CODE ANN. § 13-13 (Supp. 1981).

32. 533 F. Supp. 105 (D. Utah 1981), *dismissed without prejudice*, No. 81-1692 (10th Cir. March 5, 1982).

33. PA. STAT. ANN. tit. 73, § 203 (Purdon Supp. 1982). The Pennsylvania legislature included its findings and purposes in the statute:

§ 203-2. *Legislative findings and purposes*

The General Assembly of the Commonwealth of Pennsylvania finds and declares that the licensing and distribution of feature motion pictures to theatres in this Commonwealth, including the rights and obligations of distributors and exhibitors, vitally affects the general economy as well as the access of the public to works of artistic expression and opinion. In order to promote the public interest

its blind bidding,³⁴ advances,³⁵ and, where the distributor shares in a percentage of box office revenues, guarantees.³⁶ Addition-

and public welfare of this Commonwealth to:

(1) insure unabridged access for the public to artistic expression and opinion in feature motion pictures at reasonable prices and at many different locations;

(2) avoid undue control of the exhibitors by the distributors;

(3) foster vigorous and healthy competition in offering feature motion pictures for the benefit of the public by prohibiting practices through which fair and honest competition is restrained, destroyed or inhibited;

(4) promote the wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures;

(5) prevent delay in the exhibition of feature motion pictures to the public in theatres playing subsequent to the first run showing;

(6) prevent theatres from unnecessarily going out of business, thereby resulting in reducing the number of small independent businesses and unemployment with losses of tax revenues and other undesirable consequences;

(7) prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of distribution and exhibition of feature motion pictures within the Commonwealth:

(8) promote fair and effective competition in that business;

(9) benefit the movie going public by limiting the long and extensive first runs so that additional theatres, in a given area, may also exhibit the same feature motion picture and at possibly a lower admission price; and

(10) prohibit blind bidding by insuring that exhibitors have the opportunity to view a motion picture and know its contents before committing themselves to exhibit it in their communities

Id. § 203-2. The pertinent parts of Pennsylvania's Feature Motion Picture Fair Business Practice Law appear *infra* notes 34-38.

34. § 203-4. *Blind bidding*

Blind bidding is hereby prohibited within the Commonwealth. No negotiations between exhibitors and distributors for the licensing or exhibition of a feature motion picture shall take place and no license agreement or any of its terms shall be agreed to for the exhibition of any feature motion picture within the Commonwealth before the feature motion picture has been trade screened within the Commonwealth.

Id. § 203-4.

35. § 203-6 *Advances*

(a) *Advances prohibited.* - It shall be unlawful for any license agreement for the exhibition of a feature motion picture at a theatre within the Commonwealth to contain or be conditioned upon a provision, agreement or understanding that the exhibitor shall advance any funds prior to the exhibition of the picture as security for the performance of the license agreement or to be applied to payments under such an agreement.

(b) *Prohibited advances void.* - Any provision, agreement or understanding which provides for such an advance shall be void and any purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

Id. § 203-6.

36. § 203-5. *Guarantees*

(a) *Minimum payment to distributor.* - It shall be unlawful for any license

ally, Pennsylvania regulates the bidding process³⁷ and length of first runs.³⁸ Ohio's statute³⁹ prohibits blind bidding⁴⁰ and regu-

agreement which provides for a fee or other payment to the distributor based in whole or in part on the attendance or the box office receipts at a theatre within the Commonwealth to contain or be conditioned upon a guarantee of a minimum payment to the distributor.

(b) Prohibited guarantees void.- Any provision, agreement or understanding which provides for such a guarantee shall be void and any purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

Id. 203-5.

37. § 203-8. *Bidding Procedures*

(a) Invitation to bid contents - If bids are solicited from exhibitors for the licensing of a feature motion picture within the Commonwealth, then the invitation to bid shall specify the following:

(1) Whether the run for which the bid is being solicited is a first, second or subsequent run; whether the run is an exclusive or non-exclusive run; and the geographical area for the run.

(2) The names of all exhibitors who are being solicited.

(3) The date and hour the invitation to bid expires.

(4) The time, date, name and address of the location where the bids will be opened, which location shall be in the exchange centers of this Commonwealth.

(b) Trade screening - If the motion picture that is the subject of a bid has not already been trade screened within the exchange centers in this Commonwealth, the distributor soliciting the bid shall include in the invitation to bid, the date, time and location of the trade screening for such picture.

(c) Bid submission and opening - All bids shall be submitted in writing and shall be opened at the same time and in the presence of those exhibitors, or their agents, who submitted bids and are present at such time.

(d) Examination of bids - Any exhibitor, or the agent of an exhibitor, who submits a bid for a particular run of a feature motion picture may, at reasonable times within 60 days after a bid is opened, examine any bid that is made for the same run of the motion picture by another exhibitor. The exhibitor may examine the bids even if the distributor rejects all bids that are submitted. Within seven business days after a bid for a particular run of a feature motion picture is accepted, the distributor shall notify in writing each exhibitor who submitted a bid for that run, the terms of the accepted bid and the identity of the successful bidder.

(e) Rejection of all bids - If a distributor issues invitations to bid for a feature motion picture and rejects all bids received, he shall not enter into a license agreement for the exhibition of the picture except by means of the bidding process specified in this section. If the distributor rejects all bids submitted pursuant to the invitation to bid, he shall notify all exhibitors who submitted bids that he rejected all the bids and shall issue a new invitation to bid.

Id. § 203-8.

