COMING TO A THEATER NEAR YOU: MOVIE DISTRIBUTORS CHALLENGE EXHIBITOR INSTIGATED ANTI-BLIND BIDDING STATUTES

I. Introduction

Thirty-five years after the devastation of the motion picture business via *United States v. Paramount Pictures, Inc.*,[1] Hollywood is once again in a state of flux, once again fighting an attack on its system of distribution in a judicial forum. Across the nation, several state statutes which regulate the way studios distribute their movies are being challenged by the Hollywood distributors, and the outcome of these court battles over state anti-blind bidding statutes may radically change the way Hollywood does business. Ironically, it was the upheaval of *Paramount* in 1948, which gave rise to the structure of the movie business facilitating the eventual proliferation of the practice of blind bidding,[2] the distribution device which these state statutes outlaw and the center of the current battle between exhibitors and distributors.

II. Blind Bidding—The Background

Exhibitors and distributors were not always adversaries. Nor were they always separate entities enjoying the special symbiotic relationship through which they maintain economic health. At one time exhibitors and distributors were one and the same—consolidated under the umbrella of the studio system.

Much has changed since the "ancient" practice in Hollywood where the big studios had talent, technicians, directors, writers, producers, marketing personnel, and a host of other workers under contract. With this assembly line of personnel, a product could be created efficiently and marketed easily in studio-owned first-run theaters.[3] This process began to undergo a radical change after *Paramount* as the studios were required to divest themselves of theater ownership.[4]

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[1] 334 U.S. 131 (1948). *See infra* note 4.

[2] *See infra* notes 30–51 and accompanying text.

[3] *See generally* M. Conant, Antitrust in the Motion Picture Industry 84-106 (1960).

[4] The Court ordered divestiture to rectify antitrust violations. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), *enforced*, 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 district court found that *vertical monopolization of the motion picture industry was to be remedied by separation of*

With the motion picture business and process no longer housed under the comfortable roof of the studio system, the division of the business into the form in which it exists today began to take shape. Where once there was only one company, performing all of the functions from script to screen, now there are several. Three separate "arms" of the movie business have developed: production, distribution, and exhibition. The production portion consists of two major forms: studio produced films and films produced by independents. The distribution arm of the industry has become highly concentrated and consists of seven major distributors.[5] These "majors" have continued to reduce their own production output—their in-house studio productions—and are now predominantly engaged in financing the work of the independent producers.[6] The exhibition arm of the business—movie theaters—is relatively unconcentrated.[7] Despite the fact that there are fifteen theater chains controlling hundreds of movie theaters, several thousand motion picture theaters remain independently owned and operated.[8]

The divestiture decree was not the only major upheaval in the structure of the movie business in the forties. Television was beginning to keep people home. The new medium became fierce competition for the attention of the movie-going public.[9] At the time of *Paramount*, movie ticket sales were high. In 1946, 44 million people went to the movies each week. With substantially the same sort of entertainment available on television, ticket sales began to exhibit a marked decrease and, by 1973, Hollywood's low point, only 14 million people were

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exhibitors and distributors to counteract the adverse effect on competition. 85 F. Supp. at 896. *See generally* Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 S. CAL. L. REV. 150 (1958); M. CONANT, *supra* note 3.

The decree required divestiture and distributors to screen their films in the exchange areas where the film was to be released.

[5] The seven major distributors are: Buena Vista Distribution Co., the exclusive distributor for the films of Walt Disney Prods.; Columbia Pictures Indus., Inc.; MGM/UA Entertainment Co.; Paramount Pictures Corp.; Twentieth Century Fox Film Corp.; Universal Pictures; and, Warner Bros., Inc. VARIETY, Mar. 12, 1980, at 46.

[6] "More than 65% of domestic films today are the work of independent producers." Harmetz, *Studios Are Picking Up More Films from Independents*, N.Y. Times, June 26, 1978, at C18, col. 1; *see also* Gottschalk, *Film Exhibitors Face a Financial Crisis as Hollywood Studios Slash Production*, Wall St. J., Feb. 8, 1977, at 46, col. 1.

[7] Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 414 (S.D. Ohio 1980), *aff'd in part and vacated in part*, 679 F.2d 656 (6th Cir. 1982). *See* Cassady, *supra* note 4, at 150.

[8] Note, *Blind Bidding and the Motion Picture Industry*, 92 HARV. L. REV. 1128, 1129 (1979).

[9] D. MADSDEN, THE NEW HOLLYWOOD: AMERICAN MOVIES IN THE '70s, 1, 2, 43, 132 (1975).

going to the movies weekly.[10] Production began to decrease substantially. Where once studio output was in excess of 400 films per year, only 123 films were released by the major studios in 1981.[11]

Another factor contributing to the decrease in production is the tremendous rise in the cost of producing and distributing motion pictures. In 1977, the average "negative cost"[12] of a film was $4.9 million. By 1981, the average negative cost had climbed to $11.4 million.[13] The median cost of producing a film in 1981 was up 40 percent alone from the median cost in 1980.[14] Additionally, the costs of marketing films[15] and striking prints[16] has also increased dramatically. Distributors, mindful of these costs, are less likely to proceed on riskier ventures and have limited their total film output substantially.

In spite of the decrease in production, the number of screens available is surprisingly on the rise.[17] Theater owners have determined that with everything riding on the draw of the individual movie they exhibit, and the high risk nature and uncertainty of success which plagues the movie business,[18] a single screen is a liability. There has been a 40 percent increase in the number of screens in recent years.[19] Theaters have been subdivided and the multiscreen complex is becoming a mainstay of the marketplace. The theater owner no longer loses everything during a period in which he has booked a bomb, for he may have one or two moderate successes, or even a hit, at the same time. With three, four, five or more films playing simultaneously, he has a greater chance of booking a hit. If, indeed, one of the films he books turns out to be a blockbuster, he may have the option of expanding a big draw to a multiple run[20] within the same complex.[21]

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[10] Harmetz, *Hollywood's Video Gamble*, N.Y. Times, Mar. 28, 1982, § 6 (Magazine), at 40; *see also* D. MADSDEN, *supra* note 9, at 1, 27, 43.

[11] Sansweet, *Wall Street Goes to the Movies*, AM. FILM, Oct. 1982, at 47; *see also The Cash-Rich Movie Companies*, BUS. WK., May 16, 1977, at 114; Gottschalk, *supra* note 6; *Making the Movies Into a Business*, BUS. WK., June 23, 1973, at 116. Yet the trend may be on the reverse. "The number of new films released by the major studios has risen every year from 1977 (89 films) to 1981 (123)." Sansweet, *supra*, at 46.

[12] The "negative cost" is the total cost involved in producing the final print of a motion picture.

[13] Sansweet, *supra* note 11, at 47.

[14] *Id.*

[15] D. MADSDEN, *supra* note 9, at 95.

[16] Each print costs in excess of one thousand dollars. VARIETY, Mar. 19, 1980, at 38, col.1.

[17] Note, *supra* note 8, at 1130.

[18] *Id.*

[19] *Id.*

[20] For instance, the same movie runs in theater 1 and theater 3.

