ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

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Reading/Lancaster, Scranton/Wilkes-Barre, Harrisburg and Erie. Plaintiffs selected January 1, 1977 as the starting date and June 30, 1983 as the termination date of the study. In all, the study included approximately 14,000 licenses. Of the six and one-half year period covered by the study, the Pennsylvania statute was only in effect for two and one half years. The period between the granting of summary judgment in AFD I and the Court of Appeals mandate reversing and remanding that decision were counted with the time before the Act took effect as the "unregulated" periods. More than twice as many licenses were issued in these times as in the regulated periods.

Plaintiffs' study demonstrates that the distributors' film rental percentage in unregulated periods was 55% and in regulated periods was 51%. Film rental percentage is that percentage of the exhibitor's box office gross paid to the distributor as rental. Plaintiffs allege that the decline in percentage rental demonstrates significant burden caused by the Pennsylvania statute. One problem with this conclusion is that it assumes that percentage film rental is a meaningful term. The evidence suggests that percentage rental is a statistic with only marginal significance. Like other businesses, the motion picture industry looks to its dollar receipts and its bottom line to measure results. Percentage rental may have little relation to the bottom line. Plaintiffs themselves offered a great deal of testimony about differences among movie theatres. Distributors do their best to license their films to prime theatres. A distributor may not be able to license a picture to a prime theatre on terms as favorable as it can to a less attractive or spaceous facility, but the film may earn more dollars at the former. In addition, there was evidence that some

distributors substantially reduce contract terms in licenses with certain exhibitors by renegotiating after the run. Reductions occur even when films are licensed by bid, where traditionally terms are held firm, and even when the film has been successful. That these reductions occur indicates that distributors do not always act to maximize percentage rental.

Another basic fallacy is plaintiff's reasoning that because distributors' share of film rental declined during the periods of regulation, the Pennsylvania Act caused the reduction. In fact, the causal connection does not appear to exist. When one examines the fortunes of each of the plaintiffs individually, it becomes extremely difficult to blame the Act for an overall decline in percentage rental. Some distributors have fared better during regulated periods than during unregulated periods. The decline of other distributors' percentage rental is more persuasively explained by factors other than the Act, such as the presence or absence of one blockbuster, or general decline in a company's fortunes.

Plaintiffs' study also fails to provide any information about the Act's effect on certain segments of the industry. Because the study was limited to films licensed by the plaintiffs, it does not show what effect, if any, the statute has on independent distributors. Furthermore, because the study was limited to six large areas, it provides no information about the effect of the statute on small towns Plaintiffs' economics expert, in fact, testified that the study would have produced more accurate results had it been a random survey of 55% the entire state, rather than an examination of certain metropolitan areas comprising 55% of the state's population.

Plaintiffs' expert also conducted a regression analysis to demonstrate the effect of the statute on percentage film rental. When the number of licenses on a particular film, the length of run, and the relative success of the film were held constant, the analysis showed that the presence of regulation correlated with a 2.9% decline in percentage film rental. As with plaintiffs' statistical study, the regression analysis was founded on the assumption that distributors attempt to maximize percentage film rental. Moreover, when one makes the assumption, which I find warranted, that the presence of regulation has not caused any distributor to switch from bidding to negotiation or to renegotiate license terms downward after the run, the regression analysis shows that any effect of regulation on percentage rental is, at most, incidental.[23]

There is no credible evidence that the Act causes a switch to either negotiation or renegotiation of licenses. Certainly on its face the Act does not mandate such procedures. In addition, there is no real evidence that the Act has indirectly had such an effect on the way distributors do business. Some of the distributors license more pictures by bid now than they did before the Act became effective. The decisions by other distributors to negotiate exclusively, to engage in competitive negotiation or to discount some licenses are business decisions unrelated to the Pennsylvania Act.

Defendants' statistical claim that some exhibitors in Pennsylvania paid higher percentage film rental to all distributors

23/ When negotiation and renegotiation are factored out, the presence of regulation results in a decline in percentage rental of .94%.

after the Act than before is also flawed. The base of data for this claim includes both first run and subsequent run films, and thus fails to isolate the Act's primary impact on first run movies. The claim is also weakened by the fact that it treats as occurences during a "regulated period" data from the period of about a year during which at least some distributors relied on the subsequently reversed ruling in AFD I that the Act was unconstitutional. More persuasive is evidence that indicates distributors did not receive higher percentage film rentals in unregulated states than in regulated jurisdictions and evidence showing that regulation has had no impact on plaintiffs' market share in Pennsylvania as a percentage of nationwide film rental. Such evidence suggests that differences in percentage film rental, if significant at all as a measure, do not depend on whether the distributor is subject to the kind of trade practice regulation contained in the Pennsylvania Act.

V. Commerce Clause

Plaintiff claims that the Pennsylvania Feature Motion Picture Fair Business Practices Law violates the Commerce Clause of the United States Constitution. Article 1 §8, Clause 3. Even in the absence of federal legislation, the Commerce Clause places some limits on state regulation. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851). The plaintiff distributors contend that the law discriminates against and unconstitutionally burdens interstate commerce.

A state law whose purpose or effect is to discriminate against interstate commerce constitutes simple economic protectionism and is virtually invalid per se. See Bacchus Imports Ltd. v. Dias, 52

U.S.L.W. 4979, 4981 (1984); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981). The Supreme Court's definition of what constitutes a discriminatory law is narrow. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), involved a Maryland law which, in part, forced all producers and refiners of petroleum products to divest themselves of retail service stations in the state. The brunt of the statute fell completely on out-of-state companies because there were no local producers or refiners. The Court held that the statute was not discriminatory. First, it did not discriminate against out-of-state producers and refiners because there were no producers or refiners in Maryland to favor. Second, the Court rejected appellant's claim that the statute discriminated by protecting in-state independent dealers from out-of-state competition:

> [I]n-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

437 U.S. at 126.

The Court also held:

> If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods.

427 U.S. at 126, n. 16.

The Pennsylvania statute at issue in this case is facially neutral. Exxon indicates that even if there were no Pennsylvania

distributors the law would not be considered economic protectionism because it draws no distinction between in-state and out-of-state distributors. In fact, there was testimony at trial that two independent distributors, albeit small ones, are located in this Commonwealth. Just as their out-of-state competitors, these local distributors must follow all the requirements of the Feature Motion Picture Fair Business Practices Law. The Pennsylvania statute does not discriminate against interstate commerce.[24]

Even a law which does not discriminate may be struck down if it unduly burdens interstate commerce. The applicable test was announced in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the 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 .... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pennsylvania's Act regulating the licensing of motion pictures satisfies the Pike test.

24/ The Sixth Circuit held that Ohio's trade screening and movie regulation statute was not discriminatory under the Commerce Clause because of its facial neutrality. Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656, 662 (6th Cir. 1982)(hereinafter Allied II). Also instructive is the Fourth Circuit's decision in American Motors Sales Corp. v. Division of Motor Vehicles of the Commonwealth of Virginia, 592 F.2d 219 (4th Cir. 1979). That case involved a Virginia statute which restricted the ability of automobile manufacturers or distributors to grant additional franchises for a particular line of vehicle in a trade area already served by one or more dealers carrying the same line. The Fourth Circuit held that because the statute drew no distinction between manufacturers within the state and those outside, it did not discriminate against interstate commerce.

Again, Exxon provides a useful comparison. There was evidence that the three refiners who marketed their product in Maryland solely through company-operated stations might withdraw from selling in Maryland completely if the statute in question were enforced. There was no evidence, however, that the statute would affect the total quantity of petroleum products shipped into Maryland. In finding that the statute imposed a permissible burden on interstate commerce, the Court stated:

> The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

437 U.S. at 127.

Appellants in Exxon also claimed that the Maryland statute would burden interstate commerce by changing the market structure in the petroleum industry. The Court also rejected that claim.

> We cannot . . . accept appellant's underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.... [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.

437 U.S. at 127-28.

There is no credible evidence that the Pennsylvania statute at issue in this case has caused any diminution in the amount of film product flowing into the state. The evidence fails also to support

plaintiff's argument that the Act has delayed the introduction of some films into Pennsylvania. The benefits from the act are substantial and outweigh the minimal burdens created by the legislation.