38. §203-7. *Length of Run*

No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature

lates the bidding process,⁴¹ but its other provisions are slightly

motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

39. OHIO REV. CODE ANN. §§ 1333.05 -.07 (Page 1979 & Supp. 1981). The pertinent parts of Ohio's Motion Picture License Agreements are reproduced below and *infra* note 41.

§ 1333.06 [certain practices of distributors prohibited: effect on license agreements].

(A) No distributor shall engage in blind bidding.

(B) No distributor shall condition the granting or execution of a license agreement on a guarantee of a minimum payment to the distributor, if the exhibitor is required by the license agreement to make any payment to the distributor that is based on the attendance or the box office receipts at a theater at which the motion picture is exhibited.

(C) No distributor shall condition the granting or execution of a license agreement on the exhibitor's advancing, more than 14 days prior to his first exhibition of a motion picture, any money that is to be used as security for the exhibitor's performance of the license agreement or is to be applied to any payments that the exhibitor is required by the agreement to make to the distributor.

(D) Any provision of a license agreement that waives any of the prohibitions of, or fails to comply with, this section or section 1333.07 of the Revised Code is void and unenforceable. Any license agreement that fails to comply with this section and section 1333.07 of the Revised Code is voidable by the exhibitor, if the exhibitor gives the distributor written notice, prior to the exhibitor's first exhibition of the motion picture that is the subject of the agreement, of his intent to have the agreement voided.

40. *Id.* § 1333.06(A). See *supra* note 39.

41. § 1333.07 [Invitations to exhibitors to bid: inspection, notice].

(A) If bids are solicited from exhibitors for the purpose of entering into a license agreement, the invitation to bid shall specify:

- (1) The number and length of runs to which the invitation to bid applies;
- (2) Whether the invitation to bid applies to a first or subsequent run;
- (3) The geographic area for each run;
- (4) The names of all exhibitors who are being given an invitation to bid;
- (5) The date, hour, and location at which the bid is required to be made;
- (6) The name and address of the location where the bids will be opened, which location shall be within this state.

(B) If the motion picture that is the subject of a bid has not already been trade screened within the state, the distributor soliciting the bid shall include in the invitation to bid the date, time, and location of the trade screening of the motion picture that is the subject of the invitation to bid.

(C) Every distributor shall furnish to all exhibitors in this state reasonable and uniform notice of all trade screenings that are held within this state of motion pictures that he is distributing.

(D) All bids shall be submitted to the distributor in written form. The distributor or his agent shall open all bids at the same time and in the presence of at least one of the exhibitors, or the agent of an exhibitor, who has submitted a bid.

(E) Any exhibitor, or the agent of an exhibitor, who submits a bid for a particular run of a motion picture may, at reasonable times within 60 days after

different than the Pennsylvania statute. Ohio does not prohibit guarantees; distributors, however, are not permitted to demand guarantees as a condition of the exhibition license.⁴² In Ohio, advances may not be made more than fourteen days prior to the first showing of the film.⁴³ Utah's statute⁴⁴ prohibits blind bidding⁴⁵ and, if the distributor shares in the box office receipts, it also prohibits guarantees.⁴⁶

The need for such statutes and their impact on the motion picture industry are matters of great controversy. Distributors maintain "that blind bidding is necessary to stabilize the eco-

the bid is opened, examine any bid that is made for the same run of the motion picture by another exhibitor. The exhibitor may inspect the bids even if the distributor rejects all bids that are submitted. Within seven business days after a bid for a particular run of a motion picture is accepted, the distributor shall notify in writing each exhibitor who submitted a bid for that run of the motion picture of the terms of the accepted bid and the identity of the successful bidder. Any bid submitted is nonreturnable.

(F) If a distributor issues invitations to bid for a motion picture, he shall not enter into a license agreement for the exhibition of a motion picture except by means of the bidding process specified in this section. If the distributor rejects all bids submitted pursuant to an invitation to bid, he shall notify all exhibitors who submitted bids that he rejected all bids and shall issue a new invitation to bid.

Id. § 1333.07.

42. *Id.* § 1333.06(B). *See supra* note 39.

43. *Id.* § 1333.06(C). *See supra* note 39.

44. UTAH CODE ANN. § 13-13 (Supp. 1981). The pertinent parts of Utah's Motion Picture Fair Bidding Act are reproduced below:

§ 13-13-3 Blind bidding prohibited. No distributor shall engage in blind bidding.

§ 13-13-4 Payment of percentage of receipts. If an exhibitor is required by a license agreement to make any payment to the distributor that is based on a percentage of the theater box office receipts the license agreement shall not require a guarantee of a minimum payment to the distributor or require the exhibitor to charge any per capita amount for ticket sales.

§ 13-13-5 Bids - Contents. If bids are solicited from exhibitors for the purpose of entering into a license agreement, the bid shall include in the invitation to bid the date, time and location of the trade screening of the motion picture that is the subject of the invitation to bid.

§ 13-13-6 Provisions waiving or violating act void. Any provision of an invitation to bid or a license agreement that waives any of the prohibitions of or fails to comply with this act is void and unenforceable.

Id.

45. *Id.* § 13-13-3. *See supra* note 44.