[21] Additionally, a combination of large and small auditoriums may give the theater owner a certain flexibility in working with the films he books. With two 800 seat theaters, a 400 seat

With the amount of released films on the decline,[22] the number of blockbusters few and far between,[23] and the number of screens—and, therefore, demand for movies to be shown on them—on the rise,[24] the relative bargaining power of distributors has been drastically increased.[25] As one commentator has noted, only when there is a shortage of films can the distribution companies extract meaningfully higher terms from theater owners.[26] Exhibitors, vying for the best films, bid highly for likely hits. Cash guarantees and advances are consistently received by distributors even when they do not demand them.[27] Distributors, quick to take advantage of their favorable bargaining position, make excessive demands and exhibitors generally comply with them.[28] Distributors are, after all, the only ready source of product.[29]

III. Blind Bidding—The Practice

This imbalance of bargaining power also gave rise to a system of competitive bidding.[30] Blind bidding[31] is that form of competitive

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theater, and a 150 seat theater, he may have the opportunity to move a gigantic success into one or even both of the large theaters while justifying holding onto a lesser success which may barely draw 150 customers per showing. Also, this might give the theater owner the benefit of scheduling less popular movies 15 to 20 minutes after a popular draw.

[22] *See supra* note 10.

[23] Of the dozens of movies released during the summer of 1982, only six were considered industry winners; of the dozen released during the fall, only one. This was because of the $1.33 billion pushed through the ticket windows during the 15-week period that started Memorial Day weekend, an astounding 18 percent of the money spent by movie patrons—$235 million—was earned by a single film, *E.T. The Extra-Terrestrial*. Harmetz, *Summer '82 Is Hollywood's Most Lucrative Ever*, N.Y. Times, Sept. 8, 1982, at C22, col. 2.

[23] *See supra* note 12.

[24] Motion pictures are licensed, not sold, to exhibitors. It is a high risk enterprise because of the difficulty in predicting public acceptance. Distributors have tried to share the financial risk with exhibitors by obtaining terms as favorable as possible. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 412–18 (S.D. Ohio 1980), *aff'd in part and vacated in part*, 679 F.2d 656 (6th Cir. 1982).

[25] *See generally* D. Londoner, Hard Times for Software (1982); *see also Cash-Rich Movie Companies*, *supra* note 11, at 116; *Making the Movies Into a Business*, *supra* note 11, at 116.

[26] *See generally*, D. Londoner, *supra* note 25; *Blind Bidding Complaints Aside, Exhibs Part with Big Money*, Variety, Feb. 7, 1979, at 10. A guarantee is a minimum rental fee which the exhibitor will pay to the distributor regardless of the admissions revenue; an advance is a lump sum paid to the distributor by the exhibitor to be used as a credit against future payments. *Rhodes*, 496 F. Supp. at 418.

[27] *Blind Bidding Complaints Aside, Exhibs Part with Big Money*, *supra* note 26, at 10. A new exhibitor anxious to attract a distributor with a likely hit film can use a high guarantee or advance as a means of making his bid more attractive, and thus enter a market which might be closed to the exhibitor if the only difference in bids was the size of the split and the number of weeks. *See infra* notes 37–44 and accompanying text.

[28] *See Rhodes*, 496 F. Supp. at 426.

[29] *Id.*

[30] Bidding is not the only means by which distributors market their films to exhibitors. Distributors frequently enter into negotiations with separate exhibitors in order to determine the terms of the license agreement.

bidding by which theater owners are forced to bid on movies and license[32] them without having the benefit of a trade screening—in other words, with no opportunity to view the finished film.[33]

The procedure for which films are blind bid is relatively straightforward. The distributor sends out a bid request brochure from 6 to 12 months before the release date of the motion picture.[34] The brochure contains the most basic information about the movie: the name and nature of the production, the credits, and a plot summary.[35] It is accompanied by an invitation to bid.[36] From this information, theater owners are asked to bid on the film,[37] to promise a percentage of box office revenues (usually in the neighborhood of 80 to 90 percent to the distributor and 10 to 20 percent to the theater for the earlier part of the run, with the distributor's slice decreasing and the exhibitor's slice increasing as the booking continues),[38] to guarantee an advance to be used against box office receipts,[39] to guarantee a minimum dollar

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[31] Distributors prefer the term, "advance licensing." *Rhodes*, 496 F. Supp. at 416 n.5.

[32] *See supra* note 24. The licensing fee the exhibitor pays to the distributor—to secure the right to show the individual film—is known as a rental. It is calculated as a percentage of box office receipts. From the total box office receipts, the exhibitor subtracts some predetermined sum, known as a "house allowance," "house figure," or "house expense." The balance constitutes the net receipts. These are divided between exhibitor and distributor on a negotiated percentage basis. *Rhodes*, 496 F. Supp. at 418.

[33] *Rhodes*, 496 F. Supp. at 416; *Blind Bidding at a Glance*, VARIETY, Jan. 13, 1982, at 11; *Heavens Gate Leaves Theater Owners Fuming*, BUS. WK., Dec. 8, 1980, at 29.

[34] Note, *supra* note 8, at 1132.

[35] Brill, *Litigating Bad B.O.*, ESQUIRE, Sept. 26, 1978, at 17.

[36] *Id.*

[37] *Id.* Thus, the exhibitor must base his competing bid not on the quality of the particular film, but on information furnished by the distributor. The exhibitor cannot complain too vociferously to a company whose bid announcement it sees as inadequate or whose film turns out to be substantially less than promised since he must maintain a working relationship with the major sources of films for his theater. *Rhodes*, 496 F. Supp. at 416.

[38] For example:

First week—90%
Second week—70%
Third week—60%
Fourth week—50%
Balance of run—35%

These terms are probably an accurate reflection of the much greater risk incurred by distributors who frequently finance the films. *Soon to Be a Major Motion Picture*, FORBES, Mar. 19, 1979, at 45. On the average, however, normally half of the money realized at the box office is returned to the distributor. "The theater owner keeps the other half. However, when a movie does extremely well during its early weeks—a time when the studio gets a bigger share of each box-office dollar—the distributor earns a larger percentage." Harmetz, *1982—A Bonanza Year at Movie Box Offices*, N.Y. Times, Jan. 25, 1983, at C20, col. 1.

[39] In the usual licensing agreement, the exhibitor must agree to present the distributor with either an advance or a guarantee. An advance requires the exhibitor to make a payment prior to the exhibition of a picture as the security for the performance of the licensing agreement. The film rental payments are applied against the advance. A guarantee is a minimum film rental

amount,[40] and, finally, to promise that the movie will run for a certain amount of time.[41] Distributors reserve the right to reject all bids if none are considered adequate,[42] in which case, the bidding process may begin again or the distributor may enter into negotiation with individual theaters to arrive at agreeable terms.[43] Finally, a licensing agreement is entered into between each selected exhibitor and the distributor.[44]

IV. Blind Bidding—The Controversy

Though the practice of blind bidding existed at the time of the *Paramount* decision,[45] and was considered to be a practice which was subject to some potential abuse,[46] the current practice was not a subject of the divestiture decree. The shift in market power brought about a growth in the practice. In 1968, a consent decree was arrived at between the Antitrust Division of the Justice Department and the major distributors which limited the number of films which the studios could blind bid per year to three.[47] The stipulation, covering a two year period beginning January 1, 1969, was subsequently extended for two additional two year periods.[48] When the stipulation expired in early 1975, the use of the practice of blind bidding to distribute films once again increased and, by 1977,[49] distributors were blind bidding from 60 percent (United Artists) to 91 percent (Colum-

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assured by the exhibitor to the distributor. Guarantees may be based on attendance or on box office receipts. *See supra* note 26.