The prohibition against trade screening serves the primary goal of reducing the risks of deceptive licensing practices by distributors. Such a goal protects not only theatre owners in the Commonwealth, but also the public. The anti-blind bidding provision facilitates exhibitors' ability to provide communities with the films they will more likely want to see. It encourages exhibitors to license films based on the merits of the product.

The burdens imposed by the trade screening requirement are minimal by comparison. There is no constitutional right to sell a pig in a poke. The financial costs of producing a trade screening print are small in comparison with the distributors' filming budgets. The trade screening requirement has not affected the quality of films, nor has it delayed their release. That a distributor may not have its picture ready in time to license it at a prime theatre is not a result of the Act. Another distributor, one who is able to produce a trade screening print more promptly, will win the theatre. As the Court made clear in Exxon, the Commerce Clause protects the interstate market, not particular firms.[26]

26/ Some mention was made during trial of the practice of licensing films by blind bidding, but with a "48 hour cancellation clause." Such clauses allows exhibitors to cancel their licenses within 48 hours after actually viewing the film. Requiring the use of these clauses would not serve the public interest as successfully as the trade screening requirement. By the time the exhibitor actually sees the picture, it is generally too close to the exhibition date to license another film.

The prohibition of guarantees and advances serves the primary purpose of preventing large exhibitors from using their deep pockets to squeeze smaller exhibitors out of the market. This benefits both small theatre owners and the public, which gains by having a greater available choice of theatres and films.[27] The interests served by these clauses are legitimate ones. In Pike, the Court recognized a State's legitimate interest in "maximizing the financial return to an industry within it." 397 U.S. at 143. See also Parker v. Brown, 317 U.S. 341 (1943). Later, in New Motor Vehicle Board v. Orrin W. Fox, Co., 439 U.S. 96 (1978), the Supreme Court upheld a California statute which regulated the granting of automobile franchises. Although that decision was based on the due process clause, the Court did identify "the promotion of fair dealing and the protection of small business" as valid state interests. 439 U.S. at 102, n.7. Relying in part on this language, the Fourth Circuit held that a similar Virginia statute did not

27/ There are some secondary benefits to the prohibition of guarantees and advances as well. The public benefits because exhibitors are less likely to stretch out the run of a film to try to recoup a guarantee. The prohibition also may help keep film prices in the Commonwealth stable.

unduly burden interstate commerce. American Motors Sales Corp. v. Division of Motor Vehicles of the Commonwealth of Virginia, 592 F.2d 219 (4th Cir. 1979).[28]

The burden imposed by the prohibition of guarantees and advance is not excessive in relation to the local benefits derived from the prohibition. Plaintiffs' own economics expert testified that the amount of unearned guarantee income was not substantial enough to affect film rental. In addition, advances are not the only effective means of dealing with slow payers or poor credit risks.

A provision merely prohibiting the solicitation of guarantees and advances, such as that in Ohio, does not serve the public interest as successfully as Pennsylvania's provision. Barring solicitation by distributors would not prevent large exhibitors from using guarantees to obtain films which might otherwise be licensed to small theatre owners.

The 42 Day provision also passes the Pike test. There is a legitimate and substantial benefit in promoting the faster dissemination of new films in rural and suburban areas. Once the distributors' misinterpretations of the provision are discounted, the burdens imposed by the clause are minimal. That a distributor may elect not to open

28/ In Allied II the Sixth Circuit remanded the issue of the validity of Ohio's regulation of guarantees and advances. District Court Judge Duncan had found that the regulation primarily acted to correct a bargaining imbalance between exhibitors and distributors. Allied Artist Pictures Corp. v. Rhodes, 496 F.Supp. 408 (S.D. Ohio 1980)(hereinafter Allied I). The Court of Appeals, relying on Baldwin v. Seelig, Inc., 29 U.S. 571 (1935), concluded that "a state's interest in righting a bargaining imbalance, standing alone, is not sufficient under the Commerce Clause to permit direct interference with pricing where it burdens interstate commerce." 679 F.2d at 665. The Court remanded for determination of whether any other legitimate local public interest existed. I do not base my decision on a bargaining imbalance between local exhibitors and out-of-state distributors. I base it instead on the state's clearly legitimate interest in maintaining the vitality of its small theatre owners and in protecting them from being engulfed by powerful exhibitors, both local and national. Moreover, I read Baldwin v. Seelig, Inc. to reject a New York law which on its face amounted to economic protectionism.

a film in Pennsylvania on a given day because of the 42 day clause is a decision of marketing strategy, not an effect of the Act. The Commerce Clause does not protect the "methods of operation in a retail market," Exxon, 437 U.S. at 127, nor does it guarantee to distributors freedom from any regulation that might marginally influence their business strategy.

The Pennsylvania Act's provisions regulating bidding procedures also pass muster under the test announced in Pike. The open bidding and re-bidding requirements of the Act provide a substantial benefit to the public interest by discouraging deception by distributors and collusion between distributors and exhibitors and by encouraging honest bidding practices. The burdens imposed by these sections of the Act are minor. There was no credible evidence that the bidding procedure regulations caused any delay in the release of films or anything more than minor administrative expense.

The plaintiff's contention that the Pennsylvania Act reduced distributors' film rental does not change the balance under the Pike test. Cost is a factor to be taken into account when assessing burden in a Commerce Clause analysis. Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 445 n.21 (1978). Percentage film rental, however, is a term without any real meaning. Even if it did have significance, the Act is not the cause of declining percentage film rental.

Plaintiffs argue that the Act has caused some distributors to switch from bidding to negotiation and that, as a result, percentage fil rental has declined. The decisions to negotiate or to renegotiate are, however, based on business judgment and are not caused by the Pennsylvania Act. In addition, when negotiation and renegotiation are

held constant, plaintiff's regression analysis demonstrated only a .91% decline in percentage film rental during periods of regulation.

The Pennsylvania Feature Motion Picture Fair Business Practices Law serves legitimate and substantial public purposes. The Act takes a small step against dishonest and unfair practices in the motion picture industry. A legislature

> need not strike at all evils at the same time or in the same way .... [I]t may implement its program step by step,... adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (citations omitted).

In contrast to its benefits, the burdens imposed by the Pennsylvania Act are incidental and are not "clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142.

VI. The First and Fourteenth Amendments

The Pennsylvania Feature Motion Picture Fair Business Practices Law does not violate the First and the Fourteenth Amendments to the United States Constitution. In its opinion reversing AFD I, the Court of Appeals stated the test by which this Court must evaluate the statute. Associated Film Distribution Corp. v. Thornburgh, 683 F.2d 808, 813 (3d Cir. 1982). Although motion pictures are protected by the First Amendment, Interstate Circuit v. Dallas, 390 U.S. 676, 682 (1968), the Court held that the Pennsylvania Act is content-neutral trade practice legislation. As such, the applicable test is that set forth in United States v. O'Brien, 391 U.S. 367, 377, rehearing denied, 393 U.S. 900 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial government 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.

The Court of Appeals remanded this case for a factual determination of the Act's actual threat to First Amendment values, the nature and weight of the state's interests in enacting the law and a balancing of the state's concerns against the impact on the First Amendment.

In fact, the Pennsylvania Act has had little or no impact on First Amendment values. There was no credible evidence that the Act has had or will have any effect on the quality or number of films being produced or being exhibited in the Commonwealth of Pennsylvania. There was also no evidence that the Act has caused a material delay in the exhibition of films in the Commonwealth. No evidence was offered which suggested that more films miss their release dates now than before the Act. The trade screening requirement, when combined with production delays, creates a minimal risk of delayed release. Distributors, however, accelerate post-production and have missed release dates in only a handful of cases. Even in these instances, it is not proven that the Act caused the delay. Plaintiffs claim that some distributors have chosen not to release certain films at an early date in Pennsylvania because of the 42-day clause. Although it may marginally influence a distributor's marketing decision, the clause does not compel the distributor to make such a decision.

The concerns which led the Commonwealth to enact the Act are substantial. The Act promotes fair dealing between distributors and exhibitors, helps preserves the viability of small exhibitors and promotes wider dissemination of films at diverse locations and at reasonable [illegible]. The statute, in fact, advances some of the interests underlying the First Amendment. The trade screening requirement encourages innovation by making it more likely that films will be licensed on merit rather than on the name of their producer, director or star. The abolition of guarantees and advances promotes competition among exhibitors, and promotes the exhibition of a variety of films at many locations. The 42 day provision makes it easier for people living outside cities to see films more quickly.