46. *Id.* § 13-13-4. *See supra* note 44. Utah's statute, the least restrictive that has undergone judicial review, does not regulate advances.

nomics of motion picture production and distribution.”⁴⁷ With blind bidding, distributors can release a film shortly after completion and do so simultaneously in many theaters. Such an arrangement generally affords the best return on the producer-distributor’s financial investment because film advertising and promotion of ancillary items, such as books and record albums, can be coordinated over a wide area. In addition, blind bidding affords an earlier release date than if a completed film must be first screened for theater owners. The earlier release date means the film will begin to recoup its production and distribution costs more quickly. Further, distributors contend that imposition of bidding procedures increases their costs and discourages investment in new films.⁴⁸

One advocate of blind bidding and guarantees finds the shifting of risk from distributor to exhibitor to be reasonable and fair:

[B]ecause the distributor is often in an equally blind position when he agrees to underwrite or distribute an unproduced film, it does not seem unreasonable for him to demand that the exhibitor share some of the risk [W]hile it is understandable that exhibitors wish to be in the position to “make their own mistakes” it is possible that they will, for the most part, make the same mistakes whether under a blind bidding or trade screening system.⁴⁹

Exhibitors, viewing blind bidding as unfair,

have complained that the practice [of blind bidding] has contributed to the substantial decline of their industry and, even in the short run, leaves them in the position of having commitments to unexpectedly bad pictures and playing to empty houses for long durations.⁵⁰

Whether blind bidding is unfair and prejudicial to open compe-

47. Cohen, *Abolition of an Unfair Business Practice - Anti-Blind Bidding Statute for the Motion Picture Industry*, 26 MASS. L. REV. 239, 239 (1979).

48. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 416-17 (S.D. Ohio 1980), *aff’d in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982).

49. Note, *Blind Bidding and the Motion Picture Industry*, 92 HARV. L. REV. 1128, 1133 (1979).

50. Cohen, *Abolition of Unfair Business Practice - Anti-Blind Bidding Statute for the Motion Picture Industry*, 65 MASS. L. REV. 239, 239 (1979).

tition, as the exhibitors contend, or whether it benefits the entire industry and the viewing public, as the distributors maintain, are factual issues that were fully explored for the first time when the Ohio statute was litigated.

IV. Legal and Factual Issues at Trial

Distributors have challenged statutes in Ohio, Pennsylvania, and Utah that regulate motion picture distribution. Distributors complained that the statutes violate substantive due process, first amendment guarantees of freedom of expression, federal copyright laws, the commerce clause of the Constitution, and federal antitrust laws. Not all of these issues were reached by each court; in each case, however, the arguments put forth by the distributor-plaintiffs were similar.

A. *Substantive Due Process*

In *Allied Artists Pictures Corp. v. Rhodes*,⁵¹ the distributors complained that the Ohio statute was unconstitutional because it did not rationally relate to any legitimate governmental interest or further any legitimate governmental objective.⁵² The Federal District Court for the Southern District of Ohio applied a low level of scrutiny to the Ohio statute, finding that "substantive due process requires economic regulation to meet a fairly minimal standard."⁵³ Since no purpose was stated in the Ohio statute, the court examined and accepted the State's argument that the statute met a legitimate state interest in eliminating economic abuses,⁵⁴ and in maximizing a financial return to an industry within the state.⁵⁵ The district court found that the Ohio statute was carefully drawn to "effect a better balance of bargaining power between exhibitors and producer/distributors by the prohibition of risk shifting devices [e.g., blind bidding and

51. *Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. 408 (S.D. Ohio 1980), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982).

52. *Id.* at 428.

53. The court quoted from *Nebbia v. New York*, 291 U.S. 502, 537 (1934). "If the laws passed are seen to have a reasonable relation to proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied" *Id.*

54. *Id.* at 429 (citing *Ferguson v. Skruppa*, 372 U.S. 726 (1963)).

55. *Id.* at 429 (citing *Parker v. Brown*, 317 U.S. 341 (1943)).

guarantees].”⁵⁶ Thus, there was no due process violation because a rationale nexus existed between the Ohio statute and a legitimate state interest.

In *Warner Bros., Inc. v. Wilkinson*,⁵⁷ the distributors claimed that section 4 of the Utah Act, which prohibits guarantees if the distributors receive a percentage of the box office revenues,⁵⁸ was an unreasonable interference with their ability to contract, thereby restricting competition and unconstitutionally abridging their “liberty of contract.”⁵⁹ The Federal District Court for the District of Utah found the contract limitation imposed by the Utah statute requiring a distributor to choose between a guaranteed minimum payment or a percentage of the box office receipts to be reasonable.⁶⁰ The court decided that the statute, instead of restricting competition, “in fact . . . [preserved] and [fostered] competition, stemming the flow of economic concentration, and limiting monopoly and its fruits.”⁶¹ Since the distributors had not met the burden of demonstrating that the Utah legislature had acted in an arbitrary and irrational way, or that the statute did not serve a legitimate state interest, the court found it to be constitutional.⁶²

D. First Amendment Guarantee of Freedom of Expression

The distributor-plaintiffs in *Allied Artists* complained that the Ohio statute violated their first amendment rights of free

56. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 429. The court reached the conclusion that the Ohio statute was legitimately and carefully drawn by examining the effect prior industry practices had on Ohio exhibitors. It was determined that the Ohio exhibitors were at a substantial disadvantage when dealing with distributors under such practices. The Ohio statute was analogized to a California statute upheld by the Supreme Court in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). There, the California statute “corrected a disparity in bargaining power between local automobile manufacturers and dealers . . .” *Id.* at 100-101.

57. 533 F. Supp. 105 (D. Utah 1981).

58. See *supra* note 44 for regulation of guarantees in the Utah statute.

59. *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. at 109.