[40] *Id.*

[41] *See* Brill, *supra* note 35, at 17.

[42] *Rhodes*, 496 F. Supp. at 415.

[43] *Id.*

[44] *See supra* note 24.

[45] United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 350 (S.D.N.Y. 1946).

[46] Blind bidding was not expressly dealt with by the *Paramount* Court. The district court decree provided that the exhibitors could reject 20 percent of blind bid films when bidding for two or more films. There was no restriction of blind bidding for single motion pictures. The court stated that blind bidding was not as serious a problem as some of the other practices adopted by distributors. "Blind-selling does not appear to be as inherently restrictive of competition as block booking, although it is capable of some abuse." 334 U.S. at 157 n.11.

[47] *Rhodes*, 496 F. Supp. at 416.

[48] United States v. Paramount Pictures Corp., Civil Action 87-273 (S.D.N.Y., Aug. 14, 1968). The decree was with Columbia Pictures Corp.; M.G.M., Inc.; National General Corp.; Paramount Pictures Corp.; Twentieth Century Fox Film Corp.; United Artists Corp.; Universal Pictures; and Warner Bros. Seven Arts Distribution Corp. *See Rhodes*, 496 F. Supp. at 417 n.6.

[49] 1977 was the year in which the bill which became the Ohio anti-blind bidding law was introduced into the Ohio legislature. *Rhodes*, 496 F. Supp. at 417.

bia) of first run films.[50] Clearly, blind bidding had become the predominant method of distributing films.[51]

Distributors consider blind bidding the most efficient and least risky method of marketing films. It guarantees the placement of their films in choice theaters immediately upon completion.[52] It allows films to undergo an immediate "wide release"—a simultaneous release of the same motion picture in theaters across the country. National television commercials can be booked and used to maximize return.[53] Blind bidding enables distributors to plan their advertising campaigns with licensing agreements already in place.[54]

Exhibitors claim that blind bidding compels them to commit to playing the movie in advance without their being able to view the film in order to assess its potential profitability.[55] They argue that the practice is like buying a "pig in a poke"[56] and offer specific examples of its adverse effects on their economic well-being.

Films marketed through blind bidding have brought disastrous results at the box office.[57] Theater owners blamed the practice of blind bidding for financial failures from movies they had booked for long periods sight unseen.[58] They sought to curtail the practice of blind bidding and, in 1977 and 1978, the National Association of Theater Owners[59] used these failures as ammunition against the practice as they lobbied for the introduction and enactment of bills outlawing the practice of blind bidding through five state legislatures.[60] In 1979, similar bills were introduced in almost every state.[61] Both sides lobbied intensely,[62] the theater owners using with some success the argument that blind bidding was an oppressive and unfair trade practice

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[50] *Id.*

[51] *Id.* at 417-18. The top nine grossing films of 1977, including *Star Wars*, were blind bid. *See Heaven's Gate Leaves Theater Owners Fuming*, *supra* note 33, at 29.

[52] *Rhodes*, 496 F. Supp. at 416.

[53] *Id.* at 417.

[54] *Id.*

[55] *Id.* at 418.

[56] *Id.*

[57] In one theater owner's words, "*Sgt. Pepper's Lonely Hearts Club Band* was hyped and hyped and hyped and all we knew was that it was the Bee Gees and Peter Frampton. So we bid a very high guarantee and promised to play it ten weeks. Then when we saw it, the movie was absolutely miserable. Or there's *The Cheap Detective*. . . . All we knew was that it was done by Neil Simon and that Simon had just had a hit with *The Goodbye Girl*. But it's terrible. Hell, we're showing it to about fifteen people every night." Brill, *supra* note 35, at 17.

[58] *Id.*

[59] This organization represents many exhibitors. *Id.*

[60] Alabama, Louisiana, Ohio, South Carolina, and Virginia. *See infra* note 65.

[61] Brill, *supra* note 35, at 17.

[62] *Id.*

which allowed little opportunity for them to adequately control the product shown on their screens,[63] forcing them to become saddled with objectionable and inferior films which they were unable to view until it was already too late.[64]

As of the beginning of 1983, 22 states had adopted some form of anti-blind bidding legislation.[65] These acts are designed to alleviate

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[63] In New York, theater owners took their case directly to the movie-going public by way of an $8,000 trailer, financed by theater owners and shown before feature movies all over the state. The theater owners created the following on screen story:

> A married couple enter an automobile showroom and tell the mustachioed car salesmen [sic] they want to buy a car. He says, 'Sure,' and shows them three cars, each covered by a drop sheet. The wife tries to peek under the cloth and the salesman slaps her hand and tells her, 'You can't see it now. Buy it now and you can see it in eight weeks when you come to pick it up.'
>
> Incredulous, the husband balks at the terms, and the pair want to explore alternatives. There are, of course, no alternatives, so they make the deal.
>
> Eight weeks later, the couple returns to pick up the car, and the beaming salesman whisks off the drape. It's a jalopy.
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> The salesman then peels off his moustache and he and the startled couple explain that these are the conditions under which theater owners in this state conduct business.

Jacobson, *Bid Foes Struggle Against Power Brokers in Albany Via Petitions and Trailers*, VARIETY, Sept. 26, 1979, at 4, 41.

[64] *Rhodes*, 496 F. Supp. at 429.

[65] ALA. CODE §§ 8-18-1 to -6 (Supp. 1983);
ARK. STAT. ANN. §§ 70-1101 to -1106 (Supp. 1983);
GA. CODE ANN. §§ 10-1-290 to -294 (Supp. 1983);
IDAHO CODE §§ 18-7701 to -7708 (Supp. 1983);
IND. CODE ANN. §§ 24-1-5-1 to -1-5-7 (Burns 1982);
KY. REV. STAT. ANN. §§ 365.750–.765 (Bobbs-Merrill Supp. 1982);
LA. REV. STAT. ANN. §§ 37:2091–:2905 (West Supp. 1984);
ME. REV. STAT. ANN. tit. 10, §§ 1901–1904 (1980 & Supp. 1983–84);
MASS. GEN. LAWS ANN. ch. 93F, §§ 1-4 (West 1984);
MO. ANN. STAT. § 407.350, .353, .355, .357 (Vernon Supp. 1984);
MONT. CODE ANN. §§ 30-14-301 to -308 (1983);
N.M. STAT. ANN. §§ 57-5A-1 to -5 (Supp. 1983);
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. 1983–84);
S.C. CODE ANN. §§ 39-5-510 to -520, -530, -540, -550, -560 (Law. Co-op Supp. 1983);
TENN. CODE ANN. §§ 47-25-701 to -704 (Supp. 1983);
UTAH CODE ANN. §§ 13-13-1 to -7 (Supp. 1983);
VA. CODE §§ 59.1-255 to -260 (1982);
WASH. REV. CODE ANN. §§ 19.58.010–.020, .030, .040, .050, .900, .905 (Supp. 1983–84);
W. VA. CODE §§ 47-11D-1 to -4 (1980).