On balance, the Feature Motion Picture Fair Business Practices Law satisfies the O'Brien standard. It was within the constitutional power of the state to enact the law.[29] The legislation furthers a substantial state interest which is content-neutral and, therefore, unrelated to the suppression of free expression. The impact of this law

29/ I will discuss the validity of the statute under the Pennsylvania Constitution in a later portion of this opinion.

on First Amendment freedoms in de minimis and, in any event, is outweighed by the interests of the state in passing the statute.[30]

VII. Copyright Preemption

Plaintiffs' third claim is that the Federal Copyright Act, 17 U.S.C. § 101 et seq., and the Supremacy Clause of Article VI of the United States Constitution preempt the Pennsylvania statute. The district judge's original opinion in AFD I ruled that on its face the Pennsylvania Act was preempted by the copyright laws. 520 F.Supp. at 995. The Court of Appeals reversed and remanded for a determination of whether "the prohibitions contained in the Pennsylvania Act in fact stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.... The question of whether and to what extent the Pennsylvania Act interferes with attaining the 'purposes and objectives of Congress' is one which must be resolved before the trial court can decide, as a matter of law, whether the interference (if any) is such as to require invalidation of all or part of the Pennsylvania Act

30/ Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), was decided after the Third Circuit's opinion in AFD II and the Sixth Circuit's opinion in Allied II. In that case, a newspaper challenged a Minnesota statute which imposed a use tax on ink and paper. The tax exempted the first $100,000 spent by a publication on ink and paper in any calendar year. The Court stated that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional .... Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585. The decision in Minneapolis Star is distinguishable. Pennsylvania has not imposed a tax on distributors. It is not proven that the legislation in the present case has had any impact on profits. Moreover, the differential treatment of the movie industry in Pennsylvania's laws is justified by the special problems of that industry. The Commonwealth's attempt to remedy these specific evils is not related to the suppression of free expression and is warranted by the state's interest in reforming the licensing process. Finally, the decision in Minneapolis Star rested, in part, on the fact that the Minnesota statute was not content-neutral in that its burden rested solely on large periodicals.

on preemption grounds." 683 F.2d at 816.

The Supreme Court has held recently that preemption of a state law will occur:

> [f]irst, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law . . .; second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation. . .; and, finally, when compliance with both state and federal law is impossible . . . or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Capital Cities Cable, Inc. v. Crisp, ____ U.S. _____, 81 L. Ed. 2d 580, 588-89 (1984)(quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

Plaintiffs claim that the Pennsylvania Act fails to pass muster under the first and third tests.

For its argument that the Act violates the first test, plaintiffs rely on 17 U.S.C. § 301, which states:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to --
> ...
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

17 U.S.C. § 106 provides that the owner of a copyright has the

exclusive right to do 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 of 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 ... 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 pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

The narrow question is whether the state statute grants any rights equivalent to the exclusive rights given to copyright owners. As the Court of Appeals stated in AFD II, "the Act does not take away from plaintiffs and give to another the right to reproduce the film, to prepare derivative works based on the film, to distribute the film, or to license its performance." 683 F.2d at 816. The statute does not create any rights equivalent to those enumerated in §106 on its face or in practice.

The purpose of § 301 was not to invalidate state trade practice legislation, but to eliminate the former system in which federal copyright law controlled published works and state law unpublished works.

> Instead of a dual system of "common law copyright" for unpublished works and statutory copyright for published works. . . the bill adopts a single system of Federal statutory copyright from creation .... Common law copyright protection for works coming within the scope of the statute would be abrogated....

Notes of the Committee on the Judiciary, House Report No. 94-1476, 94th Cong., 2d Sess. (1976)(reprinted at pp. 271-72 of 17 U.S.C.A. (1977)).

As Professor Nimmer explains, § 106 identifies those rights which are within "the general scope of copyright." The copyright owner's right is the exclusive right "to prohibit reproduction,... performance, distribution or display" of the copyrighted work. 1 Nimmer On Copyright, § 1.01[B] at 1-11, 1-12.

> Thus, in essence a right which is "equivalent to copyright" is one which is infringed by the mere act of reproduction, performance, distribution or display .... If under state law the act of reproduction, performance, distribution or display, no matter whether the law includes all such acts or only some, will in itself infringe the state created right, then such right is pre-empted. But if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie "within the general scope of copyright," and there is no preemption.

id.[31]

Acts other than the acts of reproduction, performance, distribution or display are necessary elements of violations under the Pennsylvania statute.[32] The Act does not create any rights equivalent to those guaranteed to the copyright owner and is not pre-empted by 17 U.S.C. § 301.

31/ § 301(b) of the Copyright Act, as originally drafted stated:

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any state with respect to --
>
> (3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

§ 301(b)(3), H.R. 4347, 89th Cong., 2d Sess. (1966). The elimination of the illustrative clause in § 301(b)(3) was not intended as a substantive change in the meaning of the provision. 1 Nimmer on Copyright, § 1.01[B] at 1-14.3.

32/ In the Ohio litigation, Judge Duncan used this framework to find that the Ohio statute was not pre-empted by the federal copyright act. Allied I, 496 F.Supp. at 407-08.

I turn now to plaintiffs' contention that the Act is pre-empted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The Court of Appeals in AFD II remanded because on its face the Act did not interfere with the purposes and objectives of the copyright laws. After full trial on the merits, this Court concludes that the Act does not stand as an obstacle to the federal copyright system in practice. As the Court stated in Mariniello v. Shell Oil Company, 511 F.2d 853, 857-58 (3d Cir. 1975):

> In recent times, the Supreme Court has employed the Supremacy clause sparingly to strike down state law.... Where conflict is alleged between federal and state law, the specific purpose of the federal act must be ascertained in order to assess any potential erosion of the federal plan by operation of the state law.

Article I, § 8 of the United States Constitution, which confers on Congress the power to legislate in the field of copyright, explicitly declares that the purpose of copyright is "[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." The Copyright Act is "based on the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors," AFD II, 683 F.2d at 815 (quoting Allied I, 496 F.Supp. at 446); however, "[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration." AFD II, 683 F.2d at 815 (quoting United States v. Paramount Pictures, Inc., 334 U.S. at 158).

In remanding this case, the Court of Appeals explicitly adopted the framework of analysis set forth by Judge Duncan in Allied I:

The Supreme Court has rejected the notion that because "a copyright is property derived from a grant by the United States," it is not subject to state regulation of the manner in which its product is marketed. Fox Film Corp. v. Doyal, 286 U.S. 123, 128 (1932). Further, the Supreme Court has rejected claims that the exclusive right granted by Congress to distribute copyrighted material included the exclusive right to distribute it in the manner deemed most desirable by the copyright holder. Watson v. Buck, 313 U.S. 387 (1941).

In Fox Film, supra, the Supreme Court upheld a state's direct taking by imposition of a tax of royalties derived from federal copyrights. Scarcely a more blatant, effective method of reducing the author's award can be imagined. Yet the Court stated:

> The statute confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter, U.S.C., Tit. 17. In creating this right, the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use. Nor did the Congress provide that the right, or the gains from its exercise,

> would be free of tax. The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.
>
> * * *
>
> . . . The nature and purpose of copyrights place them in a distinct category and we are unable to find any basis for the supposition that a nondiscriminatory tax on royalties hampers in the slightest degree the execution of the policy of the copyright statute.

Fox Film, supra, 286 U.S. at 127, 131 (citations omitted).

The authority of the states to regulate market practices dealing with copyrighted subject matter is well-established. Thus, for example, the Supreme Court has made it clear that the existence of a copyright does not permit its owner to contract concerning it in ways that suppress competition in violation of federal antitrust laws. 15 U.S.C. § 1, et seq. Interstate Circuit v. United States, 306 U.S. 208, 230 (1939). Similarly, ownership of a copyright does not entitle a company to abuse the market power it obtains thereby by engaging in a per se illegal tying arrangement, see e.g., United States v. Paramount Pictures Inc., 334 U.S. 131, 156-57 (1948), price fixing, see,

e.g., Watson v. Buck, 313 U.S. 387 (1941), or other fraudulen or deceptive practices, cf. Mariniello v. Shell Oil Co., 511 2d 853 (3d Cir. 1975); Hearing Aid Ass'n. of Kentucky, Inc. v Bullock, 413 F. Supp. 1032 (E.D. Ky. 1976).

