Motion Picture Licensing Acts: An Analysis of the Constitutionality of Their Provisions

Mary Elizabeth Kilgannon
NOTES

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INTRODUCTION

Since 1948, when distributors were required to divest themselves of ownership of exhibition companies,¹ the distribution arm of the film industry has become increasingly concentrated in several major companies.² Conversely, exhibitors have remained substantially less concentrated.³ In the competitive atmosphere ensuing from divestiture, in which distributors license films to exhibitors by either bidding or negotiation,⁴ the bargaining power of distributors has grown disproportionately to that of exhibitors,⁵ leading to a licensing system in


3. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 414 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982); see Cassady, supra note 1, at 150.


5. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 426 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982). The imbalance has resulted from the combination of increased concentration of distributors in a few major companies while exhibitors have remained less concentrated, and
which exhibitors generally accede to distributors' demands. For example, exhibitors have been required to obligate themselves contractually prior to film completion, and to make non-refundable payments on film rentals. Moreover, film distributors without established reputations, known in the industry as "independents," are often precluded from licensing films to the more desirable movie theaters because the major distributors book those theaters months in advance through blind bidding.

Blind bidding requires exhibitors to bid for or negotiate a film license without having an opportunity to view the film. Since the expiration of an agreement between certain distributors and the United States Department of Justice which had restricted blind bidding to no more than three films per year per distributor, blind bidding has become the predominant practice in the movie industry. Nevertheless, certain distributors and exhibitors have recognized the unusually interdependent relationship between distributors and exhibitors. Id. at 413-14; see Cassady, supra note 1, at 150.


10. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 433 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982); Blind Bidding, supra note 2, at 1134; see Heavens Gate, supra note 7, at 29.


13. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 416-17 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982); see Blind Bidding for Movies is Attacked, UPI, Mar. 10, 1981 (available Mar. 12, 1981, on LEXIS, Nexis library, Wire Services file) (95% of all films shown in Colorado are licensed through blind bidding); Theater Owners, supra note 2 (the nine top grossing films of 1977 were licensed by blind bidding).
problems created by blind bidding. Moreover, the Supreme Court has acknowledged the unfairness of this practice.

To alleviate inequitable practices in the motion picture industry, twenty-two states have enacted motion picture licensing acts. The acts are designed to promote informed decision-making and to establish fair and open bidding procedures, while also enhancing competition and preventing deceptive practices. Furthermore, the public should benefit from anticipated lower admission prices and reduced exposure to objectionable films.


The Court recognized that blind bidding is subject to abuse. Id.


The acts are commonly referred to as "anti-blind bidding" acts because, although they vary, each requires a distributor to trade screen a film, that is, to show a film to interested exhibitors before either entertaining bids or negotiating an exhibition license. Most acts regulate the bidding procedure, and several acts prohibit guarantees and advances. Waivers of any provision are usually void. Under most acts, violation is a civil offense; under a few, violation is a misdemeanor.

Motion picture licensing acts have been criticized as an improper and unwise governmental interference in the film industry. Three acts have been judicially challenged as unconstitutional on the...
grounds that they violate the commerce clause,\textsuperscript{31} the first amendment,\textsuperscript{32} which is applicable to states through the fourteenth amendment,\textsuperscript{33} and the supremacy clause.\textsuperscript{34} The acts have been defended as


\textsuperscript{32} Allied Artists Pictures Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982) (affirming lower court's holding that the statute did not violate the first amendment); Warner Bros. v. Wilkinson, 533 F. Supp. 105, 108 (D. Utah 1981) (found no violation of first amendment); Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971 (E.D. Pa. 1981) (district court held, on summary judgment, that the act violated the first amendment), \textit{rev'd and remanded}, 683 F.2d 808 (3d Cir. 1982).


\textsuperscript{34} Allied Artists Pictures Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982) (affirming lower court's holding that the act did not violate the supremacy clause); Warner Bros. v. Wilkinson, 533 F. Supp. 105, 108 (D. Utah 1981) (held not preempted by the Copyright Act); Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971, 996 (E.D. Pa. 1981) (on summary judgment, district court held the act preempted by the Copyright Act), \textit{rev'd and remanded}, 683 F.2d 808 (3d Cir. 1982). An argument has been made that the acts violate antitrust laws. In Rice v. Norman Williams Co., 102 S. Ct. 3294 (1982), the Supreme Court stated that "[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy." \textit{Id.} at 3299. A motion picture licensing act will thus be facially invalid "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a party to violate the antitrust laws in order to comply with the statute. . . . [T]he conduct contemplated by the statute [must] in all cases [be] a \textit{per se} violation." \textit{Id.} at 3300. In \textit{Allied Artists}, the Ohio act was criticized as violating federal antitrust laws and therefore preempted under the supremacy clause. 496 F. Supp. at 448. The alleged grounds of violation were encouragement of product splitting, interference with independent pricing behavior and reduction of competition among exhibitors. \textit{Id.} at 448. Product splitting would occur if groups of exhibitors within a geographical area agree to allocate available films among themselves, thereby assuring each exhibitor a film to exhibit at all times. \textit{Id.} Product splitting, however, requires collusion by exhibitors. The acts, as the \textit{Allied Artists} court found regarding the Ohio act, neither require nor authorize "collusive conduct of any kind among exhibitors." \textit{Id.} The acts do not interfere with independent pricing. Although the additional information made available by the acts may be used in a manner violative of antitrust laws, the open bidding following from the information requirement does not affect licensing terms. \textit{Id.} at 449-50. Additional acts not authorized by these provisions are necessary before anti-competitive effects result from interference with independent pricing behavior. \textit{Id.} The dissemination of price information is not a \textit{per se} violation of the Sherman Act. United States v. Citizens &
being within the permissible scope of state action. This Note scrutinizes the constitutionality of the various provisions of the acts, and concludes that all of the analyzed provisions are constitutional except for a provision found in the Pennsylvania act which limits the length of exclusive first runs.