However, once passed, the statutes are not immune from lobbying as evidenced by the 1983 Arkansas House of Representatives vote to repeal that state's anti-blind bidding law. "By a lopsided 73-6 voted [sic], the Arkansas House of Representatives . . . became the country's first legislative body voting to repeal an anti-blind bidding statute previously passed." *Arkansas Repeals Anti-Blind Bid Law*, VARIETY, Mar. 16, 1983, at 5.

these perceived unfair practices in the motion picture industry. The acts have as their stated purposes the promotion of informed decision making, the creation of a forum in which bidding procedures are fair and open, the promotion of competition, and the prevention of deceptive trade practices.[66]

Although these acts vary,[67] all require a distributor to have a trade screening of a film—to show it to potential exhibitors before either entertaining bids or entering into the negotiation procedure to license the film.[68] Some of the acts merely contain provisions which prohibit blind bidding.[69] Others also contain provisions which prohibit certain aspects of the traditional process such as advances,[70] guarantees,[71] or the determination of the minimum or maximum length of the run. The Pennsylvania statute is the most comprehensive and by far the strictest. It prohibits not only the solicitation of, but also the offering of, advances and guarantees and it limits the length of an exclusive run to 42 days.[72]

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[66] *See, e.g.*, ARK. STAT. ANN. § 70-1101 (Supp. 1983); PA. STAT. ANN. tit. 73, § 203-2 (Purdon Supp. 1983-84).

[67]

	Prohibits *Blind Bids*	Regulates *Bid Process*	Restricts *Guarantees*	Restricts *Advances*
Alabama	X	X		
Arkansas	X	X		
Georgia	X			
Idaho	X		X	X
Indiana	X	X		
Kentucky	X	X		X
Louisiana	X	X		
Maine	X	X		
Massachusetts	X	X		
Missouri	X[w]	X		
Montana	X	X	X	
New Mexico	X	X		
North Carolina	X	X		
Ohio	X	X	X	X
Oregon	X			
Pennsylvania	X	X	X	X
South Carolina	X[w]	X		
Tennessee	X			
Utah	X	X	X	
Virginia	X	X		
Washington	X	X		
West Virginia	X[w]	X		

[w] Waiver possible by agreement.

[68] *See supra* note 67.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] PA. STAT. ANN. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1983-84).

These anti-blind bidding acts have been widely accused of being unwise governmental meddling in a private sector matter—the distribution of films by the large film distributors.[73] Distributors initiated challenges in federal district court[74] against the Ohio,[75] Pennsylvania,[76] and Utah[77] licensing statutes which questioned the constitutional validity of the statutes. Plaintiffs, the distributors, claimed that the statutes were violative of several constitutional provisions including the commerce clause,[78] the first amendment,[79] and the supremacy clause.[80] The courts examining the statutes analyzed their constitutionality along different grounds and arrived at conflicting conclusions. For example, the Pennsylvania statute was ruled summarily unconstitutional[81] and the Utah statute was found to be summarily valid.[82] Two of the challenges were appealed to the circuit court level, *Allied Artists Picture Corp. v. Rhodes*[83] and *Associated Film Distribution Corp. v. Thornburgh*.[84] *Rhodes* affirmed the district court's holding that the Ohio statute was valid.[85] *Thornburgh* reversed the district court's holding of summary judgment and remanded for factual findings.[86]

V. Blind Bidding—The Analysis

The anti-blind bidding statutes should be immune from constitutional challenge. Though the courts have not been uniformly in agree-

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[73] *See* Note, *supra* note 8, at 1129.

[74] Plaintiffs are the motion picture distributors; defendants are the governors and attorneys general of the states adopting the acts.

[75] Allied Artists Picture Corp. v. Rhodes, 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd in part and vacated in part*, 679 F.2d 656 (6th Cir. 1982).

[76] Associated Film Distrib. Corp. v. Thornburgh, 520 F. Supp. 971 (E.D. Pa. 1981), *rev'd*, 683 F.2d 808 (3d Cir. 1982).

[77] Warner Bros., Inc. v. Wilkinson, 533 F. Supp. 105 (D. Utah 1981).

[78] *Rhodes*, 697 F.2d at 665 (remanded for determination of any commerce clause violation); *Thornburgh*, 683 F.2d 808 (commerce clause issue not addressed); *Wilkinson*, 533 F. Supp. at 107 (no commerce clause violation).

[79] *Rhodes*, 697 F.2d 656 (affirmed district court's determination that the Ohio statute did not violate the first amendment); *Thornburgh*, 683 F.2d 808 (reversed lower court's holding that the act summarily violated the first amendment); *Wilkinson*, 533 F. Supp. at 108 (the Utah statute did not violate the first amendment).

[80] *Rhodes*, 679 F.2d at 662–63 (affirmed lower court finding of no supremacy clause violation); *Thornburgh*, 683 F.2d 814 (reversing summary judgment that act was preempted); *Wilkinson*, 533 F. Supp. at 107–08 (act not preempted).

[81] *Thornburgh*, 683 F.2d 808. *See supra* notes 78–80.

[82] *Wilkinson*, 533 F. Supp. 105. *See supra* note 78–80.

[83] 679 F.2d 656 (6th Cir. 1982).

[84] 683 F.2d 808 (3d Cir. 1982).

[85] 679 F.2d at 665.

[86] 683 F.2d at 816–17.

ment on this point,[87] even the Pennsylvania statute is constitutionally valid. The body of relevant decisions on the grounds under which the Ohio, Pennsylvania, and Utah statutes have been challenged provides a framework for assuring the validity of similar statutes confronted with similar challenges.

A. *The First Amendment*

The first amendment challenge to these statutes takes two forms. The first is that anti-blind bidding statutes are a form of prior restraint. The second is that they cause a chilling effect on expression. Distributors claim that each statute:

> will operate as an unlawful prior restraint on plaintiff's exercise of the constitutional right to freedom of expression in that it will prohibit plaintiffs from exhibiting motion pictures within the state . . . and licensing the same for an initial exhibition at the time, place, and under the circumstances that will be optimum to the expression contained therein and will delay each exhibition for periods of three to six months . . . .[88]

They also contend that:

> The effect of delays . . . coupled with the prohibition against minimum guarantees. . .will operate to restrain, retard, and discourage the creation and production of all motion pictures . . . because of the chilling effect these requirements will have upon the success of financial support . . . and the increased costs necessarily imposed.[89]

1. Prior Restraint

Motion pictures are protected in full by the first amendment guarantee of freedom of speech.[90] This applies to the states through the fourteenth amendment.[91] Any law which creates a prior restraint on freedom of speech will be upheld only if the procedural safeguards built into the law will avoid the dangers of a censorship system.[92] This

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[87] *See supra* text accompanying footnotes 78–86.

[88] Plaintiff's Complaint at para. XXIX, Allied Artistis Pictures Corp. v. Rhodes, 496 F. Supp. 408 (S.D. Ohio 1980).

[89] *Id.* at para. XXX.

