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Trade Screening Laws: A Survey and Analysis

By THOMAS A. BARTASI*

I Introduction

Since the late seventies, a battle has been taking place between motion picture distributors and exhibitors. The battleground, however, is not some Hollywood soundstage; rather, it is the floor of state legislatures. At stake is a trade practice known as "blind" or "advance" bidding, under which exhibitors negotiate and bid for the right to exhibit a motion picture without having had an opportunity to view the picture.¹ Exhibitors seek to end the use of blind bidding, contending that it prevents them from making informed licensing decisions as to the quality and nature of motion pictures before becoming contractually committed to their exhibition.² Distributors, on the other hand, seek to preserve the practice, arguing that blind bidding is not unfair and that it is essential to the successful marketing and distribution of some motion pictures.³

To date, exhibitors have been able to convince the legislatures of twenty-three states to enact laws requiring distributors in some instances to screen their motion pictures to exhibitors before the licensing process can begin.⁴ The restric-

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1. Exhibitors refer to this licensing method as "blind" bidding, whereas distributors prefer the term "advance" bidding. Although no motion picture is actually licensed "blind" since a distributor provides exhibitors with information about a picture prior to licensing, for purposes of this note, this licensing method will be referred to by its more frequently used term "blind bidding." See *infra* notes 42-52 and accompanying text.

2. See *infra* notes 46-50 and accompanying text. The lobbying efforts of exhibitors have largely been directed by the National Association of Theater Owners (NATO) through its state affiliates. See *infra* note 14.

3. See *infra* notes 45 and 51 and accompanying text. The lobbying efforts of the major motion picture distribution companies have been directed by their trade association, the Motion Picture Association of America (MPAA). See *infra* note 11 and accompanying text.

4. See *infra* note 60.

tions and prohibitions contained in these "trade screening laws"⁵ differ in scope and detail from state to state. In addition to restricting the use of blind bidding, many laws limit the use of certain licensing terms and require distributors to follow specific bidding guidelines and procedures once bids have been solicited from exhibitors. This legislative battle between exhibitors and distributors is far from being over. While twenty-seven states still do not regulate the use of blind bidding, repeal legislation has surfaced in several states⁶ and the constitutionality of three laws is presently before the courts.⁷

Whether there is a legitimate need for states to regulate the motion picture licensing process is an issue that has been subject to much debate among exhibitors, distributors, legislators, and commentators.⁸ This note does not attempt to resolve this controversy. Rather, its purpose is to provide legislators contemplating the enactment or revision of trade screening legislation with a detailed survey of state trade screening laws and discussion of various drafting alternatives. Following a brief background discussion of the operational structure of the motion picture industry and licensing process, the note then focuses on trade screening legislation. It analyzes the differences among the various trade screening laws by grouping the twenty-three laws into three separate categories. The response of distributors to the enactment of these laws and their alleged effect on the licensing process are also noted. Finally, the note suggests possible alternatives to the common provisions contained in these laws.

5. These laws have also been referred to as "anti-blind bidding laws," "motion picture licensing acts," and "motion picture fair competition acts."

6. See *infra* note 138.

7. See *infra* note 109.

8. One commentator has concluded that state regulation of blind bidding is unwise and unwarranted, Note, *Blind Bidding and the Motion Picture Industry*, 92 HARV. L. REV. 1128, 1147 (1979). Another commentator has concluded that such laws are warranted and necessary to promote the fair and efficient operation of the motion picture industry, Statfeld, *Blind Bidding: or What Should be Playing at the Bijou?* 11 PERF. ARTS REV. 27, 56 (1981). For a thorough discussion regarding the business aspects of blind bidding and the arguments raised both for and against its use, see Statfeld, *supra*, at 33-42. See also *infra* note 142.

II

The Motion Picture Industry: Structure and Licensing

A. The Distributor-Exhibitor Relationship

The motion picture industry is a worldwide, billion dollar business, attracting over a billion movie-goers annually.⁹ The operational structure of the industry can be divided into three basic components: production, distribution, and exhibition. In general, production encompasses the actual manufacturing of a motion picture from script to final print; distribution refers to the marketing, licensing, and dissemination of the picture to exhibitors; and exhibition consists of the public display of the picture in theatres and drive-ins.¹⁰ The production and distribution components have become integrated over the years and are presently dominated by a few major companies.¹¹ These companies are the primary source of first-run motion pictures for exhibitors.¹² The exhibition component is not significantly integrated with either the production or distribution arms of

9. Domestic theatre attendance for 1982 was estimated to be 1.165 billion, with projected box office receipts totaling \$3.449 billion. Murphy, *Dollar Record for '82 U.S. B.O.*, Daily Variety, Jan. 12, 1983, at 1, col. 4. For a profile of the movie-going public and an economic review of the motion picture industry covering 1981, see *Industry Economic Review and Audience Profile*, in THE MOVIE BUSINESS BOOK 353 (J. Squire ed. 1983).

10. Unless otherwise noted, "theatre" as used throughout this survey includes both walk-in and drive-in theatres, and "exhibitor" includes both walk-in and drive-in owners.

11. Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 414 (S.D. Ohio 1980) (constitutional challenge of the Ohio trade screening law by distributors), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982). The major production-distribution companies are Universal Pictures Division of Universal City Studios, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, MGM/UA Entertainment Company, Warner Brothers, Inc., Columbia Pictures Industries, Inc., and Walt Disney Productions/Buena Vista Distribution Company. These major companies either finance, produce and distribute their own motion pictures or provide financing, distribution, or both for independent producers. See generally Freedman, *Indies, Majors Learn to Work Together to Meet Challenges of Changing Industry*, The Hollywood Reporter, Aug. 9, 1983, at S-13, col. 1. Motion pictures distributed by the major companies accounted for a 93% share of U.S.-Canadian film rentals in 1982. Murphy, *U the Big 1982 Rentals Winner*, Daily Variety, Jan. 13, 1983, at 1, col. 4. For a discussion of a major production-distribution company's role in the motion picture industry, see Myers, *The Studio as Distributor*, in THE MOVIE BUSINESS BOOK 275 (J. Squire ed. 1983). The Motion Picture Association of America (MPAA) is the representative and lobbying organization of these major companies.

12. *Allied Artists Pictures Corp.*, 496 F. Supp. at 414. Other sources of motion pictures include numerous domestic and foreign production and distribution companies. For a breakdown and discussion of motion picture production between the major and

the industry,¹³ and is less concentrated on a national level, varying from nationwide and regional chains to individually owned and operated theatres.¹⁴ Structurally, however, the exhibition component operates in geographical markets wherein theatre ownership can be highly concentrated.¹⁵

independent production companies, see Cohn, *Cutback in Majors' Prod'n Giving Indies Chance to Fill in Missing Spaces*, Daily Variety, May 5, 1983, at 1, col. 1.

13. Although each component operated separately and independently during the early years of the industry, integration gradually occurred until the major production-distribution companies owned major interests in the nation's first-run theatres. For a discussion of the development of the motion picture industry in its early years (1900-1940), see *Arbitration in the Motion Picture Industry: Introduction to the Industry*, 5 ARB. J. 10 (1941) [hereinafter cited as *Introduction to the Industry*]. However, as a result of antitrust litigation during the 1940's, the major companies were required to divest themselves of their theatre ownership and were enjoined from using several anticompetitive marketing practices. *United States v. Paramount Pictures, Inc.*, 70 F. Supp. 53 (S.D.N.Y. 1947), *aff'd in part, rev'd in part*, 334 U.S. 131 (1948), *on remand*, 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd sub nom.*, *United States v. Loew's Inc.*, 339 U.S. 974 (1950). See *United States v. Paramount Pictures, Inc.*, 1980-82 TRADE CAS. (CCH) ¶ 63,553 (S.D.N.Y. Sept. 2, 1980) (an accounting of judicial activity under the *Paramount* decision); see generally M. CONANT, *ANTITRUST IN THE MOTION PICTURE INDUSTRY* (1960); Conant, *The Paramount Decrees Reconsidered*, 44 LAW & CONTEMP. PROBS. no. 4 at 79 (1981); Note, *An Experiment in Preventive Anti-trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees*, 74 YALE L.J. 1041 (1965); Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 S. CAL. L. REV. 150 (1958). Although the defendant-distributors are barred from theatre ownership under the *Paramount* decision, several exhibitors have periodically engaged in motion picture financing and distribution (but before any corporation succeeding to the theatre circuits of the defendant-distributors can engage in the production or distribution of motion pictures, the *Paramount* decrees require that it obtain special permission from the presiding district court). See Conant, *supra*, at 94-95. The Department of Justice is presently reviewing the *Paramount* decrees to determine whether separation of the distribution and exhibition components is still necessary. Robbins, *Justice Action May Open Door to Studios Owning Theatres*, Daily Variety, July 8, 1983, at 1, col. 1. For a summary discussion of antitrust considerations in the motion picture industry, see H. SWERDLOW & J. JAFFE, *Current Antitrust Aspects of the Distribution/Exhibition Relationship*, in *THE SELLING OF MOTION PICTURES IN THE 80'S: NEW PRODUCER/DISTRIBUTOR/EXHIBITOR RELATIONSHIPS* 240 (Dec. 5-6, 1980) (available in the UCLA Law School Library).