I. CONSTITUTIONALITY UNDER THE COMMERCE CLAUSE AND THE FIRST AMENDMENT

A. The Commerce Clause

The commerce clause grants Congress authority "[t]o regulate Commerce . . . among the several States." Despite the national scope of film distribution, Congress has not regulated this area. Congress thus either intended the area to remain unregulated or intended it to be regulated locally. Logically, states are in a better position than Congress to regulate film licensing. For example, the determination of where a trade screening should be held is based upon the particularities of a locality and is therefore more effectively dealt with on a state-by-state basis. Motion picture licensing acts nevertheless have been criticized as interfering with film exhibition licenses that traverse state lines. In *Pike v. Bruce Church, Inc.*, the Supreme Court has said that "[a]nalysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws." *Rice v. Norman Williams Co.*, 102 S. Ct. 3294, 3300 (1982).


37. *Id.* § 203-7.

38. *Id.* § 8, cl. 3.


40. For example, in Virginia, where the theaters of several states are in proximity, the act permits trade screening in another state. Va. Code § 59.1-258 (1982).

41. *See supra* note 31.

Court set forth the test for determining the validity of state regulations that burden interstate commerce:

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.\textsuperscript{43}

State regulations thus may not discriminate against interstate commerce.\textsuperscript{44} Motion picture licensing acts do not distinguish between in-state and out-of-state distributors because the acts apply with equal force to all distributors.\textsuperscript{45} Although the commerce clause "limits the power of the States to erect barriers against interstate trade,"\textsuperscript{46} the acts are valid if they foster an overriding legitimate state interest.\textsuperscript{47} Such validity is addressed after a brief discussion of first amendment considerations.

\section*{B. The First Amendment}

Motion pictures are protected by the first amendment guarantee of freedom of speech\textsuperscript{48} applicable to the states through the fourteenth

\begin{itemize}
\item[43.] Id. at 142 (citations omitted).
\item[48.] Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682 (1968); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); see Associated Press v. United States, 326 U.S. 1, 7 (1945).
\end{itemize}
The content of speech may not be regulated absent a compelling state interest. Motion picture licensing acts do not, on their face, regulate the content of speech. They apply to all films that are distributed, regardless of their content. Furthermore, the acts do not have the effect of regulating content because in determining whether there has been compliance, the content of the film is irrelevant.

The first amendment does not guarantee that freedom of speech may be exercised regardless of other rights and interests. Time, place and manner of speech may be regulated if an important and substantial governmental interest is furthered, and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." The licensing acts regulate the time, place and manner of film exhibition.

49. See supra note 33 and accompanying text.
52. See supra note 16 and accompanying text.
55. Time, place and manner restrictions are permissible if "they are justified without reference to the content of the regulated speech, ... serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)). A Pennsylvania district court, while acknowledging the content-neutral nature of the Pennsylvania act, held that it violated the first amendment because the restriction on free speech was more than necessary. Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971, 986-91 (E.D. Pa. 1981), rev'd and remanded, 683 F.2d 808 (3d Cir. 1982).
Mere legislative preferences or beliefs respecting matters of public convenience ... [are] insufficient to justify [regulation that] diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so,
The first amendment test employs a balancing of the state interest against the impingement upon the protected interest: The more important the state interest is, the greater the impingement on freedom of speech may be.\textsuperscript{58}

Although a general state interest—alleviation of inequitable licensing practices—is sought to be furthered by motion picture licensing acts,\textsuperscript{59} each provision is designed to promote a specific state purpose.\textsuperscript{60} A discussion of the validity of the individual provisions of the motion picture licensing acts under the commerce clause and the first amendment follows.

C. Statutory Provisions

1. Trade Screening

The trade screening provision requires that a distributor provide an opportunity for interested exhibitors to view a film before the distributor either solicits bids for or negotiates an exhibition license.\textsuperscript{61} By promoting informed decision-making, the provision encourages licensing terms that reflect the actual quality of the film licensed.\textsuperscript{62}

The requirement burdens interstate commerce to the extent that it delays the flow of films into a regulating state until a trade screening occurs.\textsuperscript{63} Distributors assert that compliance with the varying provi-
sions of the acts will render nationwide distribution unduly difficult. Nationwide distribution will not be hampered, however, because all acts have the trade screening requirement.

Freedom of speech is affected because a distributor may not communicate a film to the public without first providing a trade screening. This restriction may in some circumstances delay release. Because viewing audiences are seasonal, the timely release of a film is critical in maximizing audience size. Moreover, successful advertising depends on timely release.

Although the mere threat of delay could constitute grounds for invalidating a statute, the threat of delay created by trade screening is not a serious one. Distributors can avoid delay by making accommodations in the production schedule. Moreover, any threat of delay is outweighed by the important state interest in licensing films according to actual quality. Trade screening removes the unfairness inherent in


65. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 128 (1978). In Exxon, the Court recognized that the evil feared by opponents to the state statutes was "not that the several States will enact differing regulations, but rather that they will all conclude that [the] provisions are warranted." Id.