60. *Id.* “It [section 4 of the Utah act] is a rational effort on the part of the legislature to maintain a semblance of sense in distribution in an industry not particularly noted for rationality.” *Id.*

61. *Id.*

62. *Id.* at 110. The *Warner Bros.* court quoted *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976): “[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” *Id.*

expression. They contended that since motion pictures are protected forms of expression and the Ohio statute had a direct and immediate impact on their films, strict judicial scrutiny was the appropriate standard of review.⁶³ The district court noted that motion pictures are protected forms of expression under the first amendment,⁶⁴ however, such protection was not absolute;⁶⁵ the level of scrutiny was lower for a statute dealing with economic regulation than for a statute dealing with the content of protected speech.⁶⁶

The court decided that the Ohio statute came within the category of "general regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise."⁶⁷ Such statutes, the court reasoned, should be upheld when "justified by subordinating valid governmental interests."⁶⁸ Employing the balancing test established by the Supreme Court in *United States v. O'Brien*,⁶⁹ the district court examined the three specific adverse impacts that the distributors claimed were being imposed on them by the Ohio statute: delay in releasing films; foreclosure of access to Ohio markets; and reduction in quantity, quality, and diversity of films.

Finding a risk of delay in releasing motion pictures, and acknowledging that such a delay was an abridgment of plaintiffs' freedom of expression, the court nonetheless decided the risk was minimal, and was properly subordinate to a legitimate gov-

63. *Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. at 432.

64. *Id.* at 432 (citing *Interstate Circuit v. Dallas*, 390 U.S. 676, 682 (1968); *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 166 (1948)).

65. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 432 (citing *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961)).

66. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 433. The Supreme Court established the following balancing test for first amendment issues:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government: if it furthers an important or substantial governmental interest if the governmental interest; is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377, *reh'g denied*, 393 U.S. 900 (1968).

67. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 433 (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 50 (1961)).

68. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 433 (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961)).

69. 391 U.S. 367, 377, *reh'g denied*, 393 U.S. 900 (1968). See *supra* note 66 for the test in *O'Brien*.

ernmental interest.⁷⁰ Further, the distributors had no first amendment right to market their films in the most financially rewarding manner. The court found no convincing testimony that distributors would have less access to Ohio markets under the statute than they had before it was enacted. There was no evidence indicating that the Ohio statute would have an impact on industry decisions regarding the kind, number, and caliber of motion pictures produced. After balancing the incidental restriction on distributors' freedom of expression against the legitimate state interests developed at trial, the district court held that the Ohio statute did not infringe distributors' first amendment rights.⁷¹

The Federal District Court for the Eastern District of Pennsylvania in *Associated Film Distribution Corp. v. Thornburgh*,⁷² granted summary judgment and held that the Pennsylvania statute, on its face, violated the distributors' first amendment rights of free expression.⁷³ The Pennsylvania statute was also subjected to the *O'Brien* test, but yielded the opposite result from the *Allied Artists* scrutiny of the Ohio statute.⁷⁴ The court found that the purposes contained in the Pennsylvania statute⁷⁵ were not substantial governmental interests and thus did not meet the *O'Brien* criteria.⁷⁶

The court decided that strict scrutiny was the appropriate level of judicial review for first amendment issues.⁷⁷ Further,

70. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 433-34. The court found the following legitimate government interests from the testimony: readjusting the relative market strengths of exhibitors and distributors; establishing fair and open bidding practices; and removing opportunities for unfair dealing. *Id.* at 435.

71. *Id.* at 435.

72. 520 F. Supp. 971 (E.D. Pa. 1981), *remanded*, 683 F.2d 808 (3rd. Cir. 1982).

73. *Id.* at 996.

74. *See supra* notes 69-71 and accompanying text.

75. *See supra* note 33 for the purposes of the Pennsylvania statute.

76. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 986. *See supra* note 66 for the test in *O'Brien*.

77. The court found support for strict scrutiny in *Buckley v. Valeo*, 424 U.S. 1, 65 (1975). "[T]his type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises . . . indirectly as an unintended but inevitable result of the government's conduct . . ." *Id.* The court also relied upon *Citizens For a Better Environment v. Village of Schaumburg*, 444 U.S. 620, *reh'g denied*, 445 U.S. 972 (1980). (ordinance barring solicitation of contributions unless 75% of receipts are used for charitable purposes, held a violation of first amendment); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (requirement that newspapers provide access for opposing

first amendment protection extended to the means of distribution, not merely the content of the film.⁷⁸ Since the Pennsylvania statute regulated the distribution of motion pictures by imposing conditions on the licensing process, it was unconstitutional for the same reason that a statute regulating the means of distribution of newspapers was held unconstitutional: the statute imposed an indirect restraint on freedom of expression.⁷⁹

The court also found that the prohibition of blind bidding caused a risk of delay in releasing motion pictures for exhibition, which was sufficient to make the act unconstitutional.⁸⁰ The court specifically noted that statutes that inhibit freedom of expression by creating financial risk have been held to be unconstitutional.⁸¹ Further, the court concluded that although the Pennsylvania statute was overbroad, its purposes "might well be valid and support another, more limited regulation, possibly one more closely resembling the Ohio statute."⁸²

C. Copyright Preemption

The distributors in *Allied Artists* alleged that the Ohio statute deprived them of their rights under the federal Copyright Act.⁸³ Specifically, they argued that the Ohio statute was preempted by section 301 of the Copyright Act,⁸⁴ article I, section 8

editorial views, held a first amendment violation because newspapers might limit their editorial content to less controversial subjects); *Freedman v. Maryland*, 380 U.S. 51 (1965) (state statute that required films be submitted to state censor before showing created an unconstitutional risk of delay).

78. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 982 (citing *Philadelphia Newspapers, Inc. v. Borough Council of Swathmore*, 381 F. Supp. 228, 241 (E.D. Pa. 1974) (town ordinance prohibiting the placement of newspaper boxes on a public street was not constitutional because it affected the means of distributing protected expression)).

79. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 981-83.

80. *Id.* at 984. The court decided that the Supreme Court had spoken definitively on the risk of delay in licensing motion pictures in *Freedman v. Maryland*, 380 U.S. 51 (1965). The statute in *Freedman* was held unconstitutional because of the delay in exhibition after the films were submitted to the State Board of Censors.

81. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 982 (citing *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976) (statute that infringed on freedom of speech by imposing limitations on campaign expenditures by candidates for public office held unconstitutional)).

82. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 988-89.

83. 17 U.S.C. §§ 101-810 (Supp. III 1979 and Supp. IV 1980).

84. 17 U.S.C. § 301 (Supp. III 1979) provides for preemption of state statutes and

of the Constitution granting copyrights,⁸⁵ and the supremacy clause in article VI of the Constitution.⁸⁶ Further, they contended that the Ohio statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸⁷

Section 301 of the Copyright Act preempts state law that is equivalent to any of the rights granted in section 106 of the Copyright Act.⁸⁸ The district court's analysis in *Allied Artists* employed "a two-step process of first ascertaining the construction of the two statutes and then determining whether they [were] in conflict."⁸⁹ The court first examined whether the Ohio statute "creates, grants, or destroys any rights that are equivalent to the exclusive rights of copyright set forth in [section] 106."⁹⁰ Rather

common law that create legal or equitable rights that are equivalent to any of the exclusive rights granted under the Copyright Act.

85. U.S. CONST. art. I, § 8, cl. 8. grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

86. U.S. CONST. art. VI, cl. 2, establishes the Constitution as "[t]he supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

87. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 441 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The district court in *Allied Artists* examined the legislative history of the Copyright Act, contained in H.R. REP. No. 1476, 94th Cong., 2d Sess. 132, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5747, and decided that Congress limited preemption only to those State laws that were within the scope of the Copyright Act. *Id.* at 442-43. The court found that Congress intended to permit the States to establish laws that might affect the exercise of copyright, as long as the subject matter of the State statutes was not directed to copyright infringement. *Id.* at 444.

88. 17 U.S.C. § 106 (Supp. III 1979):

[T]he owner of the copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographed works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and . . . individual images of motion pictures or other audiovisual work, to display the copyrighted work publicly.

Id.

89. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 441 (quoting *Perez v. Campbell*, 402 U.S. 637, 644 (1971)).

90. *Id.* at 443. The district court in *Allied Artists* examined each of the exclusive

than depriving the distributors of the protection of section 106, the court found that the Ohio statute, by providing licensing procedures, recognized the distributors' right to grant exclusive licenses to exhibitors.⁹¹ Thus, the Ohio statute was held not to be in conflict with section 106 of the Copyright Act.

Having reconciled section 106 of the Copyright Act with the Ohio statute, the court turned to the distributors' complaint that the Ohio statute was an obstacle to accomplishing the objectives that Congress sought in enacting the copyright law. Four arguments were put forth by the distributors. First, their right to distribute copies of their films was impeded by the Ohio provision that guarantees cannot be a condition of granting an exhibition license. Second, their ability to license films on the best terms was restricted by the Ohio provision that prohibits negotiation for a license if all bids are rejected. Third, the blind bidding prohibition did not permit distributors to license their films under optimum circumstances. Fourth, the requirement to trade screen their films destroyed their right to choose whether or not to perform by making performance a condition of granting a license.⁹²

The court considered the first three objections together and decided that the distributors had no right under the Copyright Act to market their product in a manner most favorable to them.⁹³ Relying on two Supreme Court decisions,⁹⁴ the court found that states have the authority to regulate market practices dealing with copyrighted subject matter.⁹⁵ Although the copyright owner could not be forced to perform his work, the court found nothing in the Ohio statute that compelled distributors to

rights granted by section 106 of the Copyright Act and each provision of the Ohio statute. It found nothing in the Ohio statute that created or destroyed any rights equivalent to those in section 106 of the Copyright Act. *Id.*

91. *Id.*

92. *Id.* at 445.

93. *Id.* at 446.

94. *Id.* at 447. The court relied on *Watson v. Buck*, 313 U.S. 387 (1941) and *Fox Films v. Doyal*, 286 U.S. 123 (1932), which together held that rights granted by the Copyright Act do not preclude a state from regulating the marketing of copyrighted products nor does the copyright owner have the right to distribute the product in the manner he deems most desirable.

95. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 447.

trade screen their films.⁹⁶ Rather, the court decided that the provisions of the Ohio statute affected the distributors only after they had already decided to market their films in Ohio.⁹⁷ Thus, they retained full control over their copyrighted films, and there was no conflict between the Ohio statute and the objectives of Congress.⁹⁸

In *Associated Film Distribution Corp. v. Thornburgh*,⁹⁹ distributors put forth the same argument in attacking the Pennsylvania statute as was made in the challenge to the Ohio statute. They maintained that the Pennsylvania statute conflicted with their rights under the Copyright Law and thus stood as an obstacle to the objectives of Congress in enacting the law. The district court found that the Pennsylvania statute "substantially restricts the conditions under which a copyright holder may distribute and license its work. . . . [I]ts regulation . . . interferes with federally created rights granted by [section] 106 . . . in ways the Ohio statute . . . does not."¹⁰⁰ Specifically, the Pennsylvania statute was seen as more restrictive than its Ohio counterpart regarding advances,¹⁰¹ guarantees,¹⁰² and the terms of the license.¹⁰³ The court held that the provisions of the Pennsylvania statute so interfered with the distributors' exclusive right to license and control their films, and with their right to choose the means of distribution.¹⁰⁴ Hence, the court held that the Pennsylvania statute stood as an obstacle to the objectives of

96. *Id.*

97. *Id.* "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *Id.* at 446 (quoting *United States v. Paramount*, 334 U.S. 131, 158 (1948)).

98. *Id.* at 447.

99. 520 F. Supp. 971 (E.D. Pa. 1981), *remanded*, 683 F.2d 808 (3d Cir. 1982).

100. *Id.* at 994.

101. *Id.* See *supra* note 35. No advances were permitted in Pennsylvania. In Ohio, advances were permitted but not more than 14 days before the showing of the film. Although the Ohio statute was less restrictive, it too would have been preempted by the *Associated Film Distribution* court. "[T]he requirement . . . that an advance screening be held, requires the copyright holder to delay licensing. . . . This requirement, also present in Ohio conflicts with section 106 [of the Copyright Act]." *Id.* at 995.

102. See *supra* note 36. No guarantees were permitted in Pennsylvania. Guarantees were permitted in Ohio if they were not a condition of the license.

103. See *supra* note 38. In Pennsylvania films must be rebid after 42 days. There is no limit on the length of first runs in Ohio.

104. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 996.

Congress, and was thus preempted by the Copyright Act.¹⁰⁵

In *Warner Bros., Inc. v. Wilkinson*,¹⁰⁶ the distributors challenged the provision of the Utah statute which prohibits guarantees if the distributor shares in a percentage of the box office receipts.¹⁰⁷ They argued that the Utah statute was preempted by section 106 of the Copyright Act. The district court, in a brief analysis, found no connection between the Utah statute and the Copyright Act, stating:

The right to transfer or license copyrighted material for use by others under sections 106 and 201 *et seq.* of the Copyright Act has never encompassed a right to transfer the work at all times and at all places free and clear of all regulation; it has meant that the copyright owner has the exclusive right to transfer the material for a consideration to others.¹⁰⁸

D. *The Commerce Clause*

The distributors in *Allied Artists* contended that the Ohio statute attempted to deprive interstate commerce of its national uniformity, discriminated against interstate commerce, and imposed an undue burden on interstate commerce. Specifically, the distributors maintained that blind bidding statutes force the industry to deal with "a welter of varying or conflicting state regulations which will virtually destroy their ability to operate efficiently and effectively on a national basis."¹⁰⁹ The district court found the evidence insufficient to conclude that the flow of interstate commerce would be impeded. It did note that all the state statutes banning blind bidding were similar in their provisions, and the court found nothing to show that the distributors would be prevented from operating efficiently on a national scale.¹¹⁰

The district court found no discrimination against interstate commerce since all distributors were treated equally under the Ohio statute.¹¹¹ If there were Ohio distributors, they would be

105. *Id.*

106. 533 F. Supp. 105 (D. Utah 1981).

107. *Id.* at 106. See *supra* note 44 for the provisions of the Utah statute.

108. *Id.* at 108.

109. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 436.

110. *Id.* at 436 n. 17.

111. *Id.* at 437.

subject to the same provisions as the out of state distributors.¹¹² The court found that the only burden demonstrated at trial was the minor delay in the release of some films attributed to the requirement for a trade screening.¹¹³ It found such a burden permissible in view of the benefits of the Ohio statute.¹¹⁴

The district court in *Associated Film Distribution* did not reach the commerce clause issue, having granted summary judgment on the first amendment and copyright questions.¹¹⁵ The district court in *Warner Bros.* found evidence in the hearing record sufficient to demonstrate that the Utah statute was not an unreasonable or discriminatory burden on interstate commerce.¹¹⁶

E. Antitrust Violation

The distributors in *Allied Artists* charged that the Ohio statute required certain collusive conduct among exhibitors in violation of federal antitrust laws,¹¹⁷ and was therefore preempted by the supremacy clause of the Constitution.¹¹⁸ The distributor-plaintiffs alleged three violations. First, the Ohio statute encouraged exhibitors to agree to allocate films among themselves. Second, the open bidding procedures interfered with pricing behavior of the exhibitors because each exhibitor could compare the terms offered after the bids are opened. Third, restricting guarantees limited competition by negating a competitive tool. The court found that the Sherman Act¹¹⁹ would be violated only "if there is established joint conduct among participating exhibitors which unreasonably restrains trade."¹²⁰ Since the Ohio statute did not require or approve collusive conduct, the court decided that hypothetical conduct put forth by

112. *Id.*

113. *Id.* at 438.

114. *Id.* at 439.

115. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 996. See *supra* notes 72-82 and accompanying text.

116. *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. at 439. See *supra* notes 57-62 and accompanying text.

117. 15 U.S.C. §§ 1, 2, 13, 13a (1976, Supp. III 1979 & Supp. IV 1980).

118. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 448.

119. 15 U.S.C. §§ 1-7 (1976).

120. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 448.

the distributors was not sufficient to establish a violation of the Sherman Act.¹²¹ Disclosure of bid terms to all competitors was not viewed as anticompetitive unless the exhibitors used that information to limit competition.¹²² Absent any evidence of such activity, the court found the disclosure of bid terms acceptable.¹²³ Further, restriction on guarantees were determined not to be anticompetitive.¹²⁴ Guarantees were only prohibited when the distributors' demand for them was combined with a demand to participate in a percentage of the box office receipts.¹²⁵ The court found that the guarantee restriction actually fostered competition because it precluded large exhibitors from offering substantial guarantees for the best films, thus forcing out smaller competitors.¹²⁶

The district court in *Warner Bros.* found no antitrust violation in the Utah statute. The court referred to the *Allied Artists* decision and concluded that the Utah statute enhanced, rather than restricted, competition.¹²⁷

V. Appellate Decisions

The circuit court decision in *Allied Artists Pictures Corp. v. Rhodes*¹²⁸ held that those provisions of the Ohio statute concerned with state regulation of the bidding process did not deprive distributors of any protected rights, nor were they preempted by federal law.¹²⁹ The issue of whether restraints on the terms of licensing agreements under the Ohio statute were valid was remanded for further fact finding by the district court.¹³⁰

121. *Id.* The court noted that the concept of a hypothetical restraint of trade that was being proposed by the distributors had been discredited by the Supreme Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131 (1978). *Id.* at 448-49.

122. *Id.* at 449.

123. *Id.* at 450.

124. *Id.* at 451.

125. *Id.* See OHIO REV. CODE ANN. § 1333.06(B) (Page 1979 & Supp. 1981) reprinted *supra* in note 39.

126. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 451.

127. *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. at 107.

128. 679 F.2d 656 (6th Cir. 1982).

129. *Id.* at 662-63.

130. *Id.* at 665. The portion of the Ohio statute that was upheld was section 1333.06 (A) and (D) and section 1333.07. The portion of the statute remanded was section 1333.06 (B) and (C). See *supra* note 39 for the text of the Ohio statute.

The circuit court decision in *Associated Film Distribution Corp. v. Thornburgh*¹³¹ reversed the lower court's grant of summary judgment that found the Pennsylvania statute defective and remanded all issues for trial.¹³² The appeal from the district court decision in *Warner Bros.* was dismissed without prejudice.¹³³

VII. Analysis

The major provisions of state statutes regulating motion picture distribution readily separate into two categories: those that are concerned with regulation of the bidding process (prohibition of blind bidding and bidding procedures), and those that impose restraints on the terms of exhibition license agreements (guarantees, advances, length of run). This analysis critiques the differing rationales of the district court decisions in *Allied Artists* and *Associated Film Distribution* to determine whether blind bidding statutes are constitutionally defective or are valid trade regulations.

A. First Amendment Guarantees of Freedom of Expression

The circuit court in *Associated Film Distribution* was correct in criticizing the trial court's analysis of the Pennsylvania statute.¹³⁴ The trial court had decided that since the Pennsylvania Act was "more comprehensive [than the Ohio statute], it must be judged by more rigorous standards than Ohio's comparatively limited regulation"¹³⁵ Assuming *arguendo* that a more comprehensive statute requires a higher level of scrutiny, such a distinction between the Pennsylvania and Ohio statutes was incorrect. The Pennsylvania and Ohio statutes are identical in their essential elements: the regulation of the bidding pro-

131. 683 F.2d 808 (3d Cir. 1982).

132. *Id.* at 817. The court stated that it agreed with the analysis set forth by the district court in *Allied Artists*, but found that it could not apply the analysis without fact finding at trial. *Id.* See *supra* notes 63-71 and accompanying text for a discussion of the analysis used by the *Allied Artists* district court.

133. *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981), *dismissed without prejudice*, No. 81-1692 (10th Cir. March 5, 1982).

134. See *supra* notes 72-82, 132 and accompanying text.

135. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 979. See *supra* notes 33-38 (Pennsylvania statute) and notes 39, 41 (Ohio statute).

cess¹³⁶ and the prohibition against blind bidding.¹³⁷ It was these identical elements of the two statutes that caused a potentially indirect impact on the distributors' freedom of expression, and not those portions of the Pennsylvania Act that made it slightly more restrictive in its control of licensing terms. Thus, the two statutes should have received the same level of judicial scrutiny.

Having chosen the incorrect level of scrutiny, the district court then found as a matter of law that no compelling state interest existed that justified an indirect impact on the distributors' freedom of expression.¹³⁸ The cases chosen by the court to demonstrate precedent for its selection of a high level of scrutiny and for finding the Pennsylvania statute constitutionally defective on its face are not on point.¹³⁹ None of the cases cited by the court are concerned with the validity of statutes that regulate business practices between parties.

The proper line of cases for analyzing the Pennsylvania and Ohio statutes are those dealing with regulation of trade where there is a potential for indirect impact on freedom of expression. Such a line of cases was correctly used by the district court in *Allied Artists* for its analysis of the Ohio statute.¹⁴⁰ In essence, those cases held that the first amendment's guarantee of freedom of expression was not absolute;¹⁴¹ if a statute was regulatory in nature and did not have the purpose of controlling the content of speech, then any incidental infringement of freedom of expression must be balanced against a legitimate state interest to determine whether the statute was constitutional.¹⁴² These are precisely the circumstances presented by the Pennsylvania and Ohio statutes. Thus, the *Allied Artists* trial court applied

136. See *supra* notes 33-38 (Pennsylvania statute) and notes 39, 41 (Ohio statute).

137. See *supra* notes 34-38 (Pennsylvania statute) and notes 39, 41 (Ohio statute).

138. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. at 981. See *supra* notes 75, 76 and accompanying text.