14. *Allied Artists Pictures Corp.*, 496 F. Supp. at 414. There were 18,020 screens in the United States in 1982. Ritzer, *'82 Bonanza Year for Studios with 280 Releases; Best Year Since '74*, The Hollywood Reporter, Feb. 11, 1983, at 1, col. 2. See generally Durwood & Resnick, *The Theatre Chain: American Multi-Cinema*, in *THE MOVIE BUSINESS BOOK* 327 (J. Squire ed. 1983). The interests of the majority of exhibitors in the United States are represented by either the National Association of Theater Owners (NATO) and its state affiliates or the National Independent Theater Exhibitors (NITE).

15. See, e.g., *United States v. Capitol Service, Inc.*, No. 80-C-407 at 9-11 (E.D. Wis. June 16, 1983) (composition of the Milwaukee exhibition market). Each exhibition market can be further divided into sub-markets, e.g., first-run theatres, second-run or subsequent run theatres, and limited market theatres, such as repertory, foreign and adult theatres.

The exhibition of motion pictures centers around the distributor-exhibitor relationship. The relationship among distributors and among exhibitors is a competitive one, whereas the relationship between the two groups has been characterized as a mutually-dependent one.¹⁶ On the one hand, distributors compete against each other to have their pictures shown in each market's best theatres at the best times,¹⁷ while exhibitors of each market compete among themselves to obtain exhibition licenses for the best pictures offered by distributors. On the other hand, a mutually-dependent relationship exists between the two in which distributors depend on exhibitors to present their product to the movie-going public in a commercially appealing manner, while exhibitors rely on the ability of distributors to provide motion pictures that will continue to attract audiences into their theatres.¹⁸

Although the distributor-exhibitor relationship may be characterized as being one of mutual dependence, the balance of bargaining power has been perceived to weigh in favor of the major distributors due to their high market concentration and ability to control the flow of first-run motion pictures.¹⁹ Recent

16. *Allied Artists Pictures Corp.*, 496 F. Supp. at 414.

17. Distributors compete for a limited number of prime first-run theatres within each exhibition market. Such factors as location, size, and grossing records make certain theatres within a particular market more desirable to distributors than others. In addition, certain time periods (Christmas, Easter and the summer months) are more appealing to distributors because these are periods when theatre attendance traditionally peaks. See generally Biskind, *The Editing Room*, AM. FILM, May 1983, at 5.

18. The mutually-dependent relationship between distributors and exhibitors has been described as follows:

The [producer-distributors] create a product that depends on the exhibitors for its outlet: theater owners—the exhibitors of motion pictures—control the only available access that [producer-distributors] have to theater audiences. Conversely, producer-distributors control the quantity and quality of the product available to exhibitors, who consequently depend heavily on the [producer-distributors] for production of films to show in their theaters. As with many symbiotic relationships, the parties to it find their interests at once coincide and conflict. Without the cooperation of the exhibitors, producer-distributors would be without the major market for their goods. Without the cooperation of the producer-distributors, exhibitors would be haunted by the spectre of the "dark screen." Thus, they depend upon one another for the benefit of all in turning a profit.

Allied Artists Pictures Corp., 496 F. Supp. at 414-415.

19. Note, *Motion Picture Licensing Acts: An Analysis of the Constitutionality of their Provisions*, 51 FORDHAM L. REV. 293, 293 n.5 (1982); Statfeld, *supra* note 8, at 34; *Allied Artists Pictures Corp.*, 496 F. Supp. at 431 n. 11; *Allied Artists Pictures Corp.*, 679 F.2d at 660. For a discussion regarding the market power held by distributors in the entertainment industry and the source of that power, see 1 T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW §§ 6.01-04 (1983).

technological and market developments may further increase the bargaining position of distributors. Although the largest single source of motion picture-derived revenue for distributors has traditionally been film rentals from the exhibition component, dependence on theatrical exhibition is lessening as a result of the growth of ancillary markets in the field of home entertainment such as home video, pay cable and over-the-air subscription television.²⁰ Distributors are even beginning to bypass theatrical exhibition, both partially and completely, by producing made-for-pay-TV motion pictures.²¹ Moreover, while dependence by distributors on exhibitors lessens, dependence by exhibitors on distributors as their sole source of commercially promising motion pictures has remained constant with no prospect of change. Should this trend continue, the character of the distributor-exhibitor relationship may shift from one of mutual to that of unilateral dependence.²²

B. Motion Picture Licensing²³

Although exhibitors purchased motion pictures from produ-

20. See generally Landro, *Paramount Pursues New Markets As Changes Confront Movie Firms*, Wall St. J., May 25, 1983, at 31, col. 4; Graham, *Over \$20 billion per year seen for home entertainment by '90*, The Hollywood Reporter, Sept. 7, 1982, at 1, col. 2; Mahon, *Fade-Out, Fade-In: New Technologies, Markets Have Begun to Overshadow the Screen*, BARRON'S, Apr. 13, 1981, at 4, col. 1; M. MAYER, *THE FILM INDUSTRIES* 88-97, 213-14 (rev. ed. 1978). For a discussion regarding the response by the exhibition component to the growth of home entertainment, see Stabiner, *The Shape of Theaters to Come*, AM. FILM, Sept. 1982, at 51. See also Morin, *Movie Houses Survive Surge In Home Video*, Wall St. J., Nov. 22, 1983, at 29, col. 3.

21. Universal recently coordinated the release of the motion picture *Pirates of Penzance* to addressable cable and subscription television concurrent with the picture's release to theatres. See generally Schrage & Brown, *The Perils of Pay-Per-View*, AM. FILM, Apr. 1983, at 17; Pollock, *Studios See Bonanza in Living Room Premieres*, Los Angeles Times, July 21, 1982, pt. VI, at 1, col. 5; *Disney Channel Plans Made-for-Pay Movies*, Multichannel News, Apr. 4, 1983, at 10, col. 1; Bierbaum, *Disney Channel Moves Into Made-for-Pay Film Business*, Daily Variety, June 15, 1983, at 1, col. 1. Several major studios have also indicated a willingness to participate in pay television joint ventures but have experienced difficulty in receiving approval from the Department of Justice.

22. For additional discussion on the structure and operation of the motion picture industry, see Conant, *supra* note 13; M. MAYER, *supra* note 20; *THE MOVIE BUSINESS BOOK* (J. Squire ed. 1983); Note, *supra* note 8, at 1129-31.

23. Since trade screening laws only regulate the licensing of motion pictures between distributors and exhibitors, the scope of this note is limited to that licensing relationship. However, the commercial life of a motion picture typically includes more than exhibition licenses. A distributor will often license or sell a picture to pay television and network television, as well as for release in videodisc and videocassette

cers and distributors on a footage basis during the early years of the motion picture industry, exhibitors today license or "rent" pictures from distributors for exhibition in their theatres.²⁴ The parties enter into exhibition licensing agreements that set forth the terms and conditions under which exhibition of motion pictures will take place.²⁵ These licenses are typically recorded on basic exhibition form contracts provided by distributors.²⁶ The financial arrangement offered by exhibitors, along with the location and size of theatres, is the primary criterion used by distributors in determining which exhibitors should be awarded exhibition licenses. This arrangement, among other things, sets forth the basis by which box office receipts are to be apportioned between the parties, otherwise known as the "film rental."²⁷ Other terms generally bargained for and included in exhibition licenses are the playing dates and times, the run and clearance,²⁸ and the allocation of advertising expenses.

In addition to the film rental, the payment of "front money" in the form of guarantees and advances is sometimes included in the licensing arrangement.²⁹ A guarantee payment is a non-

form. The licensing of other ancillary rights, such as book-publishing and merchandising rights, may also be undertaken. See generally Kent, *Exploiting Book-Publishing Rights*, in THE MOVIE BUSINESS BOOK 86 (J. Squire ed. 1983); Blum, *Merchandising*, in THE MOVIE BUSINESS BOOK at 378.

24. *Introduction to the Industry*, *supra* note 13, at 11.

25. For a thorough discussion regarding the terms and mechanics of the exhibition license, see M. MAYER, *supra* note 20, at 60-65; Mayer, *The Exhibition License*, in THE MOVIE BUSINESS BOOK 338 (J. Squire ed. 1983).

26. May, *Sample Exhibition Contract*, in THE MOVIE BUSINESS BOOK 323 (J. Squire ed. 1983).

27. The film rental is commonly computed by a percentage arrangement (exhibitor agrees to pay distributor a specified percentage of gross or net box office receipts) or on a flat fee basis (exhibitor agrees to pay distributor a specified sum for the use of the picture). Other arrangements are also possible. See Statfeld, *supra* note 8, at 30. The arrangement used and the size of the percentage or rental agreed upon depends on such factors as the location, size, and grossing record of the theatre, the length of a picture's run, and whether a picture is in its first or second run.