> The State of Ohio is no more interfering with the legitimate rights of owners of copyrighted motion pictures by regulating the ways in which plaintiffs and other producer-distributors license their product in order to achieve fair and open bargaining than were the states in passing the legislation upheld in those cases.

AFD II, 683 F.2d at 815-16, (quoting Allied I, 496 F. Supp. at 446-47).

The Courts of Appeals for the Third and Sixth Circuits, in considering this issue, have stated:

> we do not find authority for the argument that state trade regulation which affects distribution procedures and, indirectly, monetary returns from copyrighted property is invalidated implicity or explicity by the terms of the Copyright Act . . . or the copyright clause [of the United States Constitution].

AFD II, 683 F.2d at 816 (quoting Allied II, 679 F.2d at 661-63).

The question for this court is "whether the Pennsylvania Act in fact precludes the 'accomplishment and execution of the full purposes and objectives' of the Copyright Act." AFD II, 683 F.2d at 817.

Plaintiffs have not fulfilled their burden of demonstrating that the Pennsylvania Feature Motion Picture Fair Business Practices Law has interfered with the Federal Copyright Act. The evidence produced at trial showed that the Pennsylvania Act has had no effect on the incentive to make and distribute motion pictures. There was no evidence that fewer motion pictures are being made today or that the quality of pictures has declined. The Copyright Act does not guarantee an author maximum profit and, in any event, it is not proven that the Pennsylvania Act has reduced the distributors' reward.

The Pennsylvania statute does not dilute the distributors' ownership rights in their films. They maintain exclusive control over the decision whether to license as well as when to license and to whom to license. The Pennsylvania Act may change the way distributors do business. It does not, however, take from them the essential rights of ownership.

Plaintiffs argue that the statute interferes with the copyright owner's exclusive right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending." 17 U.S.C. § 106(3). This argument is misplaced. The Pennsylvania Act sets no limit on the financial terms at which films may be licensed. The Act in no respect prevents a distributor from selling a film to a theatre owner outright, nor does it interfere with the distributor's ability to license a film to an exhibitor. The Act does not prevent the distributor from assuring itself of a fixed amount of remuneration for a license. Distributors may still license films for fixed sums. The prohibition of guarantees means that the distributor cannot have it both ways where there are adverse consequences; it cannot

license a film on a percentage rental basis and at the same time receive guaranteed minimum payment.

The invalidation of advances does not restrict the distributors' right to license its films. The Copyright Act does not assure security for the copyright owner. An exclusive ownership right is not equivalent to a right to license without risk.

Plaintiffs have also contended that inherent in the exclusive right to distribute is the right to offer a film at the time which the copyright owner considers most advantageous. Plaintiffs' argument is that the Pennsylvania Act imposes a direct control on the timing of licensing by preconditioning it on trade screening. The evidence presented at trial, however, showed that the Act has not impaired distributors' ability to release their films on the dates they desire. Although it is true that the statute prevents distributors from contracting until a trade screening print is available, this has little effect on the essential rights of the copyright owner:

> There is nothing in the federal Copyright Act prohibiting the state from exercising its police powers to rectify a market situation it perceives as inequitable. The comment by the Supreme Court regarding the practice of block booking in United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 . . . is apropos:
>
> > It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not

> related to the quality of the copyright .... The [prohibited] practice tends to equalize rather than differentiate the reward for the individual copyrights.

Allied I, 496 F. Supp. at 447.

Blind bidding forces exhibitors to license on the basis of inadequate and misleading information. It rewards hype, not artistic merit. The right to sell in this manner is not related to the quality of the copyright.

Plaintiffs have also argued that the trade screening provision deprives copyright holders of their ownership rights by requiring them to display their product when they would not ordinarily wish to do so. As Judge Duncan noted in Allied I, the trade screening requirement does not impede the copyright owner's right to prohibit display or distribution. The distributor must only trade screen if it decides to license in Pennsylvania. Allied I, 496 F. Supp. at 447. The trade screening requirement does not interfere with the purposes of the Copyright Act.

The plaintiffs' next contention is that the Pennsylvania Act's 42 day clause interferes with the copyright owner's right to license exclusively for the life of the copyright. After hearing the evidence in this case and after discounting the distributors' misinterpretations of the statute, the Court concludes that the 42 day provision's interference with the exclusive rights of the copyright owner is minimal. The statute does not prevent distributors from contracting for runs of longer than six weeks. It merely says that if such a

contract is made, it must contain some provision for expanding the run within the geographical area after the forty-second day. The statute also does not prevent a distributor from entering into a series of exclusive licenses with one exhibitor as long as each license does not exceed 42 days. The facts produced at trial failed to show that the 42 day clause has in any respect dampened incentive in the motion picture industry, nor has it interfered with the purpose or execution of the Copyright Act.

In fact, the 42 day clause and the Pennsylvania statute as a whole promote the purposes underlying the Copyright Act. The Act improves the public's access to creative products. The 42 day clause benefits the public by quickening the wide dissemination of creative works. Similarly, the prohibition of guarantees and advances helps maintain the viability of small exhibitors, increasing the public's choice of theatres and films. Finally, the trade screening requirement allows exhibitors to differentiate pictures on the basis of factors relating to merit and, therefore, may afford independent, lesser known distributors a better chance to display their wares.

VIII. Pennsylvania Constitution

Plaintiffs' final claim is that the Pennsylvania Feature Motion Picture Fair Business Practices Law violates Article III, Section 32 of the Pennsylvania Constitution, which is the Commonwealth's version of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It provides:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any

local or special law:

> 1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:
>
> . . .
>
> 7. Regulating labor, trade, mining or manufacturing. . . .

The Pennsylvania Act does not violate Section 32. First, the act does not constitute a "special law." In Commonwealth v. Webb, 1 Pa. Cmwlth. 151, 162, 274 A.2d 261, 267 (1971), the Commonwealth Court held:

> [i]n the exercise of the police power, and in the interest and for the protection of the public, the state may, without denial of the equal protection of the laws, reasonably regulate a business, a useful trade, occupation, or profession which may prove injurious to the public, just so the legislation is not discriminatory in the sense of applying unequally to persons pursuing or engaged in the same calling, profession, or business under the same or like conditions and circumstances.

The Pennsylvania legislation at issue in this case benefits the public interest and is a valid and reasonable exercise of the police power.[33] While the Act distinguishes the motion picture industry

33/ Plaintiffs rely heavily on Hertz Drivurself Stations, Inc. v. Siggins, 359 Pa. 25, 58 A.2d 464(1948). For the purposes of this case, however, Hertz stands for the proposition that a law must bear a reasonable and substantial relation to an end which serves the public interest. 359 Pa. at 47, 58 A.2d at 476. The Pennsylvania Act satisfies this standard.

from other trades, it applies equally to persons and firms within that business. The Act, therefore, constitutes a general law not subject to the provisions of Article III, Section 32 of the Pennsylvania Constitution. Kroger Co. v. O'Hara Township, 481 Pa. 101, 392 A.2d 266 (1978) is not to the contrary. In Kroger, the Pennsylvania Supreme Court held unconstitutional Pennsylvania's Sunday Trading Laws, known also as blue laws. The Pennsylvania blue laws represented exactly that type of special legislation § 32 was meant to combat:

> [W]hen a law which prohibits business activity is riddled with exception after exception, a time comes when the general scheme is so diluted that it violates the equal protection of the laws.

481 Pa. at 116, 392 A.2d at 273.

Even if the Pennsylvania statute is considered a "special law," it passes muster under Kroger. Kroger held that § 32 mandates careful scrutiny of any special law regulating trade. Although the Court explicity deferred the question of what is the appropriate test, I have little doubt that the highest court of this Commonwealth would

hold that the legislative classification must have a (1) fair and substantial relationship to the object of the legislation and (2) must substantially further the statutory objective. The first part of the test is derived from previous pronouncements of the Court. See Mover v. Phillips, 462 Pa. 395, 400, 341 A.2d 441, 443 (1973) In re Estate of Cavill, 459 Pa. 411, 329 A.2d 503 (1974). A fair and substantial relationship is one which rests "upon some ground of difference which has a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." Kroger, 481 Pa. at 119, 392 A.2d at 275.