139. See cases cited *supra* note 77.

140. The district court in *Allied Artists* used the following cases to form the framework for its analysis of the Ohio statute: *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *United States v. O'Brien*, 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968). See *supra* notes 67-69 and accompanying text.

141. See *supra* text accompanying notes 63-69 for a discussion of the nature of freedom of expression.

142. See *supra* note 66 for the balancing test established by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 377, *reh'g denied*, 393 U.S. 900 (1968).

the correct analysis to Ohio's blind bidding statute and the correct level of scrutiny: one that balances Ohio's interest in regulating the motion picture distributors against the potential infringement of the distributors' freedom of expression.

B. Copyright Preemption

The trial court in *Associated Film Distribution* found that since the Pennsylvania statute was more restrictive than the Ohio statute regarding guarantees, advances, and length of run, it impermissibly interfered with the distributor's right to license its films under the Copyright Act.¹⁴³

The provisions used by the district court in *Associated Film Distribution* to distinguish the Pennsylvania and Ohio statutes should not have led to a finding of copyright preemption. The Pennsylvania statute prohibits advances,¹⁴⁴ while the Ohio statute prohibits advances prior to 14 days before the film is shown to the public.¹⁴⁵ This difference was minimal, particularly in light of the *Allied Artists* district court finding that "advances rarely if ever were required . . . to be paid more than 14 days before a motion picture was to be shown."¹⁴⁶ The Pennsylvania statute also prohibited guarantees if the distributor shared in a percentage of the box office receipts.¹⁴⁷ The Ohio statute simply prohibited the distributor from demanding a guarantee as a condition for granting a license where the distributor received a percentage of the box office receipts.¹⁴⁸ The Pennsylvania statute is more restrictive because it forces the distributor to choose between a guaranteed fixed price rental or a percentage of the box office receipts. Both statutes, however, limit the distributors' unlimited discretion to demand guarantees and to receive a percentage of the box office receipts. The more restrictive Pennsylvania statute does not limit the copyright holder's ability to license his films; the restriction merely prohibits the use of guar-

143. See *supra* notes 84 and 88 for the disputed sections of the Copyright Act. See *supra* notes 99-105 and accompanying text for a discussion of the *Associated Film Distribution* district court analysis of the copyright preemption claim.

144. See *supra* note 35.

145. See *supra* note 39.

146. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 420.

147. See *supra* note 36.

148. See *supra* note 39.

antees by the distributor as a device for shifting financial risk to the exhibitor.¹⁴⁹

The portions of the Ohio statute prohibiting blind bidding and regulating the bidding process have been upheld on appeal.¹⁵⁰ These provisions are identical to the provisions in the Pennsylvania statute. The district court in *Associated Film Distribution* has been directed, on remand, to use the same analysis employed by the district court in *Allied Artists* in interpreting the Ohio statute. Thus, it is likely that the correct result reached by the *Allied Artists* court will also be found by the *Associated Film Distribution* court in a trial on the merits.

C. Commerce Clause

The provisions of the Pennsylvania and Ohio statutes regulating the terms of the licensing agreement were discussed as being discriminatory towards and imposing undue burdens on interstate commerce.¹⁵¹ The commerce clause issue has been remanded for further fact finding to the trial courts in *Allied Artists* and *Associated Film Distribution*. The *Allied Artists* district court was directed to consider the restraints on terms of license agreements in the Ohio statute in light of the Supreme Court analysis in *Baldwin v. Seelig*¹⁵² and the tests set forth in *Pike v. Bruce Church*.¹⁵³ Under *Seelig*, trade regulation to prevent deceptive trade practices was a valid state interest, but protecting the financial interest of an in-state business by providing price security was not a valid state interest.¹⁵⁴ The test in *Pike* requires the trial court to first find a legitimate local interest, and then assess the burden the activity places on interstate com-

149. The *Allied Artists* district court found that the primary purpose of guarantees was to shift financial risk from the distributor to the exhibitor. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 418.

150. See *supra* note 130 for the specific portions of the Ohio statute that were upheld. See *supra* note 39 for text of statute.

151. See *supra* notes 109-116 and accompanying text.

152. 294 U.S. 511 (1935). *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d at 664.

153. 397 U.S. 137 (1970). *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d at 665.

154. *Baldwin v. Seelig*, 294 U.S. at 523. The Supreme Court in *Seelig* held that state regulation of interstate shipments of milk was permissible for health and safety, but state regulation to insure price security was not a state interest under the commerce clause. *Id.*

merce.¹⁵⁵ The distributors' challenge to the Pennsylvania and Ohio statutes in *Associated Film Distribution* and *Allied Artists* should have been analyzed under *Seelig* and *Pike* because those cases directly addressed state regulation of trade under the Commerce Clause.

VIII. Conclusion

Most states that have enacted statutes regulating motion picture distribution practices have mandated bidding procedures and have banned blind bidding. It is probable that those provisions will withstand constitutional and preemption challenges in light of the reasoning of the federal district court in *Allied Artists Pictures Corp. v. Rhodes*. The degree to which a state may restrict licensing terms is less clear. Unless the proponents of the regulatory schemes can demonstrate more compelling reasons for such restrictions, financial protection of in-state business will not be sufficient to sustain state restriction of licensing terms.

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155. *Pike v. Bruce Church*, 397 U.S. at 142. The Supreme Court established the following test in *Pike v. Bruce Church*:

Where the [challenged state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id.