28. A motion picture's run refers to the number of weeks an exhibitor agrees to exhibit the picture. Runs can be either first, second/subsequent, or multiple. Clearance is the time period between a prior and subsequent run of a picture, during which time the distributor agrees not to license the picture to other exhibitors in the locality. For a discussion regarding the use and effect of runs and clearances, see M. CONANT, *supra* note 13, at 58-61.

29. Of the twenty-three state trade screening laws, seven restrict to some extent the use of guarantee and advance payments in exhibition licenses. See *infra* notes 82-98 and accompanying text. For a discussion regarding the general use of advance and guarantee payments in the entertainment industry, see 1 T. SELZ & M. SIMENSKY, *supra* note 19, at § 4.07.

refundable, minimum cash figure that an exhibitor agrees to pay a motion picture's distributor regardless of the box office performance of the picture.³⁰ This payment is generally required prior to the exhibition of the licensed motion picture and is credited by the distributor against the film rental owed by the exhibitor. However, due to the non-refundable character of the guarantee payment, the exhibitor will not be able to realize a return from the motion picture's exhibition until net box office receipts exceed the guaranteed amount.

The primary purpose of the guarantee payment is to transfer a portion of the high financial risks associated with the production and distribution of motion pictures to exhibitors, thereby assuring distributors some return on their product.³¹ In addition, since the guarantee payment is among the more competitive licensing terms considered by distributors when evaluating licensing offers, it allows new and small exhibitors, who are usually competing without the established track records or market strength of larger exhibitors, to break into existing exhibition markets by offering distributors attractive guarantee figures.³² Moreover, the guarantee payment provides licensing exhibitors with an incentive to undertake effective promotional campaigns. Although competition among exhibitors for popular motion pictures necessitates the offering of guarantee payments, the use of these payments is disfavored by exhibitors because it requires them to share the risk of unsuccessful pictures when box office receipts fail to exceed the amount of the guarantee. This dissatisfaction is compounded when the blind bidding method³³ is used by distributors to license their motion pictures because a situation is then created in which exhibitors may have guaranteed large sums of money for pictures they have never seen.³⁴

By contrast, an advance payment is a refundable deposit that distributors sometimes negotiate for or request an exhibi-

30. *Allied Artists Pictures Corp.*, 496 F. Supp. at 418; see generally Statfeld, *supra* note 8, at 31-33 (discussion regarding the use and role of guarantee payments).

31. *Allied Artists Pictures Corp.*, 496 F. Supp. at 418. For a discussion regarding the huge investment and high risk factors associated with production and distribution in the entertainment industry, see 1 T. SELZ & M. SIMENSKY, *supra* note 19, at §§ 2.10-10. See generally Conant, *supra* note 13, at 82-83; Valley, *The Opening and Closing of Heaven's Gate*, ROLLING STONE, Feb. 5, 1981, at 33, col. 1 (examples of the risks and uncertainties associated with the motion picture industry).

32. *Allied Artists Pictures Corp.*, 496 F. Supp. at 418.

33. See *infra* notes 42-44 and accompanying text.

34. But see *infra* text following note 177.

tor to make before a print of the licensed motion picture is shipped to his theatre. This payment is subsequently applied against the film rental owed by the exhibitor or, if the film rental figure fails to exceed the advance payment, is refunded to the exhibitor. The advance payment serves primarily as a security device to assure distributors that exhibitors will satisfy the terms and conditions under their exhibition licenses in a timely manner. Poor performance by exhibitors of their payment obligations under exhibition licenses is not uncommon.³⁵

C. Licensing Methods

The methods used by distributors to license motion pictures are negotiation, competitive bidding, or a combination of the two. Licensing by negotiation can be either competitive or direct. Under competitive negotiation, the distributor bargains with selected exhibitors within a particular exhibition market, either before or after the completion of the motion picture, over the terms and conditions under which the picture will be licensed. If a satisfactory agreement is reached, the parties enter into exhibition licenses based on that agreement. In contrast, direct negotiation refers to the noncompetitive bargaining with only one exhibitor within a market. Distributors sometimes agree to review and adjust the terms of an exhibition license entered into under direct negotiation. Under this agreement, if the box office performance of the licensed picture is not commensurate with the agreed-upon terms, a review and adjustment of those terms may be made in favor of the exhibitor.³⁶ The advantage of licensing pictures by negotiation is that it enables distributors to finalize exhibition licenses within a relatively short period of time.

Competitive bidding, although generally a more time consuming method of licensing, is preferred by many distributors because they believe the competitive nature of the bidding process results in higher rental terms.³⁷ Under competitive bidding, the distributor notifies exhibitors within a particular exhibition market of the availability of a motion picture for li-

35. See M. MAYER, *supra* note 20, at 63-64; Statfeld, *supra* note 8, at 39-40.

36. See *infra* note 177. Review and adjustment is not possible when competitive bidding is undertaken; once a bid is accepted, the terms are final.

37. Competitive bidding may not be conducted by distributors in a discriminatory manner due to antitrust considerations. See H. SWERDLOW & J. JAFFE, *supra* note 13, at 254-56.

censing and solicits bids from those exhibitors. Some exhibitors may respond by declining to bid while indicating a willingness to enter into negotiations. After evaluating the returned bids, the distributor enters into exhibition licenses with those exhibitors offering bids containing the most commercially promising licensing terms and conditions. Should the distributor be dissatisfied with the bids received, he may reject all bids and either rebid the picture or enter into negotiations with one or more of the bidding exhibitors or with exhibitors who chose not to submit bids.³⁸

The bidding process can be either closed or open. Under closed bidding, bids are opened privately by the licensing distributor without disclosing to exhibitors the basis used to determine the winning bid.³⁹ This, some exhibitors suspect, allows distributors to conduct a practice known as the "five o'clock look," whereby distributors give preferred treatment to certain exhibitors notwithstanding the superiority of other bids.⁴⁰ Under open bidding, exhibitors are given the opportunity to be present when bids are opened and to examine the contents of the bids.⁴¹

Negotiating or bidding may occur either without or after a screening. Blind bidding, the licensing practice trade screening laws are designed to restrict, has been defined by most trade screening laws as "the bidding for, negotiating for, or offering or agreeing to terms for the licensing or exhibition of a motion picture before that motion picture has been trade screened for exhibitors."⁴²

Prior to the enactment of trade screening laws, some distributors were blind bidding between sixty and ninety percent of

38. A distributor's licensing options in this situation may be restricted by trade screening laws. See *infra* notes 99-108 and accompanying text.

39. *Allied Artists Pictures Corp.*, 496 F. Supp. at 430.

40. *Id.* Witnesses in the *Allied Artists* trial described the "five o'clock look": as a situation in which the distributor, after bidding closed at the end of the day, but before bids were examined, would phone an exhibitor to whom he wanted to award the movie and state, for example, "The highest bid I have is \$65,000, if you can beat that, it's yours," or as a situation in which the bids were disregarded and a distributor would strike a deal privately with a large exhibitor to award him licenses for all of the theatres in his chain.

Id.

41. Many trade screening laws require distributors to conduct open bidding. See *infra* notes 65-68, 70 and 82 and accompanying text.

42. See generally *Allied Artists Pictures Corp.*, 496 F. Supp. at 416-18. This practice has also been referred to as "advance licensing," "advance bidding," "blind buying," and "blind selling." See *supra* note 1.

their motion pictures.⁴³ Under this method, a distributor will send potential exhibitors, between six months and a year before the scheduled release date of a motion picture, a bid solicitation announcing the availability of the picture for licensing. This solicitation generally includes the name of the uncompleted motion picture, the names of its leading cast and other key personnel, a general plot summary, speculation as to the rating of the picture, the approximate date of delivery and suggested licensing terms.⁴⁴ Based on this information and other promotional materials supplied by the distributor, interested exhibitors negotiate with or return completed bids to the licensing distributor. Trade screening, on the other hand, entails the organized private showing of a completed motion picture by its distributor to interested exhibitors *prior to* the commencement of negotiations or the solicitation of bids.

The primary justification underlying the use of blind bidding by distributors appears to be one of marketing and licensing efficiency. Distributors favor this licensing method because it allows them to secure exhibition licenses with exhibitors months in advance of scheduled release dates and to release motion pictures with little delay between production and exhibition. As one commentator has noted:

The distributors view blind bidding as the most efficient and least risky method of marketing their films, principally because it assures them placement of their motion pictures in the best first-run theaters immediately upon completion. Timing is important because national advertising campaigns and numerous product 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 are most effective when synchronized with a film 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.⁴⁵

Exhibitors, on the other hand, view blind bidding as an un-

43. *Allied Artists Pictures Corp.*, 496 F. Supp. at 417.