The Kroger case itself mandates that the legislation must substantially further the statutory objective to pass muster under §32. 481 Pa. at 121-22, 392 A.2d at 276.[34]

The Pennsylvania Feature Motion Picture Fair Business Practices Law presents a classification which bears a fair and substantial relationship to the legislative objective. I have described the problems specific to the movie industry which the Act addresses. The Act also substantially furthers the statutory objective. While it does not right every wrong, it takes a step toward remedying unfair and deceptive practices which often occur in the licensing of motion pictures.

34/ Even if the Pennsylvania Supreme Court were to apply to Article III, Section 32 of the Pennsylvania Constitution the most stringent test under federal equal protection analysis, i.e., that the law must be necessary to the accomplishment of a compelling state interest, Palmore v Sidoti, 104 S.Ct. 1879, 1882 (1984), the Pennsylvania Act would satisfy that standard.

IX. CONCLUSION

The effect of the Pennsylvania statute on the businesses of both exhibitors and distributors has been miniscule compared to the competing claims that it is a salvation and damnation. The Act has not materially affected the bottom lines of either the distribution or exhibition businesses. The ingenuity and adaptability of both retailers and wholesalers of movies has far outdistanced the modest proscriptions of the law. Trade screening of prints is a minor problem in the scheme of producing movies. The trade screening requirement seems to concern the middle management cost accountants of the wholesale movie business, but does not materially affect production, distribution or profitability of the business. Trade screening does, however, benefit those exhibitors who use it to select films on the merits of likely box office issues. The requirements of open bidding, prohibiting guarantees and advances and limiting exclusive first runs to 42 days work benefits by promoting wider dissemination of films and fairer trade practices, with little negative impact. Matters of importance in the film business turn on luck, market power, money, sharp dealing and other factors unrelated to the relatively minor and modest trade practice regulation of the Pennsylvania Act.

Marvin Katz

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATED FILM DISTRIBUTION CORPORATION, et al.	:	CIVIL ACTION
vs.	:	
THE HONORABLE DICK THORNBURGH, et al.	:	NO. 80-1179

O R D E R

AND NOW, this 5th day of August, 1985, judgment is entered in favor of defendants and against plaintiffs, declaring that the Pennsylvania Feature Motion Picture Fair Business Practices Law is constitutional.

I direct entry of this final judgment under Rule 54(b), there being no just reason for delay.

BY THE COURT:

Marvin Katz

MARVIN KATZ, J.

March 24, 1986

Senator Pat Rodey
Chairman
Senate Judiciary Committee
P.O.Box "V"
Juneau, Ak. 9[illegible]811

Dear ~~Senator Rodey~~ Pat:

As part-owner of the Fairbanks Entertainment Center,Inc. it has come to my attention that legislation has been introduced for a Fair Motion Picture Practices Act, House Bill 551.

I support this legislation as it promotes fair business practices in the motion picture industry in Alaska.

Sincerely,

Larry Carpenter
Chief Executive Officer, Churchill Group,Lmtd.

LC:llv

March 24, 1986

Senator Pat Rodey
Chairman
Senate Judiciary Committee
P.O. Box "V"
Juneau, Ak 99811

Dear Senator Rodey:

As manager of the Picture Show Theater of the Fairbanks Entertainment Center, it has come to my attention that legislation for a Fair Motion Picture Practices Act, House Bill 551, has been introduced.

I support this legislation as it promotes fair business practices in the motion picture industry in Alaska.

Sincerely,

Stephen A. Crandall

Stephen A. Crandall
Manager, Picture Show

SAC:llv

FTC

FLETCHER THEATRES & COMMUNICATIONS

Theatres - Broadcasting
300 ADAMS ST., SEWARD, AK 99664 (907) 224-5973

March 21, 1986

Re SB 363

Senator Pat Rodey
P.O. Box V
Juneau, AK 99811

Dear Senator Rodey:

I am writing you on behalf of House Bill 551.

I strongly believe in bidding fairness as is the case with bids for construction, state bids etc.

I support the House Bill 551 in that it iliminates the blind closed type of bidding I have had to contend with in past years.

Kindly give this matter your utmost attention giving us, the Exhibitor, and Citizen working in Alaska, your sincere consideration.

Thanking you, I am

Sincerely yours,

W. E. "Skip" Fletcher
Fletcher Theatres/Communications

CC: Mitch Gravo

TESTIMONY OF DAVE GROSS
GROSS ALASKA THEATRES
REGARDING
HOUSE BILL 551, SENATE BILL 363
BEFORE THE HOUSE LABOR AND COMMERCE COMMITTEE
AND SENATE JUDICIARY COMMITTEE
MARCH 26, 1986

REPRESENTATIVE NAVARRE, SENATOR RODEY, AND MEMBERS OF THE HOUSE LABOR AND COMMERCE COMMITTEE AND THE SENATE JUDICIARY COMMITTEE, MY NAME IS DAVE GROSS AND I AM HERE TODAY IN OPPOSITION TO HB 551, AND SB 363.

WHAT YOU HAVE BEFORE YOU ARE BILLS WHICH PURPORT TO "PROMOTE THE SURVIVAL OF SMALL, INDEPENDENT EXHIBITORS," BUT WHICH WERE DRAFTED AND INTRODUCED BY THE STATE'S LARGEST THEATRE CHAIN OWNER WITHOUT THE KNOWLEDGE OF OR ANY CONSULTATION WITH THE INDEPENDENT EXHIBITORS.

GROSS ALASKA THEATRES IS THE ONLY ALASKAN OWNED THEATRE CHAIN IN THE STATE. OUR THEATRES ARE LOCATED IN JUNEAU, SITKA, AND KETCHIKAN. THE COMPANY HAS BEEN OWNED AND OPERATED BY MY FAMILY SINCE THE GOLD RUSH DAYS WHEN MY GRANDFATHER AND CAP LATHROP WERE PARTNERS IN THE FIRST HAND-CRANKED MOVING PICTURE BUSINESS IN THE TERRITORY.

I CONSIDER MYSELF A SMALL, INDEPENDENT THEATRE OWNER IN COMPARISON TO TOM MOYER THEATRES AND FESTIVAL ENTERPRISES - BOTH LARGE OUT-OF-STATE OWNED CHAINS. I CERTAINLY DO NOT SEE MY SURVIVAL AS A LOCAL FAMILY - OWNED BUSINESS PROMOTED NOR PROTECTED BY THIS LEGISLATION. I AM SURE THAT THE OTHER LOCAL INDEPENDENTLY OWNED AND OPERATED THEATRES IN JUNEAU, KODIAK, PETERSBURG AND SOLDATNA ARE CONCERNED ABOUT THE REGULATORY RESTRICTIONS IMPOSED BY THIS PROPOSED LEGISLATION. IN FACT, I BELIEVE THAT THE PURPOSE OF THE LEGISLATION IS TO HELP THE LARGEST CHAINS, LIKE TOM MOYER THEATRES, USE THEIR DEEP POCKETS TO OUT BID SMALLER INDEPENDENT THEATRES OR TO PROVIDE AN ADDITIONAL BASIS FOR LITIGATION AGAINST THE FILM DISTRIBUTORS, ATTEMPTING TO FORCE THE BEST FILMS EXCLUSIVELY INTO THEIR THEATRES.

I BELIEVE THAT STRONG COMPETITION AMONG THEATRE OWNERS IS GOOD FOR THE CONSUMER, AND THAT IS PRECISELY WHAT WE HAVE TODAY IN ALASKA - STRONG COMPETITION WHICH BENEFITS BOTH THE STATE AND ALASKAN CONSUMERS, GIVING US STRONG BUSINESSES AND THE BEST PRICES. TOM MOYER THEATRES, UPON PURCHASING THE WOMETCO CHAIN IN ANCHORAGE, AND FAIRBANKS, THOUGHT IT WAS BUYING A MONOPOLY IN THOSE COMMUNITIES, BUT WAS LATER FACED WITH COMPETITION BY NEW THEATRES SUCH AS THE FESTIVAL SCREENS IN ANCHORAGE AND EAGLE RIVER. RATHER THAN TRYING TO PROMOTE COMPETITION, THIS LEGISLATION WOULD EVENTUALLY STIFLE IT AND RETURN US TO A NON-COMPETITIVE SITUATION.