66. See supra note 23 and accompanying text.

67. Id.

68. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 421-23 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982). In Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971 (E.D. Pa. 1981), rev'd and remanded, 683 F.2d 808 (3d Cir. 1982), the district court found the threatened delay sufficient to render the statute unconstitutional. Id. at 983. In reversing the district court's grant of summary judgment, the Third Circuit ruled that whether the acts threatened or resulted in delay was a question of fact for trial. 683 F.2d at 813-14.


70. See NATO, supra note 64, at 5.

71. See Freedman v. Maryland, 380 U.S. 51, 58-60 (1965). In Freedman, a state statute was held unconstitutional because it unduly delayed the exhibition of a film while a state board reviewed it to determine if it was obscene. Id. at 60. A revised version of the statute was upheld because the delay was not protracted. Star v. Preller, 375 F. Supp. 1093 (D. Md.), aff'd mem., 419 U.S. 956 (1974).

72. The producers and distributors determine the schedule necessary for timely film release. See Blind Bidding, supra note 2, at 1132. The acts are unlike those statutes held unconstitutional by the Supreme Court in which delay might have resulted from the arbitrary judgment of a local official or a lack of prompt judicial review. See, e.g., Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 684-85 (1968); Freedman v. Maryland, 380 U.S. 51, 59 (1965).
blind bidding, which has been described as "buying a pig in a poke," by giving exhibitors an opportunity to evaluate a film effectively before deciding whether and on what terms to seek a license.

The argument that the trade screening requirement is not the least restrictive means of furthering the state interest is not valid. A trade screening is a verifiable and non-arbitrary disclosure requirement. The alternative of requiring distributors to supply information short of a trade screening is inadequate because exhibitors would nonetheless be forced to imagine the final version of a film and to rely on a distributor’s ability to transform ideas into an effective film. The quality of a film cannot be fully ascertained without a trade screening.

2. Bidding Procedures

The provisions that regulate bidding typically specify the information that must be contained in solicitations to bid, the persons that must be allowed to attend bid openings and the information that must be made available to bidders after bids are opened. Most provisions prohibit licensing by negotiation once bids have been solicited. The

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73. Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656, 661 (6th Cir. 1982) (quoting lower court).
74. Id.
75. Blind Bidding, supra note 2, at 1133 (suggesting that increased disclosure achieved by providing exhibitors with “access to scripts, lengthier synopses, or unedited versions of . . . films” would be sufficient).
76. Id.
77. Producers notoriously cut and splice films to accommodate their own whims, as well as those of their particular audiences. Corliss, No, but I Saw the Rough Cut, Time, Aug. 18, 1980, at 58; see Cruising Spurs a Test of Booking Films Blind, Bus. Wk., Mar. 3, 1980, at 26.
state interest sought to be furthered by these provisions is the promotion of fair and open licensing procedures, by "counteract[ing] deception and unfair manipulation of the bidding process" and "prevent[ing] . . . misleading trade practice." Compliance with the varying bidding procedures threatens to burden interstate commerce by making it inconvenient for distributors to license films in more than one state. The bidding provisions may prolong the licensing process and increase the cost of film distribution. Moreover, once bids are solicited, distributors may not license by negotiation. These provisions thus limit the methods of licensing available to a distributor.

Compliance, however, should not be difficult. Although not identical, all the provisions of the seventeen states that specify the bidding procedure are very similar. The information that distributors are required to supply is readily accessible. Except for post-bidding information, most of the required information had been supplied routinely by distributors prior to legislation. The post-bidding information requirement, which includes supplying the name of the li-


82. Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656, 663 (6th Cir. 1982). Although referring to the purposes of the Ohio act, the district court noted that the act is similar to other acts. 496 F. Supp. at 436.

83. See supra note 79.


85. See supra note 80.

86. See supra note 86. With the exception of Utah, all the provisions require that invitations to bid specify whether the run for which bids are being solicited is the first one, the geographic area of the run, the names of all exhibitors being solicited (except Indiana), the expiration date of the invitation and the location of bid openings. With the exception of Maine and Utah, the provisions also require that bids be in writing and be opened in front of exhibitors present at the opening. With the exception of Maine, Missouri and Utah, distributors must make bids available for examination either immediately or within sixty days after bids are opened, and must notify bidders of the winner. Five states require distributors to make the winning terms available to bidders. Ten states prohibit negotiation once bidding is initiated. See id.

87. See supra note 86.

licensed exhibitor and the winning terms, and making losing bids available, should not be difficult to comply with.

The burden of supplying such information is necessary to foster the state interest in preventing deceptive practices through fair and open licensing procedures. This information, coupled with the prohibition against negotiation once bidding is initiated, prevents "five o'clock look deals," which occur when distributors allow favored exhibitors to top the highest bid.

Freedom of speech is restricted to some extent by the bidding procedure because a distributor must comply with a designated procedure to exhibit its film. Such compliance may delay distribution and increase the cost of licensing films. Distributors contend that these combined factors will diminish revenues, thereby ultimately reducing the quality or quantity of films.

Distributors, having financial acumen, however, can be expected to make every effort to avoid delays by allocating bidding time in the initial production schedule. Any increase in cost will be minimal because, as previously noted, most of the required information was already routinely supplied by distributors. The state interest in fair and open licensing procedures outweighs this slight burden on freedom of speech. There is no less restrictive way to further fair and open bidding procedures. A clearly delineated bidding procedure is needed to verify compliance. The degree of disclosure required by the bidding provisions is essential to the prevention of deceptive licensing practices.


90. See supra note 79.

91. An Ohio district court suggests that five o'clock look deals were common before the act was passed. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 430 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982).

92. See supra note 79.

93. See supra note 84 and accompanying text.

94. NATO, supra note 64, at 12.

95. See supra note 72.

96. See supra note 88.
3. Advances and Guarantees

As compensation for the leasing of a film, distributors customarily receive a percentage of box office receipts, and often receive advances and guarantees. An "advance" is a payment by a licensing exhibitor made in anticipation of box office revenues. If the film does not produce expected revenues, the payment is refunded. A "guarantee" is a non-refundable payment that assures a minimum return to a distributor should anticipated box office receipts not materialize.

The restrictions on advances and guarantees are designed to promote competition and to protect exhibitors from unfair trade practices. These objectives are achieved by prohibiting practices that developed as a result of the gross inequality of bargaining power both between distributors and exhibitors, and among exhibitors. Because these restrictions impinge on freedom of speech and interstate commerce differently, separate discussion of advances and guarantees is warranted.

98. Id.
100. Brief for Appellee at 4, Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982).
103. See supra notes 5-6 and accompanying text. The current imbalance in bargaining power is a result of the unique structure of the film industry whereby exhibitors compete both among themselves for the best movies and with distributors for the best licensing arrangements. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 415 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982). It has been intensified by the decrease in the number of films produced yearly, the increase in the number of theater screens and the vast number of exhibitors as compared to the small number of major distributors. See Blind Bidding, supra note 2, at 1129-30. Although none of the acts include balancing of bargaining power within their express purposes, one district court found, and another assumed for the purpose of summary judgment, that the acts are designed to achieve this. Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971, 979 (E.D. Pa. 1981), rev'd on other grounds and remanded, 683 F.2d 808 (3d Cir. 1982); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 429 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982). The Sixth Circuit and the Eastern District of Pennsylvania have questioned whether balancing the bargaining power constitutes a legitimate state interest. The lessening of the inequality in the bargaining power in the motion picture industry, however, is merely the consequence of prohibiting advances and guarantees; the purpose is the promotion of competition and the prevention of unfair trade practices.
a. Advances

Some acts prohibit the payment of advances more than fourteen days prior to exhibition.\textsuperscript{104} This limitation should not appreciably affect film exhibition because it is unusual for a distributor to require an advance more than fourteen days prior to exhibition.\textsuperscript{105} Other acts absolutely prohibit the use of advances.\textsuperscript{106} Because distributors have used advances to prevent delinquent payments and to collect overdue payments,\textsuperscript{107} these acts may reduce the certainty of payment provided by advances.\textsuperscript{108} Thus, interstate commerce may be burdened because distributors will be discouraged from licensing in states that absolutely prohibit advances.

The burden on interstate commerce is not substantial, however, because advances are not necessary to ensure payment by exhibitors. Distributors may avail themselves of state contract laws to redress any nonpayment.\textsuperscript{109} Moreover, exhibitors that fail to perform their contractual duties risk not being granted licenses by distributors in the future.

The provisions arguably threaten freedom of speech because fewer films may be produced if investment is discouraged by the decreased certainty of return. Moreover, if distributors are reluctant to rely on the creditworthiness of exhibitors, films conceivably may not be exhibited in states that absolutely prohibit advances.\textsuperscript{110} Investment in films should not be deterred, however, because advances are refundable.\textsuperscript{111} The prohibition against advances therefore does not increase the risk to a distributor of a film’s failure.\textsuperscript{112} Furthermore, the possi-

\textsuperscript{104} Missouri forbids an exhibitor from forwarding money to a distributor more than fourteen days prior to film release. 1982 Mo. Legis. Serv. 1170 (Vernon). Kentucky and Ohio forbid a distributor from conditioning a license on an exhibitor’s advancing money more than fourteen days prior to exhibition. Ky. Rev. Stat. Ann. § 365.755(3) (Bobbs-Merrill Supp. 1982); Ohio Rev. Code Ann. § 1333.06(c) (Page 1979).

\textsuperscript{105} Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 420 (S.D. Ohio 1980), aff’d in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982).


\textsuperscript{108} Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971, 985 (E.D. Pa. 1981), rev’d on other grounds and remanded, 683 F.2d 808 (3d Cir. 1982). The Third Circuit disagreed with the district court’s finding that the act, on its face, shifts the financial burden. Such an issue is a question of fact that must be determined at trial. 683 F.2d at 812.

\textsuperscript{109} See Key Maps, Inc. v. Pruitt, 470 F. Supp. 33, 38 (S.D. Tex. 1978) (“Principles of contract law are generally applicable in the construction of copyright assignments, licenses and other transfers of rights.” (footnote omitted)).

\textsuperscript{110} See supra notes 107-08 and accompanying text.

\textsuperscript{111} See supra note 100.

\textsuperscript{112} Additionally, any increase in the cost of producing a film created by a slight delay in the return of capital would be negligible compared with total production
bility that films will not be exhibited in states that prohibit advances is remote because distributors are not likely to forego an entire geographic viewing audience.

Consequently, the burden caused by prohibiting advances is slight and is outweighed by the importance of promoting competition and preventing unfair trade practices. There is no less restrictive way to further this interest. Absent an absolute prohibition on advances, those exhibitors that are financially able to make advances will probably continue to do so voluntarily, thus frustrating the state's purpose.113

b. Guarantees

Only those distributors that receive a percentage of box office receipts are subject to provisions that restrict the use of guarantees.114 There are two types of guarantee provisions. The first type, which prohibits distributors from conditioning the extension of a license on a guarantee,115 should not affect a distributor's ability to obtain guarantees. Although this type of provision prohibits distributors from asking for a guarantee, it does not prohibit exhibitors from offering one. Fierce competition among exhibitors116 will induce those exhibitors that have the financial means to succumb to a distributor's demand for a guarantee, to volunteer one.117

The second type of provision absolutely prohibits the use of guarantees.118 This prohibition burdens interstate commerce because it may

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113. See Blind Bidding, supra note 2, at 1130.
117. Why Do Exhibs Volunteer Such Hefty Guarantees?, Variety, Feb. 7, 1979, at 5, col. 2; see Bennett, supra note 107, at 37, col. 1.
deter some distributors from licensing exhibitors in states with such provisions. Because distributors use guarantees to shift part of the financial risk of a film's failure to exhibitors, the prohibition of this practice increases the financial risk for those distributors that would otherwise receive a guarantee. Such increase in financial risk also threatens freedom of speech because it may reduce the number of films produced.

To minimize any increased risk, however, distributors probably will demand an increased percentage of the box office receipts. Moreover, if guarantees are absolutely prohibited in an entire state, distributors may be more amenable to licensing small exhibitors that are unable to make guarantees. The number of viewers may thus in fact increase.


The number of films produced annually has been declining. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 435 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982). A more rapid decline does not necessarily follow simply because a form of compensation is disallowed. See id.

122. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 423-24 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982); see Blind Bidding, supra note 2, at 1134 & n.24. Both the Sixth Circuit and a Pennsylvania district court viewed this prohibition on guarantees as permitting exhibitors to escape sharing in the risks inherent in the movie industry. Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656, 664 (6th Cir. 1982); Associated Films Distribution Corp. v. Thornburgh, 520 F. Supp. 971, 983-85 (E.D. Pa. 1981), rev'd and remanded, 683 F.2d 808 (3d Cir. 1982). An exhibitor is still subject to these risks, however, because if a film is unsuccessful, any share to which the exhibitor is entitled is reduced.

123. The Supreme Court has acknowledged the legitimacy of protecting small businesses. See New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); American Motors Sales Corp. v. Division of Motor Vehicles, 592 F.2d 219 (4th Cir.), cert. denied, 444 U.S. 836 (1979). The state statutes upheld in these cases, however, were contested solely on commerce clause grounds. Statutes prohibiting practices that increase the costs of exercising first amendment rights have been upheld. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding federal regulation of the broadcasting industry); Breard v. Alexandria, 341 U.S. 622 (1951) (upholding ordinance prohibiting the solicitation of goods at private residences); United States v. Hunter, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972) (upholding the prohibition of the Civil Rights Act of 1968 against publishing discriminatory notices relating to sale or rental of dwellings). The unique structure of the movie industry, along with the interdependency of distributors and exhibitors, requires regulation of their conduct. Similar regulations in similarly structured industries have been upheld. This is particularly true in the motor vehicle industry. See, e.g., New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (due process challenge of state statute regulating retail automobile dealerships); American Motors Sales Corp. v. Division of Motor
The burden on interstate commerce and the free exercise of speech is outweighed by the state interest in fostering competition. This state interest cannot be furthered in a way less restrictive than an absolute prohibition. Without such a prohibition, financially able exhibitors would probably volunteer guarantees, thereby defeating the state interest.\textsuperscript{124}

4. Exclusive First Runs

The Pennsylvania act prohibits exclusive first runs of motion pictures for more than forty-two days "without provision to expand the run to second run or subsequent run theatres within the geographical area."\textsuperscript{125} The state interest sought to be furthered by this provision—the promotion of broad dissemination of information—\textsuperscript{126} is legitimate, important and substantial.\textsuperscript{127}

Prior to licensing, distributors generally consider several economic and aesthetic factors in determining whether a theater is suitable for film exhibition. These factors include grossing capacity, theater image and location.\textsuperscript{128} Moreover, the screen quality and acoustics of a theater are important in creating the optimal atmosphere.

The exclusive licensing provision requires distributors to license surrounding theaters after the statutory period for exclusive first runs has expired.\textsuperscript{129} If there are other suitable theaters in the area, the number of viewers may increase.\textsuperscript{130} Broader dissemination of information.

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\textsuperscript{1} Vehicles, 592 F.2d 219 (4th Cir.), cert. denied 444 U.S. 836 (1979) (commerce clause challenge of state regulation of automobile dealership franchises). The Supreme Court upheld a Maryland statute that required gasoline distributors to extend a "voluntary allowance" to all retail stations supplied in the state. Exxon Corp. v. Governor of Md., 437 U.S. 117, 119-20 (1978). A voluntary allowance is a temporary price reduction "granted by the oil companies to independent dealers who are injured by local competitive price reductions of competing retailers." \textit{Id.} at 122-23. The purpose of the voluntary allowance provision, the promotion of competition among retailers, is the same as that of the advance and guarantee provisions.