44. Note, *supra* note 8, at 1131-32; Statfeld, *supra* note 8, at 29.

45. Note, *supra* note 8, at 1132. See also *Allied Artists Pictures Corp.*, 496 F. Supp. at 417; Statfeld, *supra* note 8, at 35, 37, 38.

fair and unnecessary trade practice.⁴⁶ Exhibitors contend that the information made available to them about unreleased motion pictures in bid solicitations and other promotional materials from distributors provides them with an inadequate and misleading basis from which to exercise accurately their own business judgment as to the quality and commercial potential of motion pictures prior to licensing.⁴⁷ Moreover, since a picture is often in production when blind bidding is undertaken, the possibility exists that unforeseeable events or creative changes could occur during the course of production, substantially altering its post-licensing contents.⁴⁸ Exhibitors also assert that blind bidding forces them to take chances on the suitability of pictures for their particular theatre audiences, thereby risking their commercial reputations and community standing.⁴⁹ The risk of licensing undesirable pictures or "turkeys," exhibitors contend, has caused significant financial losses for some exhibitors, forced some small exhibitors out of business, as well as contributed to a rise in ticket prices. Consequently, most exhibitors prefer the trade screening of motion pictures because it allegedly provides them with the opportunity to readily assess the commercial potential and audience suitability of pictures prior to licensing, thereby enabling them to make licensing decisions based on their own judgment and not that of a picture's distributor.⁵⁰

Although licensing a product sight unseen may seem to be a

46. See generally National Association of Theater Owners' Blind Bidding Position Paper (1981) [hereinafter cited as NATO Position Paper]; *Allied Artists Pictures Corp.*, 496 F. Supp. at 421, 429-30; Statfeld, *supra* note 8, at 38-42.

47. One exhibitor has noted the following:

The most unfair element in the licensing of motion pictures through the bidding process is the practice of blind bidding, whereby distributors request bids from exhibitors before the picture is available to be screened, which precludes the exhibitor from evaluating its grossing potential. This is analogous to an individual purchasing a home or car by bidding against other persons, none of whom is permitted to see the item before making an offer.

Durwood & Resnick, *supra* note 14, at 330-31.

48. *Allied Artists Pictures Corp.*, 496 F. Supp. at 430.

49. *Id.* Exhibitors offer the following as an example:

Exhibitors bid on a movie with Paul Newman which was supposed to have the success of "Butch Cassidy" and was an action hockey picture—when this movie "Slap Shot" reached the exhibitor's theater, it had some of the foulest language ever heard on the screen and the owner was obligated to play it and could only try to answer his patrons' violent complaints by trying to explain to them about "Blind Bidding."

NATO Position Paper, *supra* note 46, at 2. See also Statfeld, *supra* note 8, at 36.

50. See *Allied Artists Pictures Corp.*, 496 F. Supp. at 421; but see *infra* note 115.

peculiar manner in which to conduct business, blind bidding, as one commentator suggests, may not be as unfair to exhibitors as it appears.

First, because the distributor is often in an equally blind position when he agrees to underwrite or distribute an unproduced film, it does not seem unreasonable for him to demand that the exhibitor share some of the risk. Moreover, purchasing on the basis of incomplete information certainly is not unique to the motion picture industry. It also exists when a publisher underwrites the work of an author based only on an idea, when a television advertiser books time for a new series, and when one invests in a Broadway play. While greater amounts of product information may be disclosed in these analogous situations, there is still significant risk involved. Second, while it is understandable that exhibitors wish to be in the position to "make their own mistakes," it is possible that they will, for the most part, make the same mistakes whether under a blind bidding or trade screening system. Exhibitors seem to be most influenced in their bidding decisions by the stars and subject matter of a film, for these factors often dictate a motion picture's box office success. Since such information is disclosed to an exhibitor before he bids for a film, trade screening should not motivate markedly different bidding decisions. In addition, the major distributors have proved to be astute judges of the tastes of the American moviegoing public. They do not invest in films which lack commercial appeal, and it is not at all certain that individual exhibitors can better assess the public's tastes. Third, although trade screening might occasionally enable exhibitors to avoid booking a mediocre or offensive film, it probably would not increase exhibitor profits. While trade screening would reduce the fluctuations in bids to bring them more in accord with actual film value, exceptional films would command higher terms. Thus, the average return to exhibitors could remain unchanged. In short, the "blindness" inherent in advance bidding may appear unfair to exhibitors, but the efficiencies which the practice permits probably benefit the industry as a whole.⁵¹

In addition, distributors assert that the prohibition of blind and closed bidding has a negative effect on motion picture marketing, licensing, and production.⁵²

51. Note, *supra* note 8, at 1134-35. See also discussion cited *supra* note 8.

52. See *infra* notes 112-21 and accompanying text.

III Trade Screening Legislation

Blind bidding has been a concern not only to exhibitors but also to the Department of Justice, which has made several attempts to curtail the practice. In 1940, a consent decree that required trade screenings for all new releases was entered into between the Department of Justice and five major distributors.⁵³ This decree expired in 1942.⁵⁴ Six years later, blind bidding was addressed by the United States Supreme Court when it approved the breakup of the distributors' anticompetitive control of the motion picture industry in *United States v. Paramount Pictures, Inc.*,⁵⁵ a civil antitrust action against the eight major distributors. Although it found several marketing practices of the distributors to be in violation of federal antitrust laws, the Court did not completely prohibit the practice of blind bidding (or "blind-selling" as it was then called) since the trial court had recommended that only a limited right of rejection of blind bid motion pictures was necessary at the time.⁵⁶ This was largely due to the fact that distributors had voluntarily continued to trade screen their pictures following the expiration of the 1940 decree. However, the use of blind bidding increased in the following decades and in 1968 a stipulation limiting the number of motion pictures that could be blind bid to three per year was entered into with the major dis-

53. *United States v. Paramount Pictures, Inc.*, 1940-1943 TRADE CAS. (CCH) ¶ 56,072 (S.D.N.Y. Nov. 20, 1940). The decree provided in relevant part:

No consenting defendant engaged in the distribution of motion pictures . . . shall license or offer for license a feature motion picture . . . for public exhibition within the United States of America at which an admission fee is to be charged, until the feature has been trade shown within the exchange district in which the public exhibition is to be held. Every trade showing shall be preceded by a notice, published in a trade publication having general circulation among exhibitors in such exchange district, which shall state the title of the picture and the date and the time when and the place or places where it will be trade shown.

Id. at 289 (footnotes omitted). For a discussion regarding the early use of consent decrees as a means of regulating the motion picture industry, see Comment, *Operation of the Consent Decree in the Motion Picture Industry*, 51 YALE L.J. 1175 (1942); Comment, *Legislation by Consent in the Motion Picture Industry*, 50 YALE L.J. 854 (1941).

54. See *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 331-33 (S.D.N.Y. 1946).

55. 334 U.S. 131 (1948). See *supra* note 13.

56. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157-58 n.11 (1948). The *Paramount* decision did approve the district court's decision to grant exhibitors the right to reject 20% of motion pictures licensed in a group ("block booking") that had not been trade screened prior to the granting of exhibition licenses. *Id.*

tributors.⁵⁷ This agreement was allegedly allowed to expire in 1975 due to the desire of the Department of Justice to deregulate the motion picture industry.⁵⁸ Thereafter, the use of blind bidding increased rapidly, and by 1977, some distributors were blind bidding from sixty to ninety percent of their new releases.⁵⁹ Having failed to eliminate the practice of blind bidding with the assistance of the Department of Justice, exhibitors turned to legislative channels in the late seventies for relief.

Since 1978, exhibitors have been able to convince the lawmakers of twenty-three states to enact trade screening laws that restrict the use of blind and closed bidding and other licensing practices.⁶⁰ These laws purport to provide exhibitors with the opportunity to make informed licensing judgments regarding the commercial potential and audience suitability of motion pictures when negotiating or bidding and to insert elements of fairness and orderliness into the motion picture licensing process. The legislative purpose enunciated in the

57. *United States v. Paramount Pictures, Inc.* No. 87-273 (S.D.N.Y., filed Aug. 14, 1968; renewed Jan. 1, 1971). This three picture limitation did not apply to any blind bid motion picture with an exhibition license that provided the exhibitor with the right to cancel the license upon viewing the completed picture. *Id.* at 4-5. Thus, a distributor was permitted to blind bid an unlimited number of motion pictures under this stipulation provided cancellation provisions were included in their licenses. *See infra* notes 150-58 and accompanying text.

58. Note, *supra* note 8, at 1137 n.36.

59. *Allied Artists Pictures Corp.*, 496 F. Supp. at 417.