[90] Interstate Circuit, Inc. v. City of Dallas, *390 U.S. 676, 682 (1968).*

[91] 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."). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

[92] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

doctrine exists because any law that creates a prior restraint will have the effect of regulating content.[93]

The district court in *Thornburgh*[94] ruled that the Pennsylvania statute[95] operated as a prior restraint. The court found that: "The Act comprehensively and directly regulates the licensing process—the means by which all motion pictures, and the ideas they contain, are made available to the theatre-going public and, on its face creates risks of limiting expression."[96]

The finding of the district court in *Thornburgh* is incorrect. The Pennsylvania statute regulates distribution not content. It is not a prior restraint. It applies to all films regardless of content. Like all the blind bidding statutes it is constitutional. Commercial regulation of distribution not based on content has been sanctioned by the Supreme Court.[97] The Court developed a test for regulations not differentiating on content in *United States v. O'Brien*.[98] Under this test:

> A government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on the alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.[99]

Similarly in *Young v. American Mini Theaters*,[100] the Court said that legislation of commercial practices of material protected by the first amendment need only be "reasonable regulations of time, place, and manner of protected speech, where those regulations are necessary to further significant government interests."[101] As will be discussed, blind bidding statutes are both reasonable and necessary, further substantial government interests, and impinge only slightly on first amendment values.

State regulation of thoughts and ideas has long been distinguished from state regulation of commercial practices. Where the

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[93] Freedman v. Maryland, 380 U.S. 51 (1965).

[94] *See supra* note 76.

[95] *See supra* note 65.

[96] *Thornburgh*, 520 F. Supp. at 982.

[97] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) ("It does not follow that the Consitution requires absolute freedom to exhibit every motion picture of any kind at all times and all places.")

[98] 391 U.S. 367 (1968).

[99] *Id.* at 377.

[100] 427 U.S. 50 (1976).

[101] *Id.* at 63.

state regulates only the commercial activities of a first amendment protected product and not the ideas or thoughts, the regulation is constitutional.[102] For instance, in *Associated Press v. United States*,[103] the Court said:

> The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. . . . [The Act] *in no wise circumscribes the full freedom and liberty of* the petitioner to publish the news as it desires it to be published or to enforce policies of its own choosing with respect to the editing and rewriting of the news for publication.[104]

In *Paramount*, the Court similarly stated, "[t]he question here is not what the public will see or if the public will be permitted to see certain features. It is clear that under the existing system the public will [not] be denied access to [movies]."[105]

Distributors, anxious to overcome this "time, place and manner" doctrine, make much of the delays that will result from the required trade screening claiming that such screening is a prior restraint. Blind bidding allows nation-wide release upon immediate completion of the film.[106] The film can benefit from national advertising, media coverage, and related merchandising, thus providing the best opportunity to achieve success at the box office. Manufacturers, paying for product tie-in licenses, count on this advertising blitz before the movie is released. National advertising, timed appearances on the front pages of prominent magazines, appearances by cast members on national talk shows in conjunction with a film, network tie-ins on the making of a film, and like practices, are rendered ineffective without a well-timed blitz to coincide with a wide release.[107] Without this "hype," the likelihood of a film's success would be reduced, unless, of course, the distributor duplicated this hype on the local level at a much

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[102] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

[103] 301 U.S. 103 (1937).

[104] *Id.* at 132-33.

[105] 334 U.S. at 166-67.

[106] Movie industry records show that the median availability of films made by independent producers during the year 1977 was only eleven days before release and that *Star Wars* was completed one week before its release. Brill, *supra* note 35, at 18.

[107] "Advertising strategy begins long before production of a motion picture is completed. This is particularly so with regard to network television buys, which often must be made from one to nine months in advance of the date the commercial will run." *Rhodes*, 496 F. Supp. at 147. In the words of one commentator:

> Timing is important because national advertising campaigns and numerous products tie-ins enable maximum exploitation of a film's profit potential during the initial weeks of exhibition. These marketing practices require significant advance time and

greater expense.[108] Trade screening, the film distributors say, will delay release and require that films open on a state by state basis.

Freedman v. Maryland[109] is applicable to the delay issue. There, the Court was concerned with a state statute which required the submission of every motion picture to a censorship board for licensing prior to exhibition in theaters. Under the statute, a film could not be shown without a license. The purpose of the statute was to weed out obscene films. The Court held the statute unconstitutional under the first amendment, finding that it assured a risk of delay or arbitrary censorship by the statute. The Court said that a state could require advance submission of motion pictures as long as the board of censors' determination would not have the effect of keeping the films out of circulation indefinitely.[110] The later case of *Star v. Preller*[111] concerned an almost identical statute which the court held constitutional, the difference being that, though the statute required the submission of every film by the distributor to a censorship board for examination and licensing, the board had a specific amount of time to make its decision. There was a provision for review of the board's decisions, assuring that films would not be withdrawn from public exhibition arbitrarily.[112] Weighing the differences between *Freedman* and *Star* it is clear that the courts require actual and permanent delays on expres-

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> are most effective when synchronized with a film's release date. Moreover seasonal timing is important. Most films are now released during the Christmas, Easter, and summer seasons, when audience attendance is highest. Furthermore, since some films can be best exploited during only one of these seasons, failure to secure appropriate exhibition houses for the desired season may result in the costly shelving of a film for a long period.

Note, *supra* note 8, 1132.

[108] In addition, distributors argue that there are several other reasons why time is of the essence. Films of a topical nature must be shown to audiences while their subjects are still hot. Some filmmakers also feel imperiled by the fact that their product is severely apt to be imitated. Time is of the essence in putting a film in the theater before television mysteriously comes up with a similar product, decreasing the paying audience's demand for the movie. By lengthening the period from idea to theater and showing the film to unnecessary audiences before a paying audience attends, the opportunity for rip-offs is increased. "Keeping everyone in the dark about works in production has become a hallmark of George Lucas [*Star Wars*] and other movie makers like Steven Spielberg [*E.T. The Extra-Terrestrial*] and John Badham [*War Games*]. . . . 'George, Steven and other successful filmmakers have seen themselves ripped off by other people. . . . They don't want to see their characters show up on television three months before the movie opens.' " Greenberger, *Howard Kazanjian, the Producer of "The Return of the Jedi," Discusses the Latest "Star Wars" Saga and the Startling Secrets Involved in This Latest Voyage to a Galaxy Far, Far Away*, STARLOG, Apr. 1983, at 35, col. 2. *See also* Van Hise, *Poltergeist, The Making of "Things That Go Bump in the Night,"* CINEFANTASTIQUE, Nov.-Dec. 1982, at 87, col. 1.

[109] 380 U.S. 51 (1965).

[110] *Id.* at 52.

[111] 375 F. Supp. 1093 (D. Md. 1974).

[112] *Id.* at 1094.

sion and not the possibility of delay, or the brief delays that will be caused by the anti-blind bidding statutes.

2. Chilling Effect

Under the "chilling effect" claim that the anti-blind bidding statutes will operate to dry up financial resources, the first amendment challenge must also fail. First amendment protection is not to be confused with the increase or guarantee of a profit. The distributors' complaint is that the risk shifting of the statute places a heavier burden on distributors, causing them to fail to receive less than the full worth of their product.[113] The possibility of profit being placed further from reach is said to chill the financing process, assuring that riskier ventures will be tabled at the drawing board stage.[114] The film industry is a risky one. Blind bidding is said to pass along some of the risks distributors have been forced to bear[115] and the distributor incurs these risks in an equally blind position when he agrees to finance and/or distribute a motion picture.[116] Without this risk shifting, distribu-

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[113] 496 F. Supp. at 417.