\textsuperscript{124} See \textit{supra} note 117.


\textsuperscript{126} \textit{Id.} § 203-2(4).


\textsuperscript{128} P. Baumgarten & D. Farber, \textit{supra} note 88, at 191-92; Murphy, \textit{What Does Average Per Screen Mean?}, Variety, July 7, 1982, at 1; Bennett, \textit{supra} note 107, at 37, col. 1.

\textsuperscript{129} See \textit{supra} note 125 and accompanying text. The geographic area referred to in the Pennsylvania act is assumed to be the competitive zone in which several exhibitors vie for the same audience. See P. Baumgarten & D. Farber, \textit{supra} note 88, at 193.

\textsuperscript{130} See \textit{supra} note 125 and accompanying text.

\textsuperscript{131} For example, subsequently licensed theaters may be more conveniently located or may charge lower admission prices.
tion may thus be achieved. If, however, there are no other suitable theaters, distributors may opt not to undergo the expense of making an additional film print, thus limiting a film's exhibition in a particular geographic area to the statutory period. A Pennsylvania district court determined that the provision "creates the risk that exhibition of a given motion picture might not take place for a period of time sufficient to make it economically worthwhile." The court invalidated the act on first amendment grounds and deemed it unnecessary to discuss the commerce clause.

Interstate commerce is burdened because, in areas where no other suitable theaters exist, licensing is interrupted upon expiration of the statutory period. Freedom of speech is similarly burdened because films will be exhibited for a shorter period in those areas. Although the state interest in broad dissemination of information is important, this provision is not properly designed to achieve it. The limitation on exclusive first runs actually may decrease the dissemination of information. The burden being excessive, the exclusive license provision violates both the commerce clause and the first amendment.

II. THE SUPREMACY CLAUSE

Motion pictures are entitled to protection under the Copyright Act of 1976, which Congress enacted pursuant to its constitutional 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." The "bundle of rights" known as copyright confers upon the owner of a copyrighted

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132. See P. Baumgarten & D. Farber, supra note 88, at 190.
133. The exhibitors who win a bid for the first exclusive runs would also be harmed because their revenues will be reduced commensurate with the reduction in the length of their exclusive run. See Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971, 985 (E.D. Pa. 1981), rev'd on other grounds and remanded, 683 F.2d 808 (3d Cir. 1982).
135. Id. at 991.
137. See id. at 985-86.
138. See supra note 127.
motion picture the exclusive right, among others, to distribute copies
and to perform the work publicly. A copyright is granted by Con-
gress and cannot be vitiated by the states. Motion picture licensing
acts are invalid if they are either explicitly or implicitly preempted by the Copyright Act.

A. Explicit Preemption

Section 301 of the Copyright Act preempts only those "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." It expressly leaves untouched the validity of those "rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to


143. 17 U.S.C. § 106 (Supp. IV 1980). Additionally, this section grants a copyright owner the right to reproduce the copyrighted work, prepare derivative works and display the copyrighted work publicly. Id. The 1909 Act granted the copyright owner the right "to vend." Such right did not confer the right to transfer works at all times and at all places free and clear of all claims of others. Morseburg v. Balyon, 621 F.2d 972, 977 (9th Cir.), cert. denied, 449 U.S. 983 (1980). It simply gave the artist "the exclusive right to transfer the title for a consideration to others." Bauer v. O'Donnell, 229 U.S. 1, 11 (1913). The legislative history of § 106 of the 1976 Act does not indicate that Congress intended to broaden the scope of this exclusive right to include transfer at all times and at all places. See House Report, supra note 39, at 61-65, reprinted in 1976 U.S. Code Cong. & Ad. News at 5674-78.


any of the exclusive rights within the general scope of copyright as specified by section 106." Essentially, the Copyright Act preempts only those state laws that provide the same protection that is already afforded by a copyright. Thus, state-created rights not violable by the mere act of reproduction, performance, distribution or display are not equivalent to copyright.

Motion picture licensing acts have been criticized as creating rights equivalent to a copyright owner's right to distribute. These acts, however, do not create a right equivalent to copyright. They are violated only if distribution is coupled with one of the following: distribution not preceded by a trade screening; distribution not in accordance with applicable bidding procedure; or distribution either preceded or accompanied by an advance or guarantee. The provisions thus regulate the manner in which the right to distribute is exercised. Such economic regulations imposed on the exercise of the right to distribute are valid.


149. 1 M. Nimmer, Nimmer on Copyright § 1.01[B], at 1-11. These are the rights the Copyright Act provides exclusively to the copyright owner. See supra note 143 and accompanying text. For a discussion on federal exemptions from copyright violation, see infra note 199 and accompanying text.


151. See supra note 23 and accompanying text.

152. See supra note 79 and accompanying text.

153. See supra notes 104, 106, 115 & 118 and accompanying text.

154. See, e.g., Watson v. Buck, 313 U.S. 387 (1941) (state application of antitrust laws to marketing copyrighted materials); Fox Film v. Doyal, 286 U.S. 123 (1932) (state may impose gross receipts tax on federally copyrighted film); Morseburg v. Balyon, 621 F.2d 972, 977 (9th Cir.) (California Resale Royalties Act not preempted by the 1909 Copyright Act), cert. denied, 449 U.S. 983 (1980). People v. M & R Records, Inc., 106 Misc. 2d 1052, 1057, 432 N.Y.S.2d 846, 849 (Crim. Ct. 1980) (statute prohibiting sale of record that does not disclose name of manufacturer and performer not preempted by § 301). Although the Pennsylvania act was held pre-
B. Implicit Preemption

Motion picture licensing acts are implicitly preempted if they conflict with Congress' purposes in enacting the Copyright Act. The Copyright Act was enacted to further the basic constitutional aim of promoting writing and scholarship. Congress has determined that writing and scholarship are best promoted by a uniform system of copyright.

1. Promotion of Writing and Scholarship

The promotion of writing and scholarship is the paramount purpose of the Copyright Act. Because the costs of making films are high, the ability of a filmmaker to attract investors is essential to the achievement of this purpose. Although licensing terms between distributors and exhibitors may be affected by the licensing acts, the

empted under the supremacy clause in Associated Film, the court did not base its holding on § 301. The Ohio and Utah district courts held that their respective state acts were not preempted by § 301. Warner Bros. v. Wilkinson, 533 F. Supp. 105, 108 (D. Utah 1981); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 432-33 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982).

155. In Morseburg v. Balyon, 621 F.2d 972 (9th Cir.), cert. denied, 449 U.S. 983 (1980), the court said "[c]onflict' . . . can require no more than a mechanical demonstration of potential conflict between federal and state law to no less than a showing of substantial frustration of an important purpose of the federal law by the challenged state law." Id. at 976.

156. The determinative issue is "whether, under the circumstances of this particular case, [the state] law 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); accord Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977). The Supreme Court has upheld state regulation of patent licensing. See, e.g., Patterson v. Kentucky, 97 U.S. 501, 508 (1878). Notably, the intellectual right one owns in a patent is more expansive than in a copyright. Goldstein, supra note 148, at 1108-09. The patent creates a monopoly over non-obvious and novel ideas. 35 U.S.C. §§ 102-103 (1976). In comparison, the copyright creates a monopoly over the expression of the idea. 1 M. Nimmer, supra note 149, § 203[D], at 2-32.


158. Id. "One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States." Id.; accord Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 442 n. 18 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982). See generally 1 M. Nimmer, supra note 149, § 1.01[B] (impact of Copyright Act on state law). To promote uniformity, therefore, Congress has ordained that a single federal system, exclusive of all others, should reign.

159. 1 M. Nimmer, supra note 149, § 1.03, at 1-30; see U.S. Const. art. I, § 8, cl. 8.

160. See supra note 112.
primary criteria financiers consider in deciding whether to invest in a film—the director, the actors and the plot—are not affected.\textsuperscript{161} Additionally, licensing agreements are usually made after financiers have committed themselves to invest.\textsuperscript{162} The acts should therefore have little influence on investment decisions.

The acts may in fact promote writing and scholarship. Independents, who are often precluded from licensing films to the better exhibitors,\textsuperscript{163} will have a greater opportunity to do so because the acts augment a competitive atmosphere,\textsuperscript{164} thereby encouraging the creation of quality films.

2. Uniformity

Copyright essentially creates a monopoly over the commercial exploitation\textsuperscript{165} of a film for a limited period of time.\textsuperscript{166} Because states must recognize the rights subsumed in copyright,\textsuperscript{167} motion picture licensing acts may not conflict with the exercise of this monopoly. Concern has been expressed regarding the effect the varying acts will have on nationwide film distribution.\textsuperscript{168} The acts, however, are not so dissimilar as to retard such distribution.\textsuperscript{169} For example, the Ohio act,\textsuperscript{170} which is one of the more stringent ones,\textsuperscript{171} was found to have only a slight burden on nationwide advertising and promotion.\textsuperscript{172}

\textsuperscript{161} See Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 434 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982).

\textsuperscript{162} See id.

\textsuperscript{163} See supra note 10.

\textsuperscript{164} See supra note 102 and accompanying text.


\textsuperscript{166} 17 U.S.C. § 302 (Supp. IV 1980); see U.S. Const. art. I, § 8, cl. 8.

\textsuperscript{167} See supra note 144 and accompanying text.

\textsuperscript{168} Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 435-37 (S.D. Ohio 1980), aff'd in part, remanded on other grounds, 679 F.2d 656 (6th Cir. 1982); NATO, supra note 64, at 16. Distributors claim that the long term result of added costs and lost revenues due to delay in nationwide film distribution will be "fewer films of lesser quality." Id.

\textsuperscript{169} See supra note 16. All acts prohibit blind bidding, see supra note 23, sixteen acts specify the bidding procedure, see supra note 79, six acts regulate the use of guarantees, see supra note 25, and four acts regulate the use of advances. See supra note 25. Only the Pennsylvania act limits the length of an exclusive license. Pa. Stat. Ann. tit. 73, § 203-7 (Purdon Supp. 1981-1982).

\textsuperscript{170} Ohio Rev. Code Ann. § 1333.05-.07 (Page 1979).


Congress did not intend the uniformity of copyright to prevent a state from attending to the particular needs of its residents through economic regulation.173 The acts, however, must not prevent174 the exercise of rights afforded under copyright law. Because individual provisions affect different rights afforded under copyright, separate discussion of each provision is warranted.

a. Trade Screening

The provisions that require trade screening175 have been challenged on the ground that a trade screening forces a distributor to perform a film publicly,176 while the Copyright Act provides a copyright owner with the right to choose whether or not to perform.177 The performance, however, is not forced upon the distributor. The trade screening requirement only applies to those distributors that have already voluntarily decided to perform.178 The performance merely takes place slightly sooner than anticipated because distributors must trade screen a film to exhibitors before entertaining bids or negotiating.179


174. See supra notes 155-56 and accompanying text.

175. See supra note 23.


179. See supra note 23.
b. Bidding Method

Provisions that prescribe bidding procedures do not conflict with the right to distribute.\(^{180}\) Although transfers that violate these provisions may be voidable,\(^ {181}\) distributors are free to distribute either by bidding in accordance with the applicable procedure or by negotiating.\(^ {182}\)

c. Advances and Guarantees

Copyright owners are entitled to rewards generated from the exercise of their copyright.\(^ {183}\) The Supreme Court, however, has stated that reward is a secondary consideration:\(^ {184}\) "[T]he reward does not serve its public purpose if it is not related to the quality of the copyright."\(^ {185}\) A copyright owner is not entitled to maximize the reward irrespective of applicable state law.\(^ {186}\)

Provisions that prohibit advances and guarantees\(^ {187}\) may affect the reward of a copyright owner.\(^ {188}\) Prohibiting distributors from receiving advances\(^ {189}\) may delay receipt of compensation for a short period of time. The type of compensation distributors will receive, however, remains unaffected. Prohibiting distributors from receiving\(^ {190}\) or, as under other provisions, from requesting,\(^ {191}\) a guarantee may change the type of compensation a distributor receives. Distributors, however, may request either a percentage of box office receipts or a flat

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180. See Warner Bros. v. Wilkinson, 533 F. Supp. 105, 108 (D. Utah 1981). The court said that copyright "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." Id. In summarily condemning the Pennsylvania act, a Pennsylvania district court found that the bidding requirements restrict the distributor's control and freedom to license. Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971, 995 (E.D. Pa. 1981), rev'd and remanded, 683 F.2d 808 (3d Cir. 1982).


182. See supra note 81.

183. Mazer v. Stein, 347 U.S. 201, 219 (1954). Congress determined that pecuniary reward is the best method of promoting the arts. Id. This is implemented by granting the copyright owner a monopoly for a limited amount of time. See supra notes 165-66.


187. See supra note 25.

188. See supra notes 108, 120 and accompanying text.

189. See supra note 25.

190. See supra note 118.

191. See supra note 115.
This choice has been denounced by distributors as a Hobson's choice. Because a trade screening is required before licensing, however, a distributor has more information about the quality of a film upon which to base its decision. Exhibitors will similarly have more information about the quality of a film and can thus better decide whether to include, if permissible, a guarantee in a bid for a film. The guarantee provision, like the advance provision, does not conflict with the right to reap rewards from copyright. Both provisions merely prevent distributors from shifting to exhibitors the risk of failure of a film while simultaneously retaining the benefits of success.

d. Limit on Exclusive Licenses

The provision of the Pennsylvania act that prohibits exclusive licensing for more than forty-two days violates the monopoly feature of copyright. The Copyright Act grants a copyright owner the right to license exclusively for a specified number of years. With the exception of this Pennsylvania provision, this right is limited only by sections 107-118 of the Copyright Act. Compulsory licenses, for example, are included within these limitations. The Pennsylvania provision creates a compulsory license because, after forty-two days, distributors are forced to license films to neighboring exhibitors. This conflicts with the right to distribute because Congress has set forth the only circumstances under which compulsory licenses must be granted. The restriction on exclusive licenses thus constitutes invalid state action.

192. See supra note 114.
194. See supra note 23.
195. See supra note 114.
196. See supra note 125 and accompanying text.
197. See supra notes 165-66 and accompanying text.
199. 17 U.S.C. §§ 107-118 (Supp. IV 1980). Such limitations include fair use, reproductions by libraries and archives, certain secondary transmissions, ephemeral recordings and compulsory licenses for making and distributing phonorecords. Id.
200. 17 U.S.C. §§ 111, 115-116, 118 (Supp. IV 1980). A copyright holder normally has the option of licensing to whomever he chooses. Under certain circumstances delineated in these sections of the Copyright Act, the copyright owner must grant a license to anyone requesting one. See id.
202. See supra note 200.
CONCLUSION

In the motion picture industry, the bargaining power of distributors far exceeds that of exhibitors. Motion picture licensing acts have been enacted as a response to abusive film distribution practices. By prohibiting blind bidding, the acts promote the licensing of films according to quality. When supplemented by regulation of bidding procedures and restrictions on advances and guarantees, the acts promote fair and open dealing in a competitive atmosphere. The demonstrated value of motion picture licensing acts in alleviating inequities in film distribution provides the states with ample incentive to enact them.

Mary Elizabeth Kilgannon

Remick, a state statute regulating sheet music distribution was invalidated because it was found to deprive copyright owners of their right to control public performance of their copyrighted musical compositions for profit. Id. at 543-45. Under the Nebraska statute, if the copyright owner did not offer the public performance rights to the sheet music purchaser, any such purchaser could have the work publicly performed without any liability to the copyright owner. Id. at 543. Unlike the statute in Remick, the exclusive license provision does not permit potential licensees to show the film without liability to the distributor. Similar to the statute in Remick, however, it deprives the copyright owner of the right to control the public performance of motion pictures.