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NOTES

MOTION PICTURE LICENSING ACTS: AN ANALYSIS OF THE CONSTITUTIONALITY OF THEIR PROVISIONS

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

1. Divestiture was imposed to rectify antitrust abuses. *United States v. Paramount Pictures, Inc.*, 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd per curiam sub nom. United States v. Loew's, Inc.*, 339 U.S. 974 (1950). The Supreme Court had affirmed the finding of a New York district court that vertical monopolization in the movie industry violated the Sherman Act. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 149-53 (1948). The Court remanded the case for appropriate relief. *Id.* at 178. On remand, the New York district court found divorcement of exhibitors and distributors necessary to remedy the adverse effect vertical integration had on competition. 85 F. Supp. at 896. See generally M. Conant, *Antitrust in the Motion Picture Industry* 84-106 (1960) (discussion of *Paramount* and its legal background); Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 S. Cal. L. Rev. 150, 152-53 (1958) (discussion of industry practices precipitating *Paramount*).

2. *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); Note, *Blind Bidding and the Motion Picture Industry*, 92 Harv. L. Rev. 1128, 1129 (1979) [hereinafter cited as *Blind Bidding*]; see *Theater Owners Work to Ban Blind Bidding*, *Bus. Wk.*, Apr. 17, 1978, at 40, col. 2 [hereinafter cited as *Theater Owners*]. These distributors include Allied Artists Pictures Corp., Avco Embassy Pictures Corp., Buena Vista Distribution Co., Columbia Pictures Industries, Metro-Goldwyn-Mayer, Inc., Paramount Pictures Corp., Twentieth Century Fox Film Corp., Universal Film Exchanges, Inc., Warner Bros., Inc. and Warner Bros. Distributing Corp. 496 F. Supp. at 413-14.

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.

4. *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); see *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 976 n.18 (E.D. Pa. 1981), *rev'd on other grounds and remanded*, 683 F.2d 808 (3d Cir. 1982). Bidding is a practice whereby a distributor notifies all exhibitors in a given area of a forthcoming film and requests bids on suggested terms. 496 F. Supp. at 415. Negotiation involves bargaining with individual theaters to arrive at mutually agreeable terms. *Id.*

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.⁶ For example, exhibitors have been required to obligate themselves contractually prior to film completion,⁷ and to make non-refundable payments on film rentals.⁸ Moreover, film distributors without established reputations, known in the industry as "independents,"⁹ 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.¹⁰

Blind bidding requires exhibitors to bid for or negotiate a film license without having an opportunity to view the film.¹¹ 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,¹² blind bidding has become the predominant practice in the movie industry.¹³ Nevertheless, certain distributors and exhibitors have recognized the

the unusually interdependent relationship between distributors and exhibitors. *Id.* at 413-14; see Cassady, *supra* note 1, at 150.

6. See *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).

7. *Blind Bidding At A Glance*, Variety, Jan. 13, 1982, at 11 [hereinafter cited as *Blind Bidding At A Glance*]; *Heavens Gate Leaves Theater Owners Fuming*, Bus. Wk., Dec. 8, 1980, at 29 [hereinafter cited as *Heavens Gate*]; *Theater Owners*, *supra* note 2, at 40.

8. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 418 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982); see Ala. Code § 8-18-2 (Supp. 1979); Pa. Stat. Ann. tit. 73, § 203-3 (Purdon Supp. 1981-1982); Utah Code Ann. § 13-13-2 (Supp. 1981); *Heavens Gate*, *supra* note 7, at 29.

9. *Blind Bidding*, *supra* note 2, at 1134.

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.

11. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 412 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982). The Supreme Court has called this practice blind-selling. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157 n.11 (1948). When films are blind bid, bidders are typically provided the names of principal actors, directors and a synopsis of the plot. 496 F. Supp. at 416.

12. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 416-17 & n.6 (S.D. Ohio 1980) (citing *United States v. Paramount Pictures, Civ. No. 87-273* (S.D.N.Y. Aug. 14, 1968)), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982). The period covered by this agreement, including extensions, was January 1, 1969 through January 1, 1975. *Id.*

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.¹⁴ Moreover, the Supreme Court has acknowledged the unfairness of this practice.¹⁵

To alleviate inequitable practices in the motion picture industry, twenty-two states have enacted motion picture licensing acts.¹⁶ 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.¹⁷ Furthermore, the public should benefit from anticipated lower admission prices¹⁸ and reduced exposure to objectionable films.¹⁹

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

15. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157 n.11 (1948). The Court recognized that blind bidding is subject to abuse. *Id.*

16. Ala. Code §§ 8-18-1 to -6 (Supp. 1979); Ark. Stat. Ann. §§ 70-1101 to -1106 (Supp. 1981); Ga. Code Ann. §§ 106-1301 to -1305 (Supp. 1982); Idaho Code §§ 18-7701 to -7708 (Supp. 1982); Ind. Code Ann. §§ 24-1-5-1 to -7 (Burns 1982); Ky. Rev. Stat. Ann. §§ 365.750-765 (Bobbs-Merrill Supp. 1982); La. Rev. Stat. Ann. §§ 37:2901-2905 (West Supp. 1982); Me. Rev. Stat. Ann. tit. 10, § 1901-05 (1980 & Supp. 1981-1982); Mass. Ann. Laws ch. 93F, §§ 1-4 (Michie/Law. Co-op. Supp. 1982); 1982 Mo. Legis. Serv. 1167 (Vernon); Mont. Code Ann. §§ 30-14-301 to -308 (1981); N.M. Stat. Ann. §§ 57-5A-1 to -5 (Supp. 1982); N.C. Gen. Stat. §§ 75C-1 to -5 (1981); Ohio Rev. Code Ann. §§ 1333.05-.07 (Page 1979); Or. Rev. Stat. § 646.890 (1981); Pa. Stat. Ann. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1981-1982); S.C. Code Ann. §§ 39-5-510 to -560 (Law. Co-op. Supp. 1981); Tenn. Code Ann. §§ 69-801 to -804 (Supp. 1981); Utah Code Ann. §§ 13-13-1 to -7 (Supp. 1981); Va. Code §§ 59.1-255 to -261 (1982); Wash. Rev. Code Ann. §§ 19.58.010-.050, .900-.905 (Supp. 1982); W. Va. Code §§ 47-11D-1 to -4 (1980). Alabama enacted the first motion picture licensing act on April 27, 1978, *see* Ala. Code §§ 8-18-1 to -6 (Supp. 1979), approximately three years after the agreement between certain distributors and the Department of Justice had expired. *See supra* note 12 and accompanying text. Puerto Rico and Prince George County, Maryland have also enacted motion picture licensing acts. Puerto Rico Regulation of Fair Competition Number VI, Jan. 21, 1980; Prince George, Md., Ordinance CB-125-1981 (Nov. 3, 1981). Puerto Rico's regulation requires that distributors have a trade screening and follow a prescribed bidding procedure, which is similar to that designated in state acts. Puerto Rico Regulation of Fair Competition No. VI, Jan. 21, 1980. *See infra* note 79 and accompanying text. The Prince George County act prohibits blind bidding and advances made more than seven days prior to exhibition; it also requires a bidding procedure similar to that of state acts. Prince George, Md., Ordinance CB-125-1981 (Nov. 3, 1981). *See infra* note 79 and accompanying text. This Note focuses its discussion on the state acts.

17. *See, e.g.*, Ala. Code § 8-18-3 (Supp. 1979); Ark. Stat. Ann. § 70-1101 (Supp. 1981); Ga. Code Ann. § 106-1301 (Supp. 1982); Pa. Stat. Ann. tit. 73, § 203-2 (Purdon Supp. 1981-1982).

18. *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). Some evidence suggests that blind bidding drove theater owners to raise ticket prices. *Id.*; *see* Debenport, *Movie Bill Approved Despite Threat From 20th Century Fox*, UPI, Feb. 11, 1981 (available Feb. 13, 1981, on LEXIS, Nexis library, Wire Services file).

19. *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); *see* Blackmon, *Bill to Get Sex and Nudity Off Screens Passed*, UPI, Mar. 31, 1982

The acts are commonly referred to as "anti-blind bidding"²⁰ acts because, although they vary,²¹ each requires a distributor to trade screen a film, that is, to show a film to interested exhibitors²² before either entertaining bids or negotiating an exhibition license.²³ Most acts regulate the bidding procedure,²⁴ and several acts prohibit guarantees and advances.²⁵ Waivers of any provision are usually void.²⁶ Under most acts, violation is a civil offense;²⁷ under a few, violation is a misdemeanor.²⁸

Motion picture licensing acts have been criticized as an improper and unwise governmental interference in the film industry.²⁹ Three acts have been judicially challenged as unconstitutional³⁰ on the

(available Apr. 2, 1982, on LEXIS, Nexis library, Wire Services file); Debenport, *supra* note 18.

20. See, e.g., Nicholson, Friendly & Newhall, *Hollywood Roulette*, Newsweek, Jan. 4, 1982, at 57; *Sick & Weary Blind Bid Impasse Persists: NATO Says Bans Don't Dent Biz*, Variety, Nov. 18, 1981, at 5; Tusher, *Studios Boycott Anti-Blind Bid State Locations*, Variety, Apr. 15, 1981, at 1, 93.

21. The Pennsylvania act is the most expansive. It absolutely prohibits advances and guarantees and limits the length of any exclusive first run to 42 days. Pa. Stat. Ann. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1981-1982). In contrast, the Georgia and Tennessee acts only prohibit blind bidding. Ga. Code Ann. §§ 106-1301 to -1305 (Supp. 1982); Tenn. Code Ann. §§ 69-801 to -804 (Supp. 1981).

22. E.g., Ala. Code § 8-18-2(9) (Supp. 1979); Ga. Code Ann. § 106-1303(i) (Supp. 1982); Ind. Code Ann. § 24-1-5-1 (Burns 1982); N.M. Stat. Ann. § 57-5A-3.H (Supp. 1982); Pa. Stat. Ann. tit. 73, § 203-3 (Purdon Supp. 1981-1982).

23. E.g., Ga. Code Ann. § 106-1304 (Supp. 1982); Ky. Rev. Stat. Ann. § 365.755 (Bobbs-Merrill Supp. 1982); La. Rev. Stat. Ann. § 37:2903 (West 1982). See *supra* note 16.

24. See *infra* note 79.

25. Idaho Code § 18-7704, -7706 (Supp. 1982) (advances and guarantees); Ky. Rev. Stat. Ann. § 365.755 (Bobbs-Merrill Supp. 1982) (advances and guarantees); 1982 Mo. Legis. Serv. 1170 (Vernon) (advances); Mont. Code Ann. § 30-14-305 (Supp. 1981) (guarantees); Ohio Rev. Code Ann. § 1333.06 (Page 1979) (advances and guarantees); Pa. Stat. Ann. tit. 73, § 203-5 to -6 (Purdon Supp. 1981-1982) (advances and guarantees); Utah Code Ann. § 13-13-4 (Supp. 1981) (guarantees).

26. E.g., Idaho Code § 18-7707 (Supp. 1982); Tenn. Code Ann. § 69-803(c) (Supp. 1981); Va. Code § 59.1-258(c) (1982); Wash. Rev. Code Ann. § 19.58.030(4) (Supp. 1982).

27. E.g., Ga. Code Ann. § 106-1305 (Supp. 1982); Ky. Rev. Stat. Ann. § 365.765 (Bobbs-Merrill Supp. 1982); N.C. Gen. Stat. § 75C-5 (1981).

28. Ark. Stat. Ann. § 70-1105 (Supp. 1981); Idaho Code § 18-7708 (Supp. 1982); S.C. Code Ann. § 39-5-560 (Law. Co-op. Supp. 1981); Utah Code Ann. § 13-13-7 (Supp. 1981).

29. See *Blind Bidding*, *supra* note 2, *passim*.

30. Warner Bros. v. Wilkinson, 533 F. Supp. 105 (D. Utah 1981) (construing Utah Code Ann. §§ 13-13-1 to -7 (Supp. 1981)); Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971 (E.D. Pa. 1981) (construing Pa. Stat. Ann. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1981-1982)), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408 (S.D. Ohio 1980) (construing Ohio Rev. Code Ann. §§ 1333.05-.07 (Page 1979)), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982).

grounds that they violate the commerce clause,³¹ the first amendment,³² which is applicable to states through the fourteenth amendment,³³ and the supremacy clause.³⁴ The acts have been defended as

31. *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 (6th Cir. 1982) (remanded case for determination of any commerce clause violation); *Warner Bros. v. Wilkinson*, 533 F. Supp. 105, 107 (D. Utah 1981) (found no violation of the commerce clause); *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 991, 996 (E.D. Pa. 1981) (without addressing the alleged commerce clause violation, court held act unconstitutional), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982).

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), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982).

33. *Stromberg v. California*, 283 U.S. 359, 368 (1931) ("[T]he conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."); *accord* *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 780 (1978); *New York Times Co. v. Sullivan*, 376 U.S. 254, 299-300 n.3 (1964) (Goldberg, J., concurring).

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), *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." *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 *per se* violation." *Id.* at 3300. In *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. *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. *Id.* Product splitting, however, requires collusion by exhibitors. The acts, as the *Allied Artists* court found regarding the Ohio act, neither require nor authorize "collusive conduct of any kind among exhibitors." *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. *Id.* at 449-50. Additional acts not authorized by these provisions are necessary before anti-competitive effects result from interference with independent pricing behavior. *Id.* The dissemination of price information is not a *per se* violation of the Sherman Act. *United States v. Citizens &*

being within the permissible scope of state action.³⁵ 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 act³⁶ which limits the length of exclusive first runs.³⁷

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."³⁸ 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.³⁹ 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.⁴⁰ Motion picture licensing acts nevertheless have been criticized as interfering with film exhibition licenses that traverse state lines.⁴¹ In *Pike v. Bruce Church, Inc.*,⁴² the Supreme

S. Nat'l Bank, 422 U.S. 86, 113 (1975); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582 (1925). The acts do not reduce competition among exhibitors. In fact, the acts foster competition. See *infra* pt. I(C)(3). The acts are thus not preempted by the federal antitrust laws under the per se rule. Regarding invalidation under the rule of reason, 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).

35. *Warner Bros. v. Wilkinson*, 533 F. Supp. 105, 109 (D. Utah 1981); *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 988 (E.D. Pa. 1981), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 428-29 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

36. Pa. Stat. Ann. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1981-1982).

37. *Id.* § 203-7.

38. U.S. Const. art. I, § 8, cl. 3.

39. See H.R. Rep. No. 1476, 94th Cong., 2d. Sess. 132, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5748 [hereinafter cited as House Report]. Congress intended to leave the states free to propound law in the areas of privacy, publicity, trade secrets, defamation and fraud, each of which affect and restrict the exercise of copyright, so long as the causes of action concerning them contain elements that are different from copyright infringement. *Id.*, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5748.

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.

42. 397 U.S. 137 (1970).

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.⁴³

State regulations thus may not discriminate against interstate commerce.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.⁴⁵ Although the commerce clause "limits the power of the States to erect barriers against interstate trade,"⁴⁶ the acts are valid if they foster an overriding legitimate state interest.⁴⁷ Such validity is addressed after a brief discussion of first amendment considerations.

B. *The First Amendment*

Motion pictures are protected by the first amendment guarantee of freedom of speech⁴⁸ applicable to the states through the fourteenth

43. *Id.* at 142 (citations omitted).

44. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 39-44 (1980); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). "Protectionist legislation," that is, state law that distinguishes for purely economic reasons between in-state and out-of-state products competing at the same level, is deemed always to impose an excessive burden on interstate commerce and is thus *per se* invalid. *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 530-31 (1949); *Baldwin v. C.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *Buck v. Kuykendall*, 267 U.S. 307, 316 (1925).

45. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 437 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982); *see Warner Bros. v. Wilkinson*, 533 F. Supp. 105, 107 (D. Utah 1981).

46. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980); *see, e.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534-38 (1949).

47. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *accord City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 441-42 (1978). The Court has stated that legitimate public interests include the health, safety and welfare of the citizens of a state. *Schneider v. State*, 308 U.S. 147, 160 (1939).

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).

amendment.⁴⁹ The content of speech may not be regulated absent a compelling state interest.⁵⁰ Motion picture licensing acts do not, on their face, regulate the content of speech.⁵¹ 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.⁵²

The first amendment does not guarantee that freedom of speech may be exercised regardless of other rights and interests.⁵³ Time, place and manner of speech may be regulated⁵⁴ if an important and substantial governmental interest is furthered,⁵⁵ and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."⁵⁶ The licensing acts regulate the time, place and manner of film exhibition.⁵⁷

49. See *supra* note 33 and accompanying text.

50. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978). In the past, the Court made narrow, categorical exceptions to first amendment protection for fighting words, defamation and obscenity. See *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words). The Court, however, has eroded these exceptions. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); see L. Tribe, *American Constitutional Law* § 12-17, at 670 (1978).

51. *Warner Bros. v. Wilkinson*, 533 F. Supp. 105, 108 (D. Utah 1981); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 432 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656, 661 (6th Cir. 1982).

52. See *supra* note 16 and accompanying text.

53. *Breard v. Alexandria*, 341 U.S. 622, 642 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951); L. Tribe, *supra* note 50, § 12-2, at 580.

54. *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961) ("[C]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the [First Amendment] forbade . . . the States to pass. . ."); see, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976); *Breard v. Alexandria*, 341 U.S. 622, 641 (1951).

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).

56. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The balancing test of *O'Brien* originated in *Schneider v. State*, 308 U.S. 147 (1939), in which the Court stated:

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.⁵⁸

Although a general state interest—alleviation of inequitable licensing practices—is sought to be furthered by motion picture licensing acts,⁵⁹ each provision is designed to promote a specific state purpose.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.⁶¹ By promoting informed decision-making, the provision encourages licensing terms that reflect the actual quality of the film licensed.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.⁶³ Distributors assert that compliance with the varying provi-

as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

Id. at 161. In *Schad v. Mount Ephraim*, 452 U.S. 61, 74-75 (1981), the Court made clear that the state has the burden of proving the sufficiency of the state interest. *Id.* There must be evidence that a need exists for the state regulation. *Id.*

57. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 432 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

58. *Id.*

59. *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 660-61 (6th Cir. 1982); *see Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 978-79 (E.D. Pa. 1981), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982). Various state statutes enacted to encourage fair trade practices have been upheld as supporting important, substantial and legitimate state interests. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 728-29 (1963); *Breard v. Alexandria*, 341 U.S. 622, 640 (1951); *Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525, 536-37 (1949).

60. Pa. Stat. Ann. tit. 73, § 203-4 (Purdon Supp. 1981-1982). *Compare* Ark. Stat. Ann. § 70-1101 (Supp. 1981); Pa. Stat. Ann. tit. 73, § 203-2(10) (Purdon Supp. 1981-1982) *with* Ark. Stat. Ann. § 70-1104 (Supp. 1981).

61. *See supra* notes 22-23 and accompanying text.

62. *See Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 660 (6th Cir. 1982); *see, e.g., Ala. Code* § 8-18-3 (Supp. 1979); *La. Rev. Stat. Ann.* § 37:2901 (West 1982); *Va. Code* § 59.1-256 (1982).

63. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 438-39 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

sions of the acts will render nationwide distribution unduly difficult.⁶⁴ Nationwide distribution will not be hampered,⁶⁵ however, because all acts have the trade screening requirement.⁶⁶

Freedom of speech is affected because a distributor may not communicate a film to the public without first providing a trade screening.⁶⁷ This restriction may in some circumstances delay release.⁶⁸ Because viewing audiences are seasonal,⁶⁹ the timely release of a film is critical in maximizing audience size. Moreover, successful advertising depends on timely release.⁷⁰

Although the mere threat of delay could constitute grounds for invalidating a statute,⁷¹ the threat of delay created by trade screening is not a serious one. Distributors can avoid delay by making accommodations in the production schedule.⁷² 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

64. *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); National Ass'n of Theater Owners, A Position Paper 16 (Dec. 1981) (reprinting *Motion Pictures Licensing*, published by the Motion Picture Association of America) (available from the National Association of Theater Owners, New York, NY) [hereinafter cited as NATO].

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.

69. *See Blind Bidding At a Glance, supra* note 7, at 11; *Holiday Winners and Losers*, Time, Jan. 14, 1980, at 55 [hereinafter cited as *Holiday Winners*].

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,"⁷³ by giving exhibitors an opportunity to evaluate a film effectively before deciding whether and on what terms to seek a license.⁷⁴

The argument that the trade screening requirement is not the least restrictive means⁷⁵ 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 information⁷⁶ 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.⁷⁷ The quality of a film cannot be fully ascertained without a trade screening.⁷⁸

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.⁷⁹ Most provisions prohibit licensing by negotiation once bids have been solicited.⁸⁰ The

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.

78. Viewing a film is the best way to determine its quality. Some distributors admit that blind bidding is an undesirable trade practice. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 417 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982). *But see Blind Bidding*, *supra* note 2, at 1132.

79. See Ala. Code § 8-18-5 (Supp. 1979); Ark. Stat. Ann. § 70-1104 (Supp. 1981); Ind. Code §§ 24-1-5-4 to -6 (1982); Ky. Rev. Stat. Ann. § 365.760 (Bobbs-Merrill Supp. 1982); La. Rev. Stat. Ann. § 37:2904 (West Supp. 1982); Me. Rev. Stat. Ann. tit. 10, § 1903 (1980); Mass. Ann. Laws ch. 93F § 3 (Michie/Law. Co-op. Supp. 1982); 1982 Mo. Legis. Serv. 1169-70 (Vernon); N.M. Stat. Ann. § 57-5A-5 (Supp. 1982); N.C. Gen. Stat. § 75C-4 (1981); Ohio Rev. Code Ann. § 1333.07 (Page 1979); Pa. Stat. Ann. tit. 73, § 203-8 (Purdon Supp. 1981-1982); S.C. Code Ann. § 39-5-530 (Law. Co-op. Supp. 1981); Utah Code Ann. § 13-13-5 (Supp. 1981); Va. Code § 59.1-259 (1982); Wash. Rev. Code Ann. § 19.58.040 (Supp. 1982); W. Va. Code § 47-11D-4 (1980).

80. See, e.g., Ala. Code § 8-18-5 (Supp. 1979); Ark. Stat. Ann. § 70-1104 (Supp. 1981); Pa. Stat. Ann. tit. 73, § 203-8 (Purdon Supp. 1981-1982); Va. Code § 59.1-259 (1982).

state interest sought to be furthered by these provisions is the promotion of fair and open licensing procedures,⁸¹ by "counteract[ing] deception and unfair manipulation of the bidding process" and "prevent[ing] . . . misleading trade practice."⁸²

Compliance with the varying bidding procedures⁸³ 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.⁸⁴ Moreover, once bids are solicited, distributors may not license by negotiation.⁸⁵ 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.⁸⁶ The information that distributors are required to supply is readily accessible.⁸⁷ Except for post-bidding information, most of the required information had been supplied routinely by distributors prior to legislation.⁸⁸ The post-bidding information requirement, which includes supplying the name of the li-

81. *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 663 (6th Cir. 1982). Sixteen acts specify bidding procedure; all give distributors the option to negotiate. See, e.g., Ala. Code § 8-18-5 (Supp. 1979); Ark. Stat. Ann. § 70-1104 (Supp. 1981); Ind. Code Ann. §§ 24-1-5-4 to -6 (Burns 1982). Bidding, however, is widely used. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161-66 (1948); see Herman, *Blind Bids on Movies Defended by Valenti*, N.Y. Times, Apr. 30, 1980, at C21, col. 2.

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.

84. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 423, 439 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

85. See *supra* note 80.

86. See *supra* note 79. 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.

88. See *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 419-20, 423 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982); P. Baumgarten & D. Farber, *Producing, Financing and Distributing Film* 191 (1973).

censed exhibitor and the winning terms,⁸⁹ and making losing bids available,⁹⁰ 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.⁹¹

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.⁹² Such compliance may delay distribution and increase the cost of licensing films.⁹³ Distributors contend that these combined factors will diminish revenues, thereby ultimately reducing the quality or quantity of films.⁹⁴

Distributors, having financial acumen, however, can be expected to make every effort to avoid delays by allocating bidding time in the initial production schedule.⁹⁵ Any increase in cost will be minimal because, as previously noted, most of the required information was already routinely supplied by distributors.⁹⁶ 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.

89. See, e.g., Ala. Code § 8-18-5 (Supp. 1979); Ark. Stat. Ann. § 70-1104 (Supp. 1981); Ind. Code Ann. § 24-1-5-5 to -6 (Burns 1982); Ky. Rev. Stat. Ann. § 365.760 (Bobbs-Merrill Supp. 1982). Exhibitors should be notified if no one won the contract. See, e.g., Ala. Code § 8-18-5 (Supp. 1979); Ark. Stat. Ann. § 70-1104 (Supp. 1981); Ind. Code Ann. § 24-1-5-5 to -6 (Burns 1982); Ky. Rev. Stat. Ann. § 365.760 (Bobbs-Merrill Supp. 1982). Post-bidding information need only be supplied to bidding exhibitors. See, e.g., Ala. Code § 8-18-5 (Supp. 1979); Ark. Stat. Ann. § 70-1104 (Supp. 1981); Ind. Code Ann. § 24-1-5-5 to -6 (Burns 1982); Ky. Rev. Stat. Ann. § 365.760 (Bobbs-Merrill Supp. 1982).

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,⁹⁷ and often receive advances and guarantees.⁹⁸ An "advance" is a payment by a licensing exhibitor made in anticipation of box office revenues.⁹⁹ If the film does not produce expected revenues, the payment is refunded.¹⁰⁰ A "guarantee" is a non-refundable payment that assures a minimum return to a distributor should anticipated box office receipts not materialize.¹⁰¹

The restrictions on advances and guarantees are designed to promote competition and to protect exhibitors from unfair trade practices.¹⁰² 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.¹⁰³ Because these restrictions impinge on freedom of speech and interstate commerce differently, separate discussion of advances and guarantees is warranted.

97. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 415, 418 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

98. *Id.*

99. *See Associated Film Distribution v. Thornburgh*, 520 F. Supp. 971, 976 n.15 (E.D. Pa. 1981), *rev'd on other grounds and remanded*, 683 F.2d 808 (3d Cir. 1982).

100. Brief for Appellee at 4, *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982).

101. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 418 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

102. Ark. Stat. Ann. § 70-1101 (Supp. 1981); Ga. Code Ann. § 106-1301 (Supp. 1982); Pa. Stat. Ann. tit. 73, § 203-2 (Purdon Supp. 1981-1982).

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.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.¹⁰⁵ Other acts absolutely prohibit the use of advances.¹⁰⁶ Because distributors have used advances to prevent delinquent payments and to collect overdue payments,¹⁰⁷ these acts may reduce the certainty of payment provided by advances.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.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.¹¹⁰ Investment in films should not be deterred, however, because advances are refundable.¹¹¹ The prohibition against advances therefore does not increase the risk to a distributor of a film's failure.¹¹² Furthermore, the possi-

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).

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).

106. Idaho Code § 18-7706 (Supp. 1982); Pa. Stat. Ann. tit. 73, § 203-6 (Purdon Supp. 1981-1982).

107. See Bennett, *Getting Movies Into Theaters: The Distribution Biz Made Simple*, *Soho Weekly News*, Aug. 30, 1979, at 37, col. 1.

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.

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)).

110. See *supra* notes 107-08 and accompanying text.

111. See *supra* note 100.

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

costs. For example, the cost of "The Black Hole," a Walt Disney movie, was \$25 million. *Hollywood Roulette*, *supra* note 20, at 57. "1941" cost nearly \$40 million to make; "Star Trek" cost \$50 million including promotion. *Holiday Winners*, *supra* note 69, at 55. In 1979, the average film production cost was \$17 million. Herman, *supra* note 81, at C21, col. 2.

113. See *Blind Bidding*, *supra* note 2, at 1130.

114. Idaho Code § 18-7704 (Supp. 1982); Ky. Rev. Stat. Ann. § 365.755 (Bobbs-Merrill Supp. 1980); Mont. Code Ann. § 30-14-305 (1981); Ohio Rev. Code Ann. § 1333.06 (Page 1979); Pa. Stat. Ann. tit. 73, § 203-5 (Purdon Supp. 1981-1982); Utah Code Ann. § 13-13-4 (Supp. 1981).

115. See Idaho Code § 18-7704 (Supp. 1982); Ky. Rev. Stat. Ann. § 365.755 (Bobbs-Merrill Supp. 1980); Ohio Rev. Code Ann. § 1333.06 (Page 1979); Utah Code Ann. § 13-13-4 (Supp. 1981). An Ohio district court has interpreted this provision to permit exhibitors to offer guarantees. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 445 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982). Because distributors may continue to reject all bids, it appears unlikely that these acts will deter the use of guarantees in licensing films. See *infra* note 116-17 and accompanying text.

116. *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); see Bennett *supra* note 107, at 37, col. 1.

117. *Why Do Exhibits Volunteer Such Hefty Guarantees?*, *Variety*, Feb. 7, 1979, at 5, col. 2; see Bennett, *supra* note 107, at 37, col. 1.

118. Mont. Code Ann. § 30-14-305 (1981); Pa. Stat. Ann. tit. 73, § 203-1-5 (Purdon Supp. 1981-1982).

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,¹¹⁹ the prohibition of this practice increases the financial risk for those distributors that would otherwise receive a guarantee.¹²⁰ Such increase in financial risk also threatens freedom of speech because it may reduce the number of films produced.¹²¹

To minimize any increased risk, however, distributors probably will demand an increased percentage of the box office receipts.¹²² 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.¹²³ The number of viewers may thus in fact increase.

119. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 418 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

120. *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).

121. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 985-86 (E.D. Pa. 1981), *rev'd on other grounds and remanded*, 683 F.2d 808 (3d Cir. 1982). 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.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."¹²⁵ The state interest sought to be furthered by this provision—the promotion of broad dissemination of information¹²⁶—is legitimate, important and substantial.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.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 theaters¹²⁹ after the statutory period for exclusive first runs has expired.¹³⁰ If there are other suitable theaters in the area, the number of viewers may increase.¹³¹ Broader dissemination of informa-

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." *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.

124. See *supra* note 117.

125. Pa. Stat. Ann. tit. 73, § 203-7 (Purdon Supp. 1981-1982).

126. *Id.* § 203-2(4).

127. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

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

129. See *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, *supra* note 88, at 193.

130. See *supra* note 125 and accompanying text.

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,¹³² thus limiting a film's exhibition in a particular geographic area to the statutory period.¹³³ 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."¹³⁴ The court invalidated the act on first amendment grounds and deemed it unnecessary to discuss the commerce clause.¹³⁵

Interstate commerce is burdened because, in areas where no other suitable theaters exist, licensing is interrupted upon expiration of the statutory period.¹³⁶ Freedom of speech is similarly burdened because films will be exhibited for a shorter period in those areas.¹³⁷ Although the state interest in broad dissemination of information is important,¹³⁸ 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 protection¹³⁹ under the Copyright Act of 1976,¹⁴⁰ 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."¹⁴¹ The "bundle of rights" known as copyright¹⁴² confers upon the owner of a copyrighted

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).

134. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 985 (E.D. Pa. 1981), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982).

135. *Id.* at 991.

136. 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).

137. See *id.* at 985-86.

138. See *supra* note 127.

139. "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . . Works of authorship include . . . motion pictures . . ." 17 U.S.C. § 102(a) (Supp. IV 1980).

140. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810 (Supp. IV 1980)).

141. U.S. Const. art. I, § 8, cl. 8.

142. House Report, *supra* note 39, at 61, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5674; see *Commissioner v. Wodehouse*, 337 U.S. 369, 417 n. 13 (1949)

motion picture the exclusive right, among others, to distribute copies and to perform the work publicly.¹⁴³ A copyright is granted by Congress and cannot be vitiated by the states.¹⁴⁴ Motion picture licensing acts are invalid if they are either explicitly or implicitly preempted¹⁴⁵ 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."¹⁴⁶ 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

(Frankfurter, J., dissenting) (quoting *Rohmer v. Commissioner*, 153 F.2d 61, 63 (2d Cir.), *cert. denied*, 328 U.S. 862 (1946)); *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 966 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982) (No. 81-1687).

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 transfer 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.

144. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

145. Federal preemption of state legislation rests on two established grounds: a finding that Congress has chosen to completely occupy a field or a finding that the state law conflicts with a valid federal statute. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). The intent of Congress is crucial in determining whether a field is so completely occupied. *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 858 (3d Cir. 1975). Even absent complete congressional occupation, federal laws override state laws with which they conflict. *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1274 (5th Cir. 1978), *rev'd on other grounds sub nom.* *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). State law is preempted if 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). If reconcilable, however, state and federal statutes should coexist. See *Maryland v. Louisiana*, 101 S. Ct. 2114, 2128-29 (1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

146. 17 U.S.C. § 301(a) (Supp. IV 1980). If Congress had intended to preempt the entire field of copyright, a wide variety of laws that traditionally have been within the states' purview would be nullified. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974); *Goldstein v. California*, 412 U.S. 546, 559 (1973).

any of the exclusive rights within the general scope of copyright as specified by section 106."¹⁴⁷ Essentially, the Copyright Act preempts only those state laws that provide the same protection that is already afforded by a copyright.¹⁴⁸ Thus, state-created rights not violable by the mere act of reproduction, performance, distribution or display are not equivalent to copyright.¹⁴⁹

Motion picture licensing acts have been criticized as creating rights equivalent to a copyright owner's right to distribute.¹⁵⁰ 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;¹⁵¹ distribution not in accordance with applicable bidding procedure;¹⁵² or distribution either preceded or accompanied by an advance or guarantee.¹⁵³ 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.¹⁵⁴

147. 17 U.S.C. § 301(b) (Supp. IV 1980). Congress intended to leave the states free to propound law in the areas of privacy, publicity, trade secret, defamation and fraud. House Report, *supra* note 39, at 132, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5747-48.

148. House Report, *supra* note 39, at 130, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5746; Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. Rev. 1107, 1108 (1977); Note, *The Fine Art of Preemption: Section 301 and the Copyright Act of 1976*, 60 Or. L. Rev. 287, 287-88 (1981). "As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain." House Report, *supra* note 39, at 131, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5747; *accord* Harper & Row, Publishers v. Nation Enters., 501 F. Supp. 848, 851 (S.D.N.Y. 1980).

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.

150. *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 991, 993-94 (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, 441, 445 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

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 conflict¹⁵⁵ with Congress' purposes in enacting the Copyright Act.¹⁵⁶ The Copyright Act was enacted to further the basic constitutional aim of promoting writing and scholarship.¹⁵⁷ Congress has determined that writing and scholarship are best promoted by a uniform system of copyright.¹⁵⁸

1. Promotion of Writing and Scholarship

The promotion of writing and scholarship is the paramount purpose of the Copyright Act.¹⁵⁹ Because the costs of making films are high,¹⁶⁰ 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. 520 F. Supp. at 993. 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.

157. House Report, *supra* note 39, at 61, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5745.

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.¹⁶¹ Additionally, licensing agreements are usually made after financiers have committed themselves to invest.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,¹⁶³ will have a greater opportunity to do so because the acts augment a competitive atmosphere,¹⁶⁴ thereby encouraging the creation of quality films.

2. Uniformity

Copyright essentially creates a monopoly over the commercial exploitation¹⁶⁵ of a film for a limited period of time.¹⁶⁶ Because states must recognize the rights subsumed in copyright,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.¹⁶⁸ The acts, however, are not so dissimilar as to retard such distribution.¹⁶⁹ For example, the Ohio act,¹⁷⁰ which is one of the more stringent ones,¹⁷¹ was found to have only a slight burden on nationwide advertising and promotion.¹⁷²

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).

162. See *id.*

163. See *supra* note 10.

164. See *supra* note 102 and accompanying text.

165. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154-56 (1975); see *United States v. Loew's, Inc.*, 371 U.S. 38, 46-47 (1962); *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 228 (1939).

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

167. See *supra* note 144 and accompanying text.

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.*

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).

170. Ohio Rev. Code Ann. § 1333.05-.07 (Page 1979).

171. The Pennsylvania act is the only more stringent act. Compare Ohio Rev. Code Ann. § 1333.05-.07 (Page 1979) with Pa. Stat. Ann. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1981-1982).

172. See *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 436-39 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

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

173. The Constitution does not give the federal government exclusive jurisdiction over copyright. See *Goldstein v. California*, 412 U.S. 546, 560 (1973). In upholding Utah's act, a district court recognized that "[s]tates may restrict the forms of enforceable agreements that private parties may enter into through contract law embodied in statutes." *Warner Bros. v. Wilkinson*, 533 F. Supp. 105, 108 (D. Utah 1981); *accord Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33, 38 (S.D. Tex. 1978); see, e.g., *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261, 271 (2d Cir. 1965); *Clark v. West*, 137 A.D. 23, 122 N.Y.S. 380 (1910), *aff'd*, 201 N.Y. 569, 95 N.E. 1125 (1911).

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

175. See *supra* note 23.

176. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 445-46 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982). A trade screening is a performance. See *id.* at 447. It also constitutes publication of the film because it is given with intent toward further distribution. Without a trade screening, publication would occur after licensing. Under the Copyright Act of 1909, copyright vested upon publication and state common law protected the author until then. House Report, *supra* note 39, at 129, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5745; 1 M. Nimmer, *supra* note 149, § 1.01[A], at 1-3. Hence, a trade screening would have triggered copyright protection. Under the 1976 Act, however, copyright vests upon creation of the work. 17 U.S.C. § 302 (Supp. IV 1980). The date of publication thus does not affect the timing of copyright protection.

177. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); see 17 U.S.C. § 106 (Supp. IV 1980). "Copyright is a right exercised by the owner during the term at his pleasure . . ." 286 U.S. at 130; *accord Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730, 734-35 (1st Cir. 1980).

178. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 447 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982).

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 guarantees¹⁸⁷ may affect the reward of a copyright owner.¹⁸⁸ Prohibiting distributors from receiving advances¹⁸⁹ may delay receipt of compensation for a short period of time. The type of compensation distributors will receive, however, remains unaffected. Prohibiting distributors from receiving¹⁹⁰ 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

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).

181. *E.g.*, Ky. Rev. Stat. Ann. § 365.755(4) (Bobbs-Merrill Supp. 1982); Ohio Rev. Code Ann. § 1333.06(D) (Page 1979).

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.

184. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); see *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

185. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

186. See *Watson v. Buck*, 313 U.S. 387, 404 (1941).

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.

fee.¹⁹² This choice has been denounced by distributors as a Hobson's choice.¹⁹³ Because a trade screening is required before licensing,¹⁹⁴ 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.¹⁹⁵ 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 days¹⁹⁶ violates the monopoly feature¹⁹⁷ of copyright. The Copyright Act grants a copyright owner the right to license exclusively for a specified number of years.¹⁹⁸ With the exception of this Pennsylvania provision, this right is limited only by sections 107-118 of the Copyright Act.¹⁹⁹ Compulsory licenses, for example, are included within these limitations.²⁰⁰ The Pennsylvania provision creates a compulsory license because, after forty-two days, distributors are forced to license films to neighboring exhibitors.²⁰¹ This conflicts with the right to distribute because Congress has set forth the only circumstances under which compulsory licenses must be granted.²⁰² The restriction on exclusive licenses thus constitutes invalid state action.²⁰³

192. See *supra* note 114.

193. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 445 (S.D. Ohio 1980), *aff'd in part, remanded on other grounds*, 679 F.2d 656 (6th Cir. 1982). Compare 496 F. Supp. at 445 (Ohio act does not create a Hobson's choice) with *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 994 (E.D. Pa. 1981) (Pennsylvania's act, which absolutely prohibits guarantees, creates a Hobson's choice), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982).

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.

198. 17 U.S.C. §§ 106, 302 (Supp. IV 1980). Copyright in a work created on or after January 1, 1978 generally endures for the life of the author plus 50 years. *Id.* § 302.

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.*

201. Pa. Stat. Ann. tit. 73, § 203-7 (Purdon Supp. 1981-1982).

202. See *supra* note 200.

203. See *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523 (D. Neb. 1944), *aff'd*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947). In

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.

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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.