THE PROBLEMS BEING ADDRESSED BY THE BILLS ARE NOT PROBLEMS FOR MOST THEATRE OPERATORS. TRADE SCREENING IS NOT A PROBLEM, AS WE ALL USE BOOKING AGENTS WHO PREVIEW FILMS FOR US IN SEATTLE. THE VAST MAJORITY OF FILMS WE SHOW ARE TRADE SCREENED IN THEIR ENTIRETY BEFORE WE BID OR NEGOTIATE FOR THEM WITH THE DISTRIBUTOR. WE SEE NO NEED FOR MANDATORY BID PROCESSES, THE DISTRIBUTORS SEEK TO MAXIMIZE THEIR RETURN ON FILMS IN EITHER CASE - THROUGH BID OR NEGOTIATION. THE DISTRIBUTOR MAY FAVOR A MANDATORY BID SYSTEM AS THEY WOULD REAP THE HIGHEST PROFIT POSSIBLE. THIS WOULD SEVERELY LIMIT THE ABILITY OF THE SMALL BUSINESS TO COMPETE FOR THE LARGER GROSSING FIRST-RUN FEATURE FILMS. THIS CONTRASTS WITH THE PRESENT OPEN MARKET WHERE THE SMALLER THEATRE OWNER CAN PROVIDE QUALITY ENTERTAINMENT AT A PRICE BOTH HE AND THE CONSUMER CAN AFFORD.

A PROBABLE RESULT OF THE BID PROCESS AS IT IS SET FORTH IN SB 363 AND HB 551 WILL LIKELY BE LITIGATION ON THE ACCEPTABILITY OF BIDS. THIS WOULD NOT BE IN THE BEST INTERESTS OF THE STATE AS IT FAVORS THE LARGE CHAINS WHO CAN AFFORD THE EXPENSE OF LENGTHLY LITIGATION - NOT THE SMALL OWNER.

ALL I WANT IS THE OPPORTUNITY TO SUCCEED OR FAIL AT A BUSINESS WHICH IS NOW IN THE FOURTH GENERATION OF MY FAMILY. I DO NOT WANT RULES AND REGULATIONS WHICH MAKE MY BUSINESS MORE VULNERABLE TO TAKE OVER BY OUT-OF-STATE CORPORATIONS NOR DO I WANT ANY SPECIAL ADVANTAGES OVER MY SMALLER COMPETITORS IN SOUTHEAST ALASKA. IF WE ARE GOING TO START REGULATING THE DISTRIBUTION OF MOVIES IN THIS MANNER, THEN THIS LIST OF PROSCRIBED PRACTICES IS JUST A START. ARE WE GOING TO REGULATE THE DISTRIBUTION OF OTHER COMMODITIES - FOOD, GAS, CLOTHING, BOOKS, OR HARDWARE? MY BUSINESS IS NOT SUBSTANTIALLY DIFFERENT THAN OTHER PROVIDERS OF GOODS OR SERVICES, SO LET'S USE THE FREE ENTERPRISE SYSTEM TO DETERMINE THE RULES.

THANK YOU FOR THE OPPORTUNITY TO SPEAK TO YOU TODAY. IF YOU HAVE ANY QUESTIONS, I WOULD BE GLAD TO ANSWER THEM.

FESTIVAL ENTERPRISES

TESTIMONY OF RICHARD JEHA BEFORE

THE HOUSE LABOR & COMMERCE

& SENATE JUDICIARY COMMITTEES
regarding HB551 and SB363

MARCH 26, 1986

Senator Rodey, Representative Navarre, and members of the Judiciary and Labor & Commerce Committees, my name is Richard Jeha and I am here today on behalf of Festival Enterprises. Festival Enterprises is the second largest theatre operation in Alaska with 12 screens in Anchorage and Eagle River.

Our theatres, which were opened last year, are among the finest in the United States. We spent over $10 million to construct the theatres, and employ 150 Alaskans in them. They have state of the art equipment, uniformed ushers, and ample lobbies. We made this investment because we felt that the Anchorage area was underserved given its demographics. We were convinced that new, modern facilities would be well received in a community which was predominantly served by outdated theatres. And after approximately 4 months of operation, we think we were right.

This proposed legislation is not intended to "promote the survival of small, independent exhibitors" or to "promote fair and effective competition in the theatre business". Its intent is to enchance the position of the largest exhibitor in Alaska which, by the way, is the very exhibitor that is proposing this legislation--Mr. Tom Moyer of Luxury Theatres. He presently has 24 screens in Alaska and has announced 11 more screens for 1986. He has also attempted to purchase other existing theatres in Alaska, including ours. Mr. Moyer has very deep pockets. He is the tenth largest exhibitor in the United States. He has the resources to out bid his smaller competitors. Once he forces his smaller competitors out of business, he has a monopoly.

We do not share the same concerns as the proponent of this bill, and we see absolutely no need for its passage. In fact, were this legislation in effect last year when we were evaluating the Alaska market, we would have decided against building our theatres here.

Our business is a highly competitive one. There are only a handful of films each year which are successful enough to produce a decent return for an exhibition. All theatres try

their best to get those films. Sometimes we get them by bids and sometimes by negotiation. We occasionally pay too much for a film, and lose money. But the important thing is that we all have the same chance to use our business skills to promote ourselves to the film producers and distributors.

The film companies consider factors other than the highest bid in granting exhibition rights to a particular theatre. These include grossing ability, location, quality of the theatre, cleanliness, employee service and courtesy, quality of the sound and projection, etc.

Unfortunately, some exhibitors operate their theatres in a manner that brings discredit to our industry. As a result, Paramount, Columbia, DeLaurentiis, Disney, Tri-Star and Twentieth Century Fox Film select the theatres that they will exhibit their films in. The criteria they use is based on patron comfort, quality of presentation and grossing capability. The highest dollar bid does not necessarily mean the best bid. We want to encourage the film companies to take a long term view of the business and not just go for the "quick buck" which may be profitable in the short term, but is not in the best interests of the industry on a long term basis.

This legislation takes away a good bit of the freedom to let the market place determine which theatres get the best pictures. It sets artificial rules that give an increased competitive advantage to the largest theatre chain owner. In Alaska, that is Moyer Theatres, which owns slightly over half the screens in the State and is the 10th largest chain in the United States.

Specifically, the bill requires:

(1) Trade screening of all films in Alaska. None of us need this -- we all preview our films in Seattle, Portland or San Francisco where our agents are located.

(2) Mandatory bidding at request of any theatre owner. We don't need a formal process, as the distributors already have plenty of incentve to get the best return on their product. The proposed process favors the deep pocket who can bid the highest. It will also encourage litigation by disgruntled theatre owners. This also benefits the people who can afford such litigation.

In summary, Chairmen and members of the committees, the free market system that we now enjoy in Alaska is the levelest playing field for competitors. Let's not tilt it to favor one or more players at the expense of the others. If we do, it will alternately be the consumer that suffers the consequences.

The Free Market System works exceedingly well -- Please do not impose unnecessary governmental restrictions that will interfere with free enterprise.

Thank you. I would be pleased to answer questions or provide additional information as you desire.

kn42.75

NEW ORPHEUM THEATRE

TESTIMONY OF MARISSA TODD BEFORE

THE HOUSE LABOR & COMMERCE

& SENATE JUDICIARY COMMITTEES
regarding HB551 and SB363

MARCH 26, 1986

Senator Rodey, Representative Navarre, and members of the Judiciary and Labor & Commerce Committees, my name is Marissa Todd, and I am here today on behalf of the New Orpheum Theatre of Juneau. The New Orpheum Theatre is a small, independently owned theatre with one screen, here in Juneau. I have owned and operated this theatre for eight years.

I strongly oppose the proposed legislation which you are considering here today because it does not "promote fair and effective competition" or "promote the survival of small, independent exhibitors" as Section 1 of the bill indicates. At the present time, I, as a small, independent theatre owner, am comfortable with the existing free market arrangements. I am free to book my films myself or through a booking agent, and have been able to fairly and effectively compete in that environment. If this proposed legislation is adopted, however, the bidding procedures and the prescreening procedures would dramatically increase my cost of doing business to the point that I would not long be able to compete with the large theatre chains in this State. I am pleased with the current arrangement. I see no need

for government intrusion in an area where the existing free market system is working effectively.