60. States that have enacted trade screening laws as of January 1, 1984 are Alabama (ALA. CODE §§ 8-18-1 to -18-6 (Supp. 1982)), Arkansas (ARK. STAT. ANN. §§ 70-1101 to -1106 (Supp. 1983)), Georgia (GA. CODE ANN. §§ 106-1301 to -1305 (Supp. 1982)), Idaho (IDAHO CODE §§ 18-7701 to -7708 (Supp. 1980)), Indiana (IND. CODE ANN. §§ 24-1-5-1 to -7 (West 1980)), Kansas (KAN. STAT. ANN. §§ 51-201 to -203 (Supp. 1982)), Kentucky (KY. REV. STAT. ANN. §§ 365.750 - .990 (Bobbs-Merrill Supp. 1982)), Louisiana (LA. REV. STAT. ANN. §§ 37:2901 - :2905 (West Supp. 1982)), Maine (ME. REV. STAT. ANN. tit. 10, §§ 1901 - 1905 (1980, Supp. 1982)), Massachusetts (MASS. GEN. LAWS ANN. ch. 93F, §§ 1 - 4 (West Supp. 1982)), Missouri (MO. ANN. STAT. §§ 407.350 to -.357 (Vernon Supp. 1983)), Montana (MONT. CODE ANN. §§ 30-14-301 to -308 (1981)), New Mexico (N.M. STAT. ANN. §§ 57-5A-1 to -5 (Supp. 1982)), North Carolina (N.C. GEN. STAT. §§ 75C-1 to -5 (1981)), Ohio (OHIO REV. CODE ANN. §§ 1333.05 to -.07 (Page 1979)), Oregon (OR. REV. STAT. § 646.890 (1979)), Pennsylvania (PA. STAT. ANN. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1983-1984)), South Carolina (S.C. CODE ANN. §§ 39-5-510 to -560 (Law. Co-op. Supp. 1982)), Tennessee (TENN. CODE ANN. §§ 47-25-701 to -704 (1983)), Utah (UTAH CODE ANN. §§ 13-13-1 to -13-7 (1981)), Virginia (VA. CODE §§ 59.1-255 to -261 (Supp. 1982)), Washington (WASH. REV. CODE ANN. §§ 19.58.010 to -.58.905 (Supp. 1983-1984)), and West Virginia (W. VA. CODE §§ 47-11D-1 to -11D-4 (1980)). In addition to these state laws, trade screening laws have been enacted in the Commonwealth of Puerto Rico (P.R. LAWS ANN. tit. 10, §§ 2101 - 2105 (Supp. 1982)) and Prince George's County, Maryland (PRINCE GEORGE'S COUNTY, MD. ORDINANCE C.B.- 125-1981 (Nov. 3, 1981)).

Washington Motion Picture Fair Competitive Act⁶¹ is indicative of the general objective underlying trade screening legislation:

The purpose of this chapter is to establish fair and open procedures for bidding and negotiation for the right to exhibit motion pictures in the state in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution and exhibition within the state; to promote fair and effective competition in that business; and to insure that exhibitors have the opportunity to view a motion picture and know its contents before committing themselves to exhibiting the motion picture in their communities.⁶²

In effect, these laws may promote competition among distributors,⁶³ reduce the risks and uncertainties that exhibitors previously had to assume under blind bidding, and advance the financial and bargaining positions of exhibitors.⁶⁴

A. Analysis of Trade Screening Laws

The twenty-three state trade screening laws are similar in two respects. First, they generally prohibit the use of blind

61. WASH. REV. CODE ANN. §§ 19.58.010 to -.58.905 (Supp. 1983-1984).

62. *Id.* § 19.58.010.

63. Prohibiting blind bidding may increase competition among distributors because, by requiring that all motion pictures be shown prior to licensing, competition among distributors will be on the basis of quality and content and not market strength or reputation. *But cf.* Note, *supra* note 8, at 1134-35 (blind bidding is not the primary reason independent distributors are at a competitive disadvantage).

64. According to the *Allied Artists* district court:

By far the most important purpose for which the [Ohio trade screening law] appears to have been designed and its primary impact on the motion picture industry in Ohio is to effect a better balance of bargaining power between exhibitors and producer-distributors by the prohibition of risk-shifting devices (*e.g.*, blind bidding, guarantees), by disclosure of licensing procedures, and by facilitating the exercise of exhibitors' informed business judgment.

Allied Artists Pictures Corp., 496 F. Supp. at 429. There is some question whether a state has a legitimate interest in correcting bargaining imbalances between business groups. The Sixth Circuit Court of Appeals in the *Allied Artists* case, although recognizing that a state has a legitimate interest in preventing unfair and deceptive trade practices, found redressing an imbalance of bargaining power in favor of in-state exhibitors to be a "highly suspect" objective under the commerce clause. 679 F.2d 656, 661 (1982). The Sixth Circuit stated: "[A] state's interest in righting a bargaining imbalance, *standing alone*, is not sufficient under the commerce clause to permit direct interference with pricing [*e.g.* advance and guarantee payments] where it burdens interstate commerce." *Id.* at 665 (emphasis added). Accordingly, the court remanded to the district court for further consideration the question of whether any legitimate state interests exist to support provisions that restrict the use of advance and guarantee payments in exhibition licenses. *Id.*

bidding by requiring distributors to trade screen their motion pictures before the licensing process can begin. Second, the majority of the laws require distributors to follow certain bidding and notice guidelines once a motion picture has been trade screened and bids have been solicited.⁶⁵ Although there is little uniformity among trade screening laws beyond these similarities, they can be categorized into three general groups: general prohibitory laws, laws containing exemptions and waivers, and restrictive laws.

1. *General Prohibitory Laws*

Thirteen states have enacted trade screening laws that may be termed general prohibitory laws.⁶⁶ These laws mandate a general prohibition of blind bidding by requiring mandatory trade screenings of motion pictures before either licensing negotiations or bidding can commence. These laws also require distributors to provide exhibitors with reasonable and uniform notice of all trade screenings and to adhere to "open bidding" procedures once bids have been solicited.⁶⁷ Open bidding instructions typically require distributors to include in their invi-

65. The fact that the basic framework for most of these laws was provided by a model trade screening law distributed by the National Association of Theater Owners accounts for these similarities.

It should be noted that trade screening laws do not require distributors to competitively bid their motion pictures. Rather, once a picture has been trade screened according to the provisions of the applicable trade screening law, its distributor is permitted to license it either by negotiation or bidding. However, once a distributor elects to bid a picture, he may be required to license it only by the bidding method. See *infra* notes 99-108 and accompanying text.

66. The thirteen states are Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Maine, Massachusetts, North Carolina, Oregon, Tennessee, Virginia, and Washington. See *supra* note 60. The Georgia trade screening law is the only one of these laws to have been subjected to judicial review. See *Paramount Pictures v. Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982) (affirming lower court's grant of summary judgment upholding the Georgia law).

67. The Georgia, Oregon, and Tennessee laws are exceptions providing neither notice nor bidding guidelines. An example of a general prohibitory law is the Massachusetts trade screening law (MASS. GEN. LAWS ANN. ch. 93F, §§ 1-4 (West Supp. 1982)), which provides:

§ 1. Definitions

The following words, as used in this chapter, unless the context otherwise requires or a different meaning is specifically prescribed, shall have the following meaning:—

"Bid", a written offer or proposal by an exhibitor to a distributor, in response to an "invitation to bid", stating the terms under which the exhibitor will agree to exhibit a motion picture.

"Blind bidding", the solicitation of bidding for, solicitation of negotiation for, or solicitations of offers for or agreeing to terms for the licensing or exhibition

tations to bid information regarding the run of the motion picture, names of all solicited exhibitors, the expiration date of

of, a motion picture if the motion picture has not been trade screened within the commonwealth before any such event has occurred.

"Defined geographic area", a relevant market area as used in the motion picture industry.

"Distributor", any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental, sale or licensing.

"Exhibit" or "exhibition", showing a motion picture to the public for a charge.

"Exhibitor", any person engaged in the business of operating one or more theatres.

"Invitation to bid", a written solicitation or invitation by a distributor to one or more exhibitors to bid for the right to exhibit a motion picture.

"License agreement", any contract agreement, understanding or condition between a distributor and an exhibitor relating to the licensing of exhibition of a motion picture by the exhibitor.

"Person", one or more individuals, partnerships, associates, societies, trusts, or corporations.

"Run", the continuous exhibition of a motion picture in a defined geographic area for a specified period of time. A "first run" is the first exhibition of a picture in the designated area, a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run. "Exclusive run" is any run limited to a single theatre in a defined geographic area and a "non-exclusive run" is any run in more than one theatre in a defined geographic area.

"Theatre", any establishment in which motion pictures are exhibited to the public regularly for a charge.

"Trade screening", the showing of a motion picture by a distributor at some location within Metropolitan Boston which is open to any exhibitor interested in exhibiting the motion picture.

§ 2. Blind bidding: trade screening

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

A distributor shall include in each invitation to bid for a motion picture for exhibition, if such motion picture has not already been trade screened within the commonwealth, the date, time and place of the trade screening of the motion picture within the commonwealth.

A distributor shall provide reasonable and uniform notice to exhibitors within the commonwealth of all trade screenings within the commonwealth of motion pictures he is distributing.

Any purported waiver of the requirements of this section shall be void and unenforceable.

§ 3. Bids; procedures

If bids are solicited from exhibitors for the licensing of a motion picture within the commonwealth then:—

1. The invitation to bid shall specify (a) the number and length of runs for which the bid is being solicited, whether it is a first, second or subsequent run, and the geographic area for each run; (b) the names of all exhibitors who are being solicited; (c) the date and hour the invitation to bid expires; and (d) the

the bid, and when and where bids will be opened. These instructions further mandate that all bids be opened at the same time in the presence of all interested exhibitors, that exhibitors be provided with the opportunity to inspect all opened bids, and that all bidding exhibitors be notified of the terms of the winning bid and the name of the winning exhibitor. Open bidding purports to promote fairness and disclosure in the bidding process while eliminating the abuses that allegedly result under closed bidding.⁶⁸ In addition, some bidding instructions may require a distributor to rebid a motion picture if the initial round of bidding does not produce an acceptable offer.⁶⁹

2. *Laws Containing Waivers and Exemptions*

Four states have trade screening laws with provisions that allow distributors, under certain circumstances, to license motion pictures without a prior trade screening for exhibitors.⁷⁰ The Missouri trade screening law⁷¹ stands alone among these laws in terms of uniqueness and complexity. This law provides distributors with two exceptions to its general trade screening requirement. First, distributors are allowed to blind bid pictures based on books that have been on the best seller list for a year or more or that have sold at least five hundred thousand copies, pictures based on stage productions that have run at

location, including the address, where the bids will be opened, which shall be within the commonwealth.