[114] "[T]he distributors have millions of dollars invested and they've got to time things so that they don't tie that money up any longer than they have to. If the production pipeline was stretched an extra six months by an advance screening procedure for a movie like *Close Encounters of the Third Kind* that required $20 million in financing . . . it would cost the distributor an extra $800,000, assuming the distributor had obtained financing at eight percent interest." Brill, *supra* note 35, at 18.

[115] "[T]he distributors blind bid too, and we risk much more. When we give a producer like Steven Spielberg twenty million dollars to produce something called *Close Encounters*, we don't see it first. All that blind bidding does is pass along some—just some—of the risk." *Id.*

[116] It is interesting to note theater owners claiming that they will better be able to assess the hit potential of films they get to view at a trade screening may be perpetuating a myth.

Judge Duncan, in the *Rhodes* district court, stated that "by permitting Ohio exhibitors to view the film before bidding, it permits the exhibitors to use their own business judgment in determining whether, and on what terms, to bid for a motion picture license. It effectively removes the unfairness inherent in the blind bidding process exhibitors described as 'buying a pig in a poke.'" *Rhodes*, 496 F. Supp. at 431.

The forecast of industry experts, who were asked to predict the public's response to the 1982 summer crop of movie releases before any of the films began their bookings, were rather conspicuously off the mark. Though *Rocky III* was consistently picked by these experts in assessing the taste of the movie-going public and, indeed, was a major success at the box office, the other films picked by these experts with regularity were *Annie*, the summer's biggest disappointment, and *Poltergeist*, which wound up as the sixth biggest money maker of the summer. Most experts failed to predict the biggest success of the summer—indeed of all time—*E.T. The Extra-Terrestrial*, nor did they even mention the other big box office success, *An Officer and a Gentlemen*. Harmetz, *supra* note 23, at C22.

Theater owners who bid on these films would have been likely to have made their decisions on stars and subject matter, which, in the case of *Rocky III* and *Annie*, both perceived as "mass appeal" films, which would have been as apparent from a blind bidding brochure as from a finished print. That the public was going to react so favorably to one, and then reject the other so emphatically, would have been beyond the predictive ability of almost every theater owner, if not every one.

tors claim that, with the change in the structure of the market, certain first amendment protected films will never be made.

The Seventh Circuit, in *Savage v. Commodity Futures Trading Commission*,[117] was faced with a situation in which plaintiff, a publisher of a newsletter, applied for and was denied registration for his publication in compliance with a newly enacted statute. The court held that the publisher's first amendment rights were not affected. The court stated:

> We find no merit in Savage's constitutional challenge to this regulatory Act. Commercial speech is entitled to a measure of First Amendment Protection . . . but it has long been recognized that the Amendment does not remove a business engaged in the communication of information from general laws regulating business practices.[118]

Although the statute might have some effect on movie financing and though production might hypothetically be discouraged, this is simply not a valid first amendment "chilling effect" argument. The Supreme Court, in *Citizen Publishing Co. v. United States*,[119] upheld the prohibition of a joint operating agreement between two newspapers despite the threat to the commerical health of one of the newspapers. The Court did not find anything wrong with the adverse effects which the nullification of the agreement would be certain to have on the newspaper's sources of financing.[120] The financing problems distributors claim they will suffer due to anti-blind bidding statutes can be viewed similarly in that even if they have some effect on the financing of feature films, it is not enough to invalidate the Acts.

Judge Jenkins, in *Warner Brothers, Inc. v. Wilkinson*,[121] summed up the chilling effect issue rather succinctly when he stated:

> No one has prohibited free expression through the display of a film by anyone. "Superman II" may be shown wherever an audience

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"[W]hen exhibitors get to prescreen films they don't eliminate the risks anyway [argues the Motion Picture Association of America], since they don't always make the best choices in terms of quality and profits. A favored example is *Black Sunday*, the Robert Evans-produced bomb that was prescreened and then bid for wildly by the exhibitors." Brill, *supra* note 35, at 18. "As Adolf Zukor, the founder of Paramount Pictures, once said: 'If we knew in advance when we made a picture how it was going to be taken by the public, we'd have to hire a hall to hold the money.' " Harmetz, *supra* note 23, at C11.

[117] 548 F.2d 192 (7th Cir. 1977).

[118] *Id.* at 197.

[119] 394 U.S. 234 (1964).

[120] *Id.*

[121] 533 F. Supp. 105 (D. Utah 1981).

> can be attracted, whether in a theater or a public square . . . . That free expression is guaranteed in the marketplace of ideas as a fundamental constitutional principle . . . , however, is not in any way tantamount to a guarantee that such expression will be compensated on terms most desired by its author.[122]

Thus, the chilling effect argument must fail since the cases clearly hold that the first amendment does not guarantee the right to make money.

B. *The Commerce Clause*

Congress, under the Constitution, has the authority "[t]o regulate Commerce . . . among the several states."[123] Although films are distributed on a national basis, no congressional regulation of the process of film distribution exists.[124] State statutes regulating in an area untouched by Congress are subject to attack—and have been attacked by distributors—on three grounds. First, that the statute discriminates against interstate commerce, either in intention or effect; second, that the statute unduly burdens interstate commerce; and third, that the statute is an impermissible and unconstitutional state regulation of an industry that is national in scope.[125]

1. Discrimination Against Interstate Commerce

In *Exxon Corp. v. Governor of Maryland*,[126] several large oil companies challenged a Maryland statute that required that a producer or refiner of petroleum products not operate any retail service station within the state and must extend all voluntary allowances uniformly to all service stations it supplied.[127] Plaintiff failed on their challenge since the statute did not discriminate against interstate commerce under the traditional test; in other words, there was no discrimination against out-of-state competitors in favor of in-state competitors. Applying the *Exxon* test to the anti-blind bidding statutes, no discrimination against interstate commerce can be found. The statutes require all film distributors, both in- and out-of-state, to trade screen their motion pictures. On their face the statutes do not favor the

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[122] *Id.* at 108 (footnote omitted).

[123] U.S. Const. art. I, § 8, cl. 3.

[124] When the stipulations expired in 1975, the Justice Department was moving toward deregulation of the motion picture industry. Federal regulation of blind bidding practices through consent decrees was not pursued. Note, *supra* note 8, at 1136 n.36.

[125] Plaintiff's Complaint at para. II, *Rhodes*.

[126] 437 U.S. 117 (1978).

[127] *Id.* at 119–20.

interest of in-state competitors over those from out-of-state. As the Court said in *Exxon*:

> Plainly, the Maryland Statute does not discriminate against interstate goods, nor does it favor local producers and refiners. Since Maryland's entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless.[128]

A challenge by distributors that any of the anti-blind bidding statutes are unconstitutional because they affect the protection of in-state theaters from the out-of-state distributors must fail since the *Exxon* doctrine allows for only direct competition.[129] Since local retailers were not treated differently from out-of-state retailers, and since Maryland had no in-state distributors, there could be no direct discrimination against out-of-state competitors.[130] For an anti-blind bidding statute to be subject to attack it would have to favor in-state exhibitors against out-of-state exhibitors or in-state distributors against out-of-state distributors. The statutes do not favor exhibitors over their direct out-of-state competitors. They favor exhibitors in their relationship with all distributors, and not against out-of-state exhibitors. Therefore, the distributors' argument that the statutes discriminate against interstate commerce has no merit.

2. Burdens on Interstate Commerce

To determine whether a statute unreasonably and, therefore, unconstitutionally burdens interstate commerce, a balancing test is used. This test, first set forth by the Supreme Court in *Pike v. Bruce Church, Inc.*,[131] provides:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate 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.[132]

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[128] *Id.* at 125.
[129] *Id.* at 125–26.
[130] *Id.*
[131] 397 U.S. 137 (1970).
[132] *Id.* at 142.

This two-step test requires a court to first determine if a legitimate local interest is served by the statute and then to weigh the concern in light of the burden, if any, that will be imposed on interstate commerce.[133] Finally, it is necessary to determine whether a less impinging statute that achieves the same aim could be fashioned.

Anti-blind bidding statutes serve several legitimate local interests: the fostering of competition, the promotion of informed decision making, and the prevention of deceptive trade practices. The statutes will foster competition by allowing the smaller, less established distributors to compete with the majors. The smaller, less-powerful distributors will have an improved chance of access to theaters since the large, well-known distributors will not be able to book motion pictures into theaters years before they are ready. The small, individually-owned theaters will be able to compete with the large, chain-owned theaters in that, in states where the statutes prohibit advances and guarantees, the smaller, less-affluent exhibitors will not have to front large sums of money to equal the bids of their wealthier counterparts. The statutes will serve to promote the freedom of choice and informed decision making by theater owners since, by requiring a trade screening, the statutes create a forum which allows theater owners to chose films based upon their own judgments as to what is *most appropriate to the patrons in their particular locality.*

Even the strictest of the anti-blind bidding statutes places only a minor burden on interstate commerce, one which is certainly outweighed by the interests served. The parameters set out by the Supreme Court in cases in which the balancing test has been applied assure that these statutes will be upheld as not imposing an undue burden. For instance, in *Pike*, the court was faced with an order issued under an Arizona state statute which required that all of the cantaloupes produced in Arizona be shipped to other states in special packaging.[134] The plaintiff, an out-of-state cantaloupe producer argued that, in order to satisfy the statute, he would have to build a new packaging plant in Arizona at great expense. The Court balanced the burden against the local concern and found that the effect of the burden was far from incidental and, therefore, the statute was unduly burdensome.[135]

The movie distributors have claimed, using the reasoning of *Pike*, that the trade screenings will increase their costs of doing business and delay the release of their motion pictures and that the prohibition

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[133] Raymond Motor Transp. Inc., v. Rice, 434 U.S. 429, 440 (1978).
[134] 397 U.S. at 146.
[135] *Id.*

against guarantees and advances will prevent their product from achieving the same monetary return that it would absent the statute. Neither the burden of conducting the trade screening, nor the abolition of advances and guarantees are enough to outweigh the local benefits under the *Pike* test. It has been found as fact by the Ohio district court that none of the plaintiff's alleged burdens impedes the flow of interstate commerce.[136] Even though the Sixth Circuit in *Rhodes* remanded for further factual finding, as to the extent of the burdens on interstate commerce, it is still unlikely that the *Pike* test will be met. Even if the avenues of distribution available to distributors are substantially altered, or if it is proven that films are achieving significantly decreased box office returns, plaintiffs will still fail to satisfy the *Pike* balancing test in light of the significant local concerns. The oil distributors in *Exxon* had made a similar argument, claiming that their methods of distribution might have to be radically altered and that some distributors might be driven from doing business in the state.[137] The Supreme Court was unmoved by this argument and granted the defendant's motion for summary judgment.[138] It is hard to imagine a greater burden on distributors than one which forces a change in the method of distribution or drives them entirely from the state. Additionally, the distributors' situation is not analogous to that of the cantaloupe producer in *Pike*. They are not required to alter their films or to create new, expensive or specially tailored systems of marketing. The trade screening is a fair, nondiscriminatory device to correct the imbalance in marketing power. It merely requires distributors to make some adjustments to their production and distribution schedules. If a distributor is driven from a state it will be by the distributor's choice, not due to any great financial burdens. In addition, it is hard to imagine a state fashioning a statute which embodies a more evenhanded approach to fostering the obvious goals of this legislation. The trade screening is not burdensome. It is a simple way to allow informed decision making. The state would be hard-pressed to fashion a statute which would have a more effective means of effectuating the local goals.

3. Regulation of National Industry

In *Exxon*,[139] the plaintiff oil distributors claimed that since the oil industry was national in scope it was not subject to state regulation.[140]

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[136] *Rhodes*, 496 F. Supp. at 439.
[137] 437 U.S. at 118.
[138] *Id.*
[139] 437 U.S. 117.
[140] *Id.* at 126.

The motion picture distributors assert the same argument. The Court in *Exxon* provided that, at times, states may be preempted from regulating within a field, but only "when a lack of national uniformity would impede the flow of interstate goods."[141] The test becomes an inquiry into the impediment of the free flow of commerce and whether, due to this impediment, the area sought to be regulated is best left to consistent treatment on a national scale.

It is true that the motion picture business is of national scope. Like the oil business, it penetrates both urban and rural areas alike. But this will be of no help to the movie distributors for the argument was flatly rejected in *Exxon*. Similar to the situation in *Exxon*, the licensing statutes do not tend to impede the free flow of commerce. Examining the statutes side by side, their basic similarity is undeniable.[142] Consistency already exists. Furthermore, this really is a matter best left to regulation by localities which are best able to decide upon the location in which trade screenings should be held.[143]

Most importantly, no impediment similar to any that the Court has ever recognized exists with respect to these statutes. The Court has had several opportunities to articulate the "free flow" principle. For instance, in *Southern Pacific Co. v. Arizona*,[144] the state had regulated the length of trains that could pass within the borders of the state.[145] The Court determined that by passing the statute, the state had created a serious impediment to the free flow of commerce. The Court elaborated, explaining that train lengths required uniform regulation, otherwise trains would have to be dismantled and reassembled at every state border.[146] Similarly, in *Bibb v. Navajo Freight Lines*,[147] Illinois passed a statute which required a type of mudguard that was illegal to use in the state of Arkansas.[148] The Court struck down this regulation saying that the alterations required at the border would cause a two to four hour delay.[149] The anti-blind bidding statutes do not have this effect. Films need not be altered. Distributors need not significantly alter their means of distribution. The requirements of the licensing statutes clearly fall outside the concept of

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[141] *Id.* at 129.

[142] *See supra* notes 65–66.

[143] For instance, in Virginia, trade screenings are permitted in nearby states. VA. CODE §§ 59.1-255 to -261 (1982).

[144] 325 U.S. 761 (1945).

[145] *Id.* at 763.

[146] *Id.*

[147] 359 U.S. 520 (1959).

[148] *Id.* at 526.

[149] *Id.*

impediments to the "free flow" of commerce. Therefore, this is not the type of area in which national regulation is dictated.

C. *Federal Preemption*

Motion pictures are a tangible embodiment of expression and, as such, are entitled to copyright protection under the Copyright Act of 1976.[150] Under section 106 of the Act, the copyright holder is given several exclusive rights, including the right to publicly display the copyrighted work, publicly perform the work, and distribute copies of the work.[151] Copyright is almost exclusively governed by federal law[152] and generally does not coexist with a corresponding body of state law. As such, anti-blind bidding statutes could not exist within the federal framework if they are preempted by the Copyright Act.

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."[153] It

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[150] 17 U.S.C. §§ 101-810 (1982).

[151] *Id.* § 106. Section 106 states:

> [T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted works;
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> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
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> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and . . . individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id.

[152] M. NIMMER, 1 NIMMER ON COPYRIGHT § 1.01[A], at 1-4 (1983).

[153] 17 U.S.C. § 301(a) (1982) provides in full:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
>
> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—
>
> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or
>
> (2) any cause of action arising from undertakings commenced before January 1, 1978; or
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

leaves to the body of state law 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 any of the exclusive rights within the general scope of copyright as specified by section 106."[154] The Copyright Act thus preempts only those state laws that duplicate the protection given by federal copyright.

Anti-blind bidding statutes have been claimed to be preempted under section 301 as they create a right equivalent to the copyright owner's right to distribute.[155] However, the statutes do not create a right equivalent to the distribution right. The statutes require that distribution be accompanied by a mandatory trade screening prior to the entering into of a licensing agreement or that the distribution follow a standard bidding procedure. The statutes do not affect the copyright holder's right to distribute; they serve merely to regulate the manner in which that right is exercised. This is not assailable on preemption grounds.[156]

VI. Conclusion

As of the writing of this Note, the Pennyslvania district court is hearing evidence on the state's anti-blind bidding statute in the remanded *Associated Film Distribution v. Thornburgh*.[157] It is likely that the court, in applying the Third Circuit's analysis, will determine, as did this Note, that the statute is constitutional. Furthermore, it is probable that other similar statutes should be able to withstand challenges of constitutionality.

As a postscript, it is worthwhile to mention that in the motion picture business, avenues and methods of distribution are always changing. The 1948 challenge in *Paramount* to studio ownership of theaters and the current challenge to distribution methods and the statutes which seek to regulate these methods, may both be forerun-

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(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

[154] *Id.*

[155] *Thornburgh*, 520 F. Supp. at 991; *Rhodes*, 496 F. Supp. at 441.

[156] *See also* Fox Film v. Doyal, 286 U.S. 123 (1932) (state may not impose tax on gross receipts of federally copyrighted film). *See generally* 1 M. Nimmer, *supra* note 152, § 1.01, at 1-2 (1983).

[157] 683 F.2d 808.

ners of, and predictive of, a future change in the way Hollywood distributes its films.[158] Just as the *Paramount* decree set the stage for the rise of blind bidding, anti-blind bidding statutes may contribute to an increased trend by the movie companies to play their product on a pay-per-view basis by charging individual households the cost of a couple of admission tickets for the right to see the film at home on premier night.[159]

If 5 million households pay $10 each to see the film, $50 million can be realized in a single night without one penny spent for distribution. The cost would be in negotiating with pay television networks, for example HBO and Showtime, instead of thousands of theaters.[160] In addition, savings from not having to promote and market, as well as duplicate hundreds of prints and place them in theaters, could be substantial.[161] In the future system of distribution, anti-blind bidding

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[158] "The distribution of movies on cable television is already a multi-million dollar business, and many movies that barely break even at the box office get their profit from sales to network and pay television. By 1985, according to some estimates, revenue from pay television could exceed box-office gross, which reached $3.4 billion [in 1983]." Salmans, *Hollywood Takes on HBO*, N.Y. Times, Feb. 3, 1983, at D1.

[159] In the words of Judge Goettel:

> In the last quarter of this century, a new creature known as "pay television" appeared, through which direct revenue could be obtained from the showing of theatrical motion pictures, uncut and unedited, on special television channels. The popularity of this medium has grown so rapidly that it is not impossible that, by the end of this century, it will be the prime method for viewing motion pictures.

United States v. Columbia Pictures Indus., 507 F. Supp. 412, 415 (S.D.N.Y. 1981). "[T]heaters represent about 70 percent of an average film's total revenue. And that ratio is likely to slip with the arrival of pay television services in nearly 60 million households by 1990, up from 16 million now.

"Pay television has already begun to change the way movies are produced, allowing more films to be made and with higher budgets." Hayes, *MGM, Its Image Bruised, Is Straining to Find Hits*, N.Y. Times, Jan. 30, 1983, § 3 (Business), at 1, 25.

[160] "In pay-per-view, a movie will earn $40 million or $80 million or $120 million in a single night," according to several hopeful movie executives. Harmetz, *supra* note 10, at 45. Some of their optimism seems well founded. "In January 1978, Columbia's movie 'The Deep' starring Nick Nolte and Jacqueline Bisset, was shown over pay-per-view ON-TV in Los Angeles. Of ON-TV's 20,000 subscribers, well more than half paid $3 to see the movie, which had already played for several months in theaters." *Id.* In 1983, *Star Wars* was aired pay-per-view and drew 21 percent of potential viewers. Caranicas, *Hollywood Wakes Up and Smells the Coffee*, CHANNELS, July-Aug. 1983, at 43.

[161] Says marketing expert, Charles Powell, "[T]here will be no $7 million marketing costs. It will no longer be necessary to send Clint Eastwood on a whirlwind 12-city tour in a private plane with limousines waiting on the airfield and the Presidential suite in the best hotel. Paramount

statutes and movie theaters themselves may be as much of an anachronism as the studio system.[162]

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made 1,200 prints of 'Raiders of the Lost Ark.' That's $1,680,000 no one will have to spend." Harmetz, *supra* note 160, at 43.

[162] "What no executive in Hollywood is willing to say out loud—but what everyone is discussing behind closed doors—is that theaters are going to be obsolete. Think of the advantages for us [distributors]. There will be no exhibitor cheating and we'll get our money at the end of the month without any hassles." *Id.*

However, the results from the first experiments are less than conclusive. Universal chose to open *The Pirates of Penzance* in theaters simultaneously with a pay-per-view broadcast. They charged $10 per set and captured less than 10 percent of the potential audience of about 1.2 million subscribers. "Jerry Hartman, vice president and director of marketing for Universal, said he was not unhappy with the results of the television showing. 'If a movie does $3 million at the box office over a three day weekend, we feel that's successful,' he said. 'This film did $1 million in a onetime showing with a limited audience. We don't think that's unsuccessful. We're very satisfied.' " Prial, *100,000 Pay to Watch 'Pirates' on TV*, N.Y. Times, Feb. 23, 1983, at C20, col. 1.

Three months later, on May 22, 1983, HBO aired *The Terry Fox Story*, the first major film ever produced for initial release on pay television. HBO has continued to finance a series of made for pay TV movies under the banner, HBO Premier Presentations, and has attracted major stars and production personnel.

> But the most significant of HBO's moves to gain exclusivity is the agreement it made last November [1982] with CBS and Columbia Pictures to set up a new motion picture studio called Nova; the new entity is capitalized at a hefty $400 million. The deal does more than expand HBO's preexisting exclusivity agreement with Columbia; it makes HBO a partner in what many believe has a good chance of becoming the "eighth major."

Caranicas, *supra* note 160, at 45.

But, with HBO as producer, distributor and exhibitor, it is possible that Hollywood has gone back to the situation *Paramount* rectified. The Justice Department has examined a similar set-up known as Premier, which was to be a joint venture of four studios with exclusive pay TV rights, and found it to be an antitrust violation. *See* United States v. Columbia Pictures Indus., 507 F. Supp. 412, 425–34.