In my eyes this legislation is extremely unnecessary. What it is proposing is a situation that would make it impossible for small, independent theatres, such as mine, to exist. It tips the scales in favor of the very large owners and puts me and many other small independents in an extreme disadvantage. The costs alone, incurred in mandatory screenings held in other parts of Alaska, would be enough to put me out of business. It would make it impossible for someone like me to compete with the large owners.

There are many things wrong with this legislation, as you have heard from the testimony given here. The point that I would like to stress is that the status-quo is fair to both in-state and out-of-state distributors, agents and theatre owners, large and small. There is clearly no reason to adopt unnecessary legislation and regulation on problems that do not even exist.

Small movie theatres provide a service to their communities here in Alaska. Please safeguard their existence by opposing this legislation in any form.

kn42.76

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

TESTIMONY OF SIMON BARSKY BEFORE

THE HOUSE LABOR & COMMERCE

& SENATE JUDICIARY COMMITTEES
regarding HB551 and SB363

MARCH 26, 1986

Senator Rodey, Representative Navarre, and members of the Judiciary and Labor & Commerce Committees, my name is Simon Barsky, and I am here today on behalf of the Motion Picture Association of America, Inc.

Motion pictures in Alaska, as in most other states, are licensed to theatre owners either by bidding or by negotiated agreements. In negotiations, the distributor seeks the best price and terms for the rights to exhibit a movie, and is free to consider all other relevant facts to a successful business arrangement. In addition to price, the distributor may also take into account theatre quality, maintenance, location, past performance, seating capacity, advertising, parking facilities, and other factors which contribute to a pleasurable public viewing experience. In fact, as the attached movie patron survey indicates, adult movie goers consider factors such as a clean theatre, comfortable seats, and good sound quality to be very important.

In the overwhelming majority of cases, motion pictures are screened for the exhibition prior to the time the motion picture is licensed for exhibition. In 1985, 94 out of 104

films, 93 percent of all motion pictures released by members of the Motion Picture Association of America, Inc. (MPAA) for exhibition in Alaska were trade screened prior to licensing. On occasion, and in particular when a film has a number of special effects or is scheduled for release during the highly competitive Christmas, summer or Easter season, film clips and descriptive materials are used in lieu of the full film preview. The process is termed advance bidding (sometimes misnomered "blind bidding"). The highest grossing picture released in 1985, BACK TO THE FUTURE, was advance bid. 1/ THE COLOR PURPLE, which received 11 Academy Award nominations was also advance bid. For the Alaska market, film previews usually take place in Seattle or Portland, where some of the Alaska theatre chains and the booking agents which handle most of the remainder of the independently-owned Alaskan theatres are headquartered. It makes little sense to require costly duplicate in-state trade screenings when films are already evaluated before licensing takes place.

Alaska now has 54 theatre screens in operation. Sixty-seven percent (36 screens) are owned by out-of-state chain;

1/ Other high-grossing advance bid films released in 1985 include THE RIVER, SPIES LIKE US, YOUNG SHERLOCK HOLMES, and WHITE NIGHTS.

19 percent (10 screens) by an Alaska-based chain; and 14 percent (nine screens) by other Alaskan independent owners. Tom Moyer Theatres, based in Portland, is the largest out-of-state owner with 24 screens in Anchorage and Fairbanks. Festival Enterprises from California owns 12 screens in Anchorage and Eagle River. Gross-Alaska Theatres, based in Juneau, owns 8 screens in Juneau, Sitka and Ketchikan. The remaining screens are small independents located in Petersburg, Seward, Kodiak, Juneau and Soldotna.

ISSUE

The Moyer Theatre chain has requested introduction of SB 363 and HB 551, which would for the first time establish state regulation of motion picture licensing. These bills, which have provisions nearly identical to legislation sponsored by Moyer Theatres that have already been rejected in the state of Washington, would require that all films licensed in Alaska be first trade screened in the state and that when requested by any theatre owner, all licensing be on an open bid basis. The Washington State Commerce and Labor Committee turned down this proposal after the rest of the exhibition community, fearful that this legislation would force them out of the market place, rose in opposition to the bill.

While the proposed legislation has been portrayed as beneficial to all theatre owners, including the Alaska-based businesses, this is not the case. In reality, while purporting to fix problems that do not exist, the proposal favors the Moyer chain at the expense of other owners. This special interest legislation should be viewed as a "Trojan Horse" designed to give the largest theatre chain in the state the competitive edge.

The 310 screen Moyer chain is the tenth largest in the U.S., currently owns 44% of all Alaskan theatres, and therefore has the financial resources to outbid the other theatres in the short run, thus preventing them from getting the best films. It is also in an aggressive takeover posture, having offered to purchase many of the remaining Alaskan based theatres. Passage of SB 363 and HB 551 would facilitate this chain's drive to become a monopoly in Alaska by requiring costly bidding wars that would drive the smaller exhibitors out of the marketplace and lessen the quality of motion picture exhibition. Motion picture distributors would no longer be able to choose to license a motion picture to an exhibitor who takes pride in his theatre.

While creating a competitive advantage for Moyer Theatres, these bills create disadvantages for other theatre owners. These measures will create bidding wars for motion pictures which will harm the local exhibition industry and benefit the large out-of-state chains. They increase the potential for litigation, when most independent owners do not

have the resources for expensive court fights as do the large chains like Moyer Theatres. They would also hurt the movie-going public by risking delay in the opening of films and increasing the cost of admission tickets. In fact, under the requirements of these bills, a film could not safely be licensed in Alaska until it had been licensed in every other state to ensure that the distributor did not accept a bid anywhere else in the country that was lower than the bid rejected in this state. The bill would force the special nature of the Alaska market to be ignored in licensing motion pictures, and would make deep pockets, rather than decent theatres, the key to success in Alaska.

The current unregulated environment of the motion picture business in Alaska has worked well since territorial days when Cap Lathrop and W. D. Gross first showed hand-cranked moving pictures to frontier saloon patrons. The status quo is fair to both in-state and out-of-state distributors, booking agents, and theatre owners. It has even allowed Moyer Theatres to prosper in the Anchorage and Fairbanks market. Let's not spend time imposing unnecessary regulations on problems which do not exist.

kn42.77

Movie Study Highlights

"Newsday," the Long Island, New York, daily newspaper, recently conducted a "Movie Study," making telephone calls to a sampling of adults and teenage residents of Nassau and Suffolk Counties. Below, are some of the highlights from that study.

ADULTS

PRICE INFORMATION

•On average, moviegoers spend $4.25 to see a film and $1.80 at the theatre's concession stand (on themselves).

•Seven out of ten moviegoers report having paid full price (or $5.00) to see a film in the past three months.

•28% of all moviegoers mention having attended movies at a discount price (between $1.50 and $2.50 per ticket) in the past three months. Slightly more than half the movies these people have attended in the past three months have been at discounted prices.

•45% of discount ticket moviegoers claim they would wait several weeks to see a movie at a discount price rather than spend full price, while 30% would buy a full price ticket in order to see a movie sooner. 15% report their decision would depend on the movie.

DESCRIPTIVE RATINGS

•The following list of items associated with movies and moviegoing are considered to be "very important" by adult moviegoers:

A clean theatre	74%	A movie's rating, such as PG or R	33%
Comfortable seats	71%	Special rates for children	31%
Good sound quality	71%	Matinees	30%
Separate sections for smokers & non-smokers	66%	Dolby stereo	29%
		A director	19%
A safe neighborhood	65%	First-run or premiere showings	18%
Plenty of parking	59%	A well stocked concession stand	17%
Convenient location	59%	Ushers	15%
A large screen	49%	The Academy Awards	15%
An actor or actress	44%	A producer	15%
Discount prices	42%	Midnight show times	9%

•Moviegoers were asked their degree of agreement or disagreement with a list of items dealing with more subjective feelings about movies. The percentage of adult moviegoers who strongly agreed with each statement is shown below:

There should be more films for the whole family	53%	Movies are a good way to spend a few hours away from home	43%
Movies should be less violent	52%	I like movies that make me think	38%
I just want to be entertained when I go to the movies	49%	I like movies that show a realistic view of life	37%
		I like movies with special effects	36%

● DESCRIPTIVE RATINGS (continued)

I feel movies are an excellent form of family entertainment	35%	Movies should be a cultural experience	22%
Going to the movies is a social event	33%	Movies are a good value for the money	19%
There's too much sex in movies	31%	I go to the movies to escape the everyday pressures of life	15%

● MOVIE INFORMATION

The demographic characteristics of adult moviegoers are as follows:

- 50% male/female
- 43% 18-34 years old; 37% 35-54 years old; 20% 55 years or older
- 20% have annual family incomes of $40,000 or more; 27% have family incomes between $25,000 and $40,000
- 65% have at least some college education
- 42% live in households where the chief wage earner has a professional/ managerial job
- 62% are married; 26% are single, never married.