2. All bids shall be submitted in writing and shall be opened at the same time and in the presence of exhibitors, or their agents, who submitted bids and are present at such time.

3. After being opened, bids shall be subject to examination by exhibitors, or their agents, who submitted bids. Within seven business days after a bid is accepted, the distributor shall notify in writing each exhibitor who submitted a bid of the terms of the accepted bid and the name of the winning bidder.

4. Once bids are solicited, the distributor shall license the picture only by bidding and may negotiate if he does not accept any of the original bids.

§ 4. Violations

Any violations of the provisions of this act shall be deemed to be an unfair and deceptive trade practice, as defined in section two of chapter ninety-three A.

68. *Allied Artists Pictures Corp.*, 679 F.2d at 663. See *supra* notes 39-40 and accompanying text.

69. See *infra* notes 99-108 and accompanying text. For an example of a typical open bidding procedure, see WASH. REV. CODE ANN. § 19.58.040 (Supp. 1983).

70. The four states are Missouri, New Mexico, South Carolina, and West Virginia. When trade screening is required by these laws, notice and bidding guidelines similar to those contained in the general prohibitory laws must be followed by distributors.

71. MO. ANN. STAT. §§ 407.350 to -357 (Vernon Supp. 1983).

least six months, or pictures based on television and radio productions.⁷² These exceptions are based on the premise that sufficient precensoring information is available to exhibitors when motion pictures are derived from such sources that trade screenings are not needed to ensure informed licensing decisions.⁷³ Second, the Missouri law allows distributors to blind bid an aggregate of two pictures each year based on original material.⁷⁴ In addition, the Missouri law requires distributors who blind bid motion pictures under these exceptions to provide exhibitors with information regarding the audience to which the picture is directed, the anticipated rating of the picture, and a right of cancellation.⁷⁵

The New Mexico, South Carolina, and West Virginia trade screening laws also provide distributors with a limited opportunity to forego trade screening and to blind bid their motion pictures. Under the New Mexico law,⁷⁶ if, after fifteen days following the solicitation of bids, a distributor has not been notified by any of the solicited exhibitors of an intent to attend the scheduled trade screening, a trade screening is not required.⁷⁷ This provision avoids forcing a distributor into trade screening a picture to an empty screening room simply to satisfy a trade screening requirement. The South Carolina law⁷⁸ provides first-run exhibitors within any county the right to waive the trade screening requirement for any motion picture if all the exhibitors within that county agree in writing to such a

72. *Id.* § 407.357.

73. However, according to Robert Evans, producer of such motion pictures as *Chinatown*, *Marathon Man*, and *Urban Cowboy*:

Best sellers don't make the best movies. I've taken the *New York Times* best-seller list for the last ten years and found many novels that were made into unsuccessful movies and many that were purchased but never made into movies at all. There are two reasons for this. First, a best-selling novel may simply not have a cinematic story; that's subjective. Second, the book-reading audience is not the movie-going audience; that's objective. The book-reading audience consists mostly of adults over 35, while the majority of the frequent movie-going audience ranges in age from 12 to 30 and does not buy books avidly. Although a successful book doesn't guarantee a big film, it does guarantee a big purchase price for movie rights. This makes agents very happy but often leaves studios heavily inventoried in fashionable but unmakeable material.

R. Evans, *The Producer*, in *THE MOVIE BUSINESS BOOK* 14-15 (J. Squire ed. 1983).

74. MO. ANN. STAT. § 407.353 (Vernon Supp. 1983).

75. *Id.* See *infra* notes 150-58 and accompanying text.

76. N.M. STAT. ANN. § § 57-5A-1 to -5A-5 (Supp. 1982).

77. *Id.* at § 57-5A-4D.

78. S.C. CODE ANN. §§ 39-5-510 to -560 (Law. Co-op. Supp. 1982).

waiver.⁷⁹ In West Virginia, the trade screening law is waived completely with respect to exhibitors whose theatres are located within twenty miles of a bordering state that does not have a trade screening law.⁸⁰ This provision is designed to provide a limited number of West Virginia exhibitors with an opportunity to compete on an equal footing with out-of-state exhibitors who are situated within the same exhibition market but who can enter into exhibition licenses without a prior trade screening. If West Virginia exhibitors were prevented from negotiating or bidding for pictures until they had been trade screened, while out-of-state exhibitors, competing within the same geographical market, were allowed to negotiate or bid for those pictures without waiting for a prior trade screening, the out-of-state exhibitors would have the opportunity to license the more popular first-run motion pictures offered to that market before West Virginia exhibitors could offer as much as a dime. Thus, the West Virginia legislature provided the market waiver to avoid placing a limited number of West Virginia exhibitors at a competitive disadvantage within their respective exhibition markets. In addition, the theatre-related patronization of local businesses such as restaurants, and tax revenues, that might otherwise have been lost out-of-state, are preserved. Application of this waiver is, however, limited since Maryland is the only state bordering West Virginia without a trade screening law.⁸¹ The West Virginia law is the only trade screening law that presently contains this type of waiver.

3. *Restrictive Laws*

Seven states have enacted trade screening laws that, in addition to prohibiting blind bidding, restrict the inclusion of advance and guarantee payments in exhibition licenses.⁸² Five of

79. *Id.* § 39-5-540.

80. W. VA. CODE § 47-11D-3(d) (1980).

81. Prince George's County, Maryland does, however, have a trade screening ordinance. *See supra* note 60.

82. The seven states with restrictive laws are Idaho, Kentucky, Missouri, Montana, Ohio, Pennsylvania, and Utah. *See supra* note 60. The Ohio, Pennsylvania, and Utah laws are presently being challenged by distributors in the courts. *See infra* note 109 and accompanying text. Of these seven laws, the Kentucky, Missouri, Ohio, and Pennsylvania laws include notice and bidding guidelines similar to those contained in the general prohibitory laws. In addition, the Missouri law provides for a waiver of its trade screening requirement, and the Pennsylvania law limits the length of exclusive first-runs by exhibitors to forty-two days. The Pennsylvania law provides in relevant part:

these seven restrict, either partially or completely, the use of advance payments.⁸³ In Pennsylvania and Idaho, the inclusion of an advance payment in exhibition licenses is completely prohibited,⁸⁴ whereas in Missouri, Ohio, and Kentucky, advance payments are permissible, but the time of payment to distributors is restricted.⁸⁵ The advance payment provision of the Ohio trade screening law provides:

No distributor shall condition the granting or execution of a license agreement on the exhibitor's advancing, more than fourteen days prior to his first exhibition of a motion picture, any money that is to be used as security for the exhibitor's performance of the license agreement or is to be applied to any payments that the exhibitor is required by the agreement to make to the distributor.⁸⁶

Since distributors generally do not require advances to be made more than two weeks prior to the scheduled release of a motion picture, the time restrictions of the Ohio and Kentucky laws impose little, if any, change in the customary payment of advances.⁸⁷ The alleged purposes of prohibiting the inclusion of advance payments is first, to promote competition among exhibitors within a particular geographical market by placing new and smaller exhibitors on an equal footing with the larger, more affluent exhibitors in that area; and second, to "protect"

No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and licenses agreements and prints of said motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

PA. STAT. ANN. tit. 73, § 203-7 (Purdon Supp. 1983-1984). This provision purports to promote a wider and more expeditious dissemination of motion pictures. *See id.* §§ 203-2(4), -2(5), and -2(9). This provision, which is the only one of its kind, has been criticized as being invalid under the commerce clause, the first amendment, and the supremacy clause and is presently being challenged in a Pennsylvania federal district court. Note, *supra* note 19, at 310-11. *See infra* notes 109 and 134.

83. In jurisdictions without such restrictions, distributors are allowed to receive advance payments at any time. For a discussion regarding the use and role of advance payments in exhibition licenses, *see supra* note 35 and accompanying text.

84. PA. STAT. ANN. tit. 73, § 203-6 (Purdon Supp. 1983-1984); IDAHO CODE § 18-7706 (Supp. 1980).

85. OHIO REV. CODE ANN. § 1333.06(C) (Page 1979); KY. REV. STAT. ANN. § 365.755(3) (Bobbs-Merrill Supp. 1982). The Missouri trade screening law prohibits distributors from receiving *any* money from exhibitors more than fourteen days prior to the scheduled release date. MO. ANN. STAT. § 407.357 (Vernon Supp. 1983).