TEENAGERS

● MOVIEGOING BEHAVIOR AMONG TEENS

- Ninety-six percent of all teenage respondents have gone to the movies in Nassau-Suffolk in the past 12 months.

- Of these moviegoers, 42% say they are going "more often compared to a year ago," 36% "about the same" and 22% "less often."

- Among the teenagers who are going "more often" the volunteered reasons center around:

Good/better movies	43%
Being older/having a driver's license	12%
Having money to go	7%

- Among the 22% going to the movies "less often," the reasons offered are:

Being too busy/no time	28%
Not too many good movies/quality of movies decreasing	10%
Films not interesting/compelling	10%
Because of a job	10%

- 58% of all teenage moviegoers have gone more than once a month. The average number of times all moviegoers have attended in the past three months is 5.4.

- Eight out of ten moviegoers report usually going to the movies with friends, 26% with family and 14% with a date. (Multiple answers were allowed).

- 31% of all teen moviegoers attend a movie within a week after it opens on Long Island, 37% between one and two weeks, 15% between two and three weeks and 10% three weeks or longer.

(continued)

●PRICE INFORMATION

●Teen moviegoers spend, on average, $4.00 to attend a movie and $2.60 at the theatre's concession stand (on themselves).

●Seventy-seven percent of moviegoers say they have paid full price or $5.00 to see a film in the past three months.

●Thirty-six percent of all teen moviegoers mention having attended movies at a discount price (between $1.50 and $2.50 per ticket) in the past three months.

●An average of 44% of all movies seen by these discount ticket moviegoers in the past three months have been at a discount price.

●Fifty-seven percent of discount ticket moviegoers would rather buy a full price ticket to see a movie sooner rather than wait several weeks to see it at a discount price; 27% would wait, while 10% say it depends on the movie.

●DESCRIPTIVE RATINGS

●Teen moviegoers rate the following list of moviegoing items as "very important":

A clean theatre	54%	A movie's rating such as PG or R	23%
Comfortable seats	65%	Special rates for children	23%
Good sound quality	67%	Matinees	19%
Separate sections for smokers & non-smokers	52%	Dolby stereo	40%
		A director	17%
A safe neighborhood	48%	First-run or premiere showings	18%
Plenty of parking	24%	A well stocked concession stand	32%
Convenient location	55%	Ushers	11%
A large screen	53%	The Academy Awards	12%
An actor or actress	45%	A producer	16%
Discount prices	37%	Midnight show times	15%

●"Strongly agree" feelings were generated by this list of items:

There should be more films for the whole family	43%	Movies are a good way to spend a few hours away from home	64%
Movies should be less violent	14%	I like movies that make me think	31%
I just want to be entertained when I go to the movies	51%	I like movies that show a realistic view of life	39%
		I like movies with special effects	53%
I feel movies are an excellent form of family entertainment	42%	Movies should be a cultural experience	9%
Going to the movies is a social event	41%	Movies are a good value for the money	27%
There's too much sex in movies	14%	I go to the movies to escape the everyday pressures of life	13%

●MOVIE INFORMATION

●43% of teen moviegoers find friends or family to be their main source of movie information; 39% newspapers; 38% T.V.; and 6% radio. (Multiple answers were accepted.)

Bradley
1/31/86

Original sponsor: Judiciary Committee

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 363 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to Motion Picture Fair Competition."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE PURPOSE. The purpose of this Act is

(1) to establish fair and open procedures for bidding and negotiation for the right to exhibit motion pictures in the state in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution and exhibition within the state;

(2) to promote fair and effective competition in that business;

(3) to prevent the award of motion picture licenses on other than an individual, picture-by-picture, theatre-by-theatre basis;

(4) to promote the survival of small, independent exhibitors; and

(5) to ensure that an exhibitor has the opportunity to view a motion picture and know its contents before deciding to exhibit the motion picture in the community.

* Sec. 2. AS 45 is amended by adding a new chapter to read:

CHAPTER 51. EXHIBITION OF MOTION PICTURES.

Sec. 45.51.010. PROHIBITED AND REQUIRED PRACTICES. (a) The buying or selling of the right to exhibit a motion picture by blind bidding or blind selling is prohibited in the state.

(b) Bids may not be returnable, negotiations for the licensing or exhibition of a motion picture may not take place and a license agreement and its terms may not be agreed upon for the exhibition of a

motion picture in the state before the motion picture has been trade screened.

(c) A distributor shall provide reasonable and uniform written notice to each exhibitor in the state at least 72 hours before a trade screening.

Sec. 45.51.020. SOLICITATION OF BIDS. (a) When a bid is solicited from exhibitors relating to the exhibition of a motion picture in the state,

(1) the invitation to bid shall specify

(A) whether the bid being solicited is a first, second, or subsequent run;

(B) whether the run is an exclusive or nonexclusive run and the geographic area for the run;

(C) the name of each exhibitor who is being solicited;

(D) the date and hour the invitation to bid expires; and

(E) the time, date, and the address in the largest city in the state where the bids will be opened;

(2) all bids shall be submitted in writing and shall be opened at the same time and in the presence of the exhibitors who submitted bids or their agents who attend the bid opening;

(3) immediately upon being opened, the bids shall be examined by the exhibitors who submitted bids or their agents who attend the bid opening;

(4) within 10 business days after the bids are opened, the distributor shall advise each exhibitor who submitted a bid

(A) of the name of the highest bidder; and

(B) the name of the bidder who received the award of exhibition rights; or

(C) that each bid submitted was unacceptable

(b) Once bids are solicited under (a) of this section, the distributor may solicit rebids only if each bid is unacceptable.

(c) If an exhibitor notifies a distributor that it wishes to submit bids for motion pictures released by the distributor in a particular area of the state designated by the exhibitor, the exhibitor and each competing exhibitor shall be solicited for bids for the first or second run of each motion picture to be released by the distributor in the designated area.

Sec. 45.51.030. REJECTION OF BIDS. The decision of a distributor that a bid is an unacceptable bid is conclusive unless a reasonable person could not have made that judgment.

Sec. 45.51.040. VIOLATION. A person aggrieved by a violation of this chapter may bring a civil action in superior court to enjoin further violations and to recover damages.

Sec. 45.51.050. DAMAGES. If the violation of this chapter is determined to be intentional, an aggrieved exhibitor may recover punitive damages necessary to deter a similar violation in the future.

Sec. 45.51.060. WAIVER. A purported waiver of rights established by this chapter is void and unenforceable and this chapter shall be liberally construed to achieve its purpose.

Sec. 45.51.100. DEFINITIONS. In this chapter

(1) "blind bidding" means an exhibitor's bid or negotiation for or the exhibitor's offer or agreement to terms for the license to exhibit a motion picture at a time either before the motion picture has been trade screened in the state or before the motion picture has been otherwise made available for viewing in the state by all exhibitors;

(2) "blind selling" means the distributor's agreement to

license a motion picture before an exhibitor has been afforded an opportunity to view the motion picture by trade screening;

(3) "buying" or "selling" of the right to exhibit a motion picture means the licensing of a theatre to show the motion picture for a specified number of days for a specified price;

(4) "distributor" means a person engaged in the business of distributing more than one motion picture during a calendar year to exhibitors by rental, sale, licensing, or other agreement;

(5) "motion picture" means a feature motion picture exceeding 60 minutes in showing time;

(6) "run" means the continuous exhibition of a motion picture in a defined geographic area for a specific period of time;

(7) "trade screening" means an exhibition of a motion picture, before its release for public exhibition by a distributor;

(8) "unacceptable bid" means a bid that is inferior to the lowest bid the distributor would accept for the same run of the same picture in an area having a population equal to or greater than the population of the area for which the inferior bid was made.

Bradley
1/31/86

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