86. OHIO REV. CODE ANN. § 1333.06(C) (Page 1979).

87. *Allied Artists Pictures Corp.*, 496 F. Supp. at 420.

exhibitors from lending interest-free capital to distributors.⁸⁸

Six of the restrictive laws expressly limit the use of guarantee payments in exhibition licenses. There are two types of guarantee payment restrictions: coupling and discretionary. Four of these laws contain a coupling restriction that prohibits the inclusion of guarantee payments in exhibition licenses in which the exhibitor is required to make a payment to the distributor based on attendance or box office receipts or, in other words, on a percentage rental basis.⁸⁹ For example, the coupling restriction of the Montana trade screening law provides:

It is unlawful for any license agreement that provides for a fee or other payment to the distributor based in whole or in part on the attendance or the box office receipts at a theatre within the state to contain or be conditioned upon a guarantee of a minimum payment to the distributor.⁹⁰

Since the coupling of a percentage rental arrangement and a guarantee is prohibited in these states, any distributor seeking a guarantee payment from exhibitors is allowed to license those motion pictures only on a flat fee basis.⁹¹ Distributors contend that coupling restrictions are, in effect, a complete prohibition on the use of guarantee payments because they allege that they cannot economically afford to license first-run motion pictures on a flat fee basis, as opposed to a percentage basis.⁹² The primary purpose of restricting the unfettered use of guarantee payments is allegedly to promote competition among exhibitors by providing new and small exhibitors with the opportunity to compete on an equal footing with the large, more affluent exhibitors within their exhibition market.⁹³

88. Brief of Defendant-Appellant Fox Theatres Management Corp. at 26, *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3d Cir. 1982).

89. IDAHO CODE § 18-7704 (Supp. 1980); MONT. CODE ANN. § 30-14-305(1) (1981); PA. STAT. ANN. tit. 73, § 203-5 (Purdon Supp. 1983-1984); UTAH CODE ANN. § 13-13-4 (Supp. 1981).

90. MONT. CODE ANN. § 30-14-305(1) (1981).

91. Under a flat fee arrangement, an exhibitor licenses a motion picture at a flat rate that remains constant throughout the picture's run, regardless of box office receipts or attendance. See *supra* note 27.

92. Brief of Appellant at 9, *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981). See *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981), *appeal pending*, No. 82-1093 (10th Cir. 1982) (distributor's challenge of the coupling restriction contained in the Utah trade screening law).

93. *Allied Artists Pictures Corp.*, 496 F. Supp. at 451; Brief of Appellant, *supra* note 88, at 25. As one commentator has noted:

Many small exhibitors do not have the financial resources to pay large guarantees months in advance for a film that is being touted as a potential box office smash. The small exhibitor is consequently in a dilemma when, months

However, such restrictions, distributors contend, may in fact tend to reduce, rather than promote, competition among exhibitors since, without the ability to accept these licensing terms, distributors are more likely to award licenses on the basis of such factors as a theatre's location, size, and box office performance record, attributes usually displayed by the larger, more established theatres of a particular market.⁹⁴ Guarantee payment restrictions also allegedly protect the economic interests of exhibitors by reducing the ability of distributors to share the risk of loss from commercially unsuccessful pictures with exhibitors.⁹⁵

The Ohio and Kentucky trade screening laws contain discretionary guarantee payment restrictions.⁹⁶ Under these provisions, although distributors are prohibited *from soliciting* a guarantee payment with a percentage rental term, it is within the discretion of exhibitors *to offer* distributors this combination in their bids. For example, the guarantee restriction of the Kentucky trade screening law provides:

No distributor shall *condition* the granting or execution of a license agreement on a guarantee of a minimum payment to the distributor, if the exhibitor is required by the license agreement to make any payment to the distributor that is based on the attendance or the box office receipts at a theatre at which the motion picture is exhibited.⁹⁷ (emphasis added)

However, as one commentator has noted, the discretionary restriction will not likely affect the ability of distributors to obtain guarantee payments, particularly for exceptional motion pictures, since affluent exhibitors will be compelled to "volunteer" guarantees as a means of effectively competing against other exhibitors who may be bidding or negotiating for the same motion picture.⁹⁸

before its release, the distributor sends out bid request letters for such a film. The small exhibitor may gamble on the picture and risk financial disaster if he loses, or not bid and watch as larger exhibitors share in the profits for a film he could not afford so far in advance.

Statfeld, *supra* note 8, at 38.

94. Brief of Appellant, *supra* note 92, at 12-13.

95. Brief of Appellant, *supra* note 88, at 25-26.

96. OHIO REV. CODE ANN. § 1333.06(B) (Page 1979); KY. REV. STAT. ANN. § 365.755(2) (Bobbs-Merrill Supp. 1982).

97. KY. REV. STAT. ANN. § 365.755(2) (Bobbs-Merrill Supp. 1982).

98. Note, *supra* note 19, at 308.

4. *Rebidding Provisions*

Another common restriction contained within trade screening laws is a rebidding provision. Occasionally a distributor will competitively bid a motion picture and be dissatisfied with the bids returned by solicited exhibitors. The bidding guidelines of fifteen trade screening laws specifically include rebidding provisions that instruct distributors as to what licensing options are available to them when an acceptable bid is not received from the initial round of bidding.⁹⁹ There are three types of rebidding provisions: mandatory, optional, and an intermediate provision.

Under a mandatory rebidding provision, once a distributor elects to license a particular motion picture under the competitive bidding method, he is thereafter prohibited from licensing that picture under any other method.¹⁰⁰ For example, the mandatory rebidding provision of the South Carolina trade screening law provides: "Once bids are solicited, the distributor shall license the picture only by bidding and must solicit rebids if he does not accept any of the submitted bids."¹⁰¹ The apparent purpose of mandatory rebidding is to prevent "producers from deceptively putting films out on competitive bid in order simply to test the market without any real intention of licensing the film to the best bidders."¹⁰² Exhibitors assert that mandatory rebidding is necessary "to prevent a distributor from using the bidding process to survey the market and then award the picture to a favored exhibitor anyway. Under the old system, if the distributor did not like the winner, he called off the game."¹⁰³

Under an optional rebidding provision, a distributor is given the option either to rebid his picture or to enter into negotia-

99. Rebidding provisions are only applicable when a distributor elects to license a motion picture under the competitive bidding method rather than by negotiation. See *supra* note 65.

100. The states with trade screening laws that contain mandatory rebidding provisions are Alabama (ALA. CODE § 8-18-5(b) (Supp. 1982)), Kentucky (KY. REV. STAT. ANN. § 365.760(6) (Bobbs-Merrill Supp. 1982)), Louisiana (LA. REV. STAT. ANN. § 37:2904(4) (West Supp. 1983)), Ohio (OHIO REV. CODE ANN. § 1333.07(F) (Page 1979)), Pennsylvania (PA. STAT. ANN. tit. 73, § 203-8(e) (Purdon Supp. 1983-1984)), South Carolina (S.C. CODE ANN. § 39-5-530(d) (Law. Co-op. Supp. 1982)), Virginia (VA. CODE § 59.1-259.4 (1982)), Washington (WASH. REV. CODE ANN. § 19.58.040(4) (Supp. 1983-1984)), and West Virginia (W. VA. CODE § 47-11D-4(4) (1980)).

101. S.C. CODE ANN. § 39-5-530(d) (Law. Co-op. Supp. 1982).

102. *Allied Artists Pictures Corp.*, 679 F.2d at 663.

103. Brief of Appellant, *supra* note 88, at 27.

tions with selected exhibitors if the initial round of bidding does not produce a satisfactory bid.¹⁰⁴ For example, the optional rebidding provision of the New Mexico trade screening law provides: "[O]nce bids are solicited, the distributor shall have the option to license the motion picture by competitive negotiation if he does not accept any of the submitted bids."¹⁰⁵ In jurisdictions without rebidding provisions, distributors are similarly free to license their pictures by negotiation when an acceptable bid is not received from exhibitors. This alternative to mandatory rebidding apparently has been adopted by those legislatures that find nothing inherently unfair about allowing sellers to occasionally use the competitive bidding process as a means of determining buyer interest in their product.

In contrast to mandatory and optional rebidding, two trade screening laws contain rebidding provisions that set forth an intermediate rebidding requirement.¹⁰⁶ Under the intermediate provision, if a distributor does not receive an acceptable bid from the initial round of bidding, the distributor is required to rebid the motion picture. If the second round does not produce an acceptable bid, the distributor is then allowed to forego competitive bidding and enter into negotiations with selected exhibitors.¹⁰⁷ For example, the intermediate rebidding provision set forth in the Missouri trade screening law provides:

If a distributor issues invitations to bid for a motion picture and he receives no bids for the motion picture, he may then negotiate for the picture with all exhibitors on the bid list. No further bidding is required. If a distributor receives bids which are not acceptable to the distributor the first time the motion picture is bid, he must rebid the motion picture a second time and if after bidding the motion picture a second time the bids are still unacceptable, he shall notify all exhibitors of such rejections and then may negotiate the motion picture. No further bidding is required and all exhibitors must be given an oppor-

104. The states with trade screening laws that contain optional rebidding provisions are Arkansas (ARK. STAT. ANN. § 70-1104(4) (Supp. 1983)), Massachusetts (MASS. GEN. LAWS ANN. ch. 93F, § 3.4 (West Supp. 1983-1984)), New Mexico (N.M. STAT. ANN. § 57-5A-5(D) (Supp. 1982)), and North Carolina (N.C. GEN. STAT. § 75C-4(d) (1981)).

105. N.M. STAT. ANN. § 57-5A-5(D) (Supp. 1983).

106. The states with trade screening laws that contain intermediate rebidding provisions are Kansas (KAN. STAT. ANN. § 51-203(c) (Supp. 1983)) and Missouri (MO. ANN. STAT. § 407.355.3 (Vernon Supp. 1983)).

107. See *infra* text following note 170.

tunity to negotiate.¹⁰⁸

This provision discourages distributors from using the bidding process as a "testing process" by requiring a mandatory second round of bidding, yet it provides flexibility by allowing distributors the option to enter into negotiations when the bidding process has genuinely failed to produce a satisfactory result.

B. Response by Distributors

Considering it to be nothing more than "special-interest" legislation designed to disrupt traditional licensing practices, distributors have not reacted passively to the enactment of trade screening legislation. Led primarily by the direction and efforts of their representative organization, the Motion Picture Association of America (MPAA), distributors have responded in several ways in an attempt to preserve the opportunity to blind bid motion pictures when the practice is necessary. In the courts, distributors have challenged the constitutionality of the Georgia, Ohio, Pennsylvania, and Utah trade screening laws.¹⁰⁹ Economically, several major distributors have indi-

108. MO. ANN. STAT. § 407.355.3 (Vernon Supp. 1983).

109. See *Paramount Pictures, Inc. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982) (affirmed lower court's grant of summary judgment upholding the Georgia trade screening law); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980) (Ohio trade screening law held constitutional), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982) (affirmed lower court's validation of trade screening and bidding guidelines, remanded issue regarding the validity of the advance and guarantee payment restrictions under the commerce clause); *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971 (E.D. Pa. 1981) (grant of summary judgment holding the Pennsylvania trade screening law unconstitutional on its face), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982) (reversed lower court's grant of summary judgment and remanded case for trial); *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981) (grant of summary judgment upholding the guarantee payment restriction of the Utah trade screening law), *appeal pending*, No. 82-1093 (10th Cir. 1982). In addition to these cases, two distributors have an action pending in a Maryland federal district court challenging the constitutionality of the Prince George's County trade screening ordinance. *Twentieth Century-Fox v. Prince George's County*, No. H-81-3185 (D. Md., filed Dec. 11, 1981). Twentieth Century-Fox filed a motion for summary judgment on June 18, 1982, however, a hearing on the motion has been postponed, at Fox's request, while the MPAA attempts to have legislation introduced repealing the county's ordinance. Letter from Steven M. Gilbert, Associate County Attorney, Prince George's County, Md. to Thomas A. Bartasi (Jan. 20, 1983).

The plaintiff-distributors in these cases have challenged the validity of the trade screening laws in question on various grounds including the first amendment, the commerce clause, the due process clause, the supremacy clause, and federal copyright and antitrust laws. For a discussion regarding the constitutionality of trade screening legislation, see Comment, *State Regulation of Motion Picture Distributors*, 3 PACE L. REV.

cated that they may avoid filming their motion pictures in states that have enacted or that plan to enact trade screening laws.¹¹⁰ Legislatively, distributors have continued to lobby extensively in states contemplating the enactment of trade screening legislation and have supported several attempts to repeal existing laws.¹¹¹

Distributors contend that compliance with trade screening laws disrupts motion picture distribution, licensing, and production in several ways.¹¹² First, distributors assert that compliance with trade screening laws, in particular, trade screening and open bidding requirements, delays the release of some motion pictures.¹¹³ In states without trade screening laws, distributors can blind bid and license motion pictures while they are still in production, thereby enabling pictures to go from production to exhibition with little, if any, delay. The prompt and timely release of motion pictures is essential to the successful marketing of some motion pictures.¹¹⁴ According to

107 (1982); Note, *supra* note 19; Statfeld, *supra* note 8, at 44-56; Note, *supra* note 8, at 1137-47.

In addition, distributors have themselves challenged, along with the Department of Justice, the use by certain exhibitors of a practice known as "product splitting." Product splitting, the agreed-upon allocation of motion pictures among exhibitors within a particular exhibition market, is allegedly used by exhibitors to reduce bidding competition among themselves. See, e.g., *General Cinema Corp. v. Buena Vista Distribution Co.*, 532 F. Supp. 1244 (C.D. Cal. 1982) (product splitting held *per se* illegal under Sherman Act); *United States v. Capitol Service, Inc.*, NO. 80-C-407 (E.D. Wisc. June 16, 1983) (split agreement among exhibitors in Milwaukee exhibition market held to be an unlawful form of price fixing and market allocation under Sherman Act); see generally H. SWERDLOW & J. JAFFE, *supra* note 13, at 247-48, 250-54; Conant, *supra* note 13, at 103-07. So while exhibitors attempt to curtail the use of blind bidding by distributors, distributors are similarly seeking to end the use of product splitting by some exhibitors.

110. Harris, *Film Studios Threaten Retaliation Against States Banning Blind Bids*, Los Angeles Times, June 1, 1981, § IV, at 1, col. 1. Location filming is important to the host state's economy because of the money it generates in the form of direct location expenditures and state tax revenues. For example, location expenditures in California for feature motion pictures in 1981 totaled \$104 million. Schipper, *Calif. losing film production to other states' competition*, The Hollywood Reporter, Apr. 13, 1983, at 1, col. 4.

111. See *infra* note 138.

112. For the various legal challenges made by distributors against trade screening legislation, see cases and discussion cited *supra* note 109.

113. Memorandum from the Motion Picture Association of America in Opposition to Texas Senate Bill 502 and House Bill 1103 (proposed Texas trade screening law) at 4 (1983).

114. See *supra* text accompanying note 45. The prompt release of motion pictures is also necessary to avoid carrying charges, the daily financing costs that accumulate on borrowed capital before a motion picture begins to generate revenue at the box office. Regarding carrying charges, Peter S. Myers, senior vice-president of Twentieth Century-Fox Entertainment, Inc. has stated:

If Fox was forced to delay a release six months in order to screen the picture

distributors, trade screening laws make such release impossible or exceedingly difficult when the final print of a particular motion picture is available close to the time of its scheduled release date, since it must then be trade screened before licensing, let alone exhibition, is allowed to begin.¹¹⁵ In addition to disrupting marketing and release schedules, distributors contend that this delay will result in higher ticket prices in some areas.¹¹⁶ Second, distributors argue that the disclosure of bidding information to exhibitors mandated by "open bidding" procedures,¹¹⁷ coupled with rebidding provisions, disrupts the competitive framework of the bidding process by enabling exhibitors to use this information to reduce the terms they might otherwise be willing to offer distributors.¹¹⁸ Third, distributors

for our customers [exhibitors], that would add at least \$15-million annually to interest costs, further delaying the return on our investments, and would give television and other media the chance to copy our pictures.

Myers, *supra* note 11, at 282.

115. In addition, at least one exhibitor has expressed dissatisfaction with the requirement that all motion pictures be trade screened prior to licensing. This small community exhibitor claimed that compliance with the mandatory trade screening requirement of the Ohio trade screening law disrupted his ability to effectively promote and advertise upcoming pictures, made it exceedingly difficult for him to acquire prints of newly released pictures from distributors, and reduced the gross income of his theatres. Affidavit from John Tabor to the Business and Commerce Committee of the House of Representatives, Commonwealth of Pennsylvania, Aug. 6, 1979 (affidavit submitted in opposition to the then pending Pennsylvania trade screening law).

116. Regarding an increase in ticket prices, distributors have noted the following:

If *Star Trek* or *Superman* opened everywhere but in a state with [a trade screening law], the volume of business in those states would have a dramatic effect on the bids that exhibitors would then have to submit. In addition, last minute "panic" buying to fill screens that would otherwise be dark at key holidays might also drive up rental prices unnecessarily. These effects would be contrary to the best interests of the local consumer.

Exhibitors by law set their own admission prices. Inevitably, some exhibitors will bid so high for a *Star Trek*, a proven audience attraction, that it will require the exhibitor to raise boxoffice [sic] prices to cover the bids. Thus, movie-goers will have to pay higher boxoffice [sic] prices, especially for the movies that people want to see most. While movie-goers in other states will pay average prices to see the best movies, with the delayed bidding required by this bill, the public in a state with this law will could [sic] pay self-imposed higher prices for the big movies.

Furthermore, the costs of a print of a color feature film range from \$2,000 to \$9,000. A proposal requiring mandatory screenings would add significant costs to the distributors. Such an expenditure would force prices higher for the exhibitor and the movie-going public. For some smaller, independent distributors, the costs of complying with such a statute may preclude them from trying to market their pictures there altogether.

Memorandum, *supra* note 113, at 4-5.

117. See *supra* note 69 and accompanying text.

118. Brief of Appellants at 8, 41-43, *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d

predict that the increased risks, burdens, and costs that trade screening laws impose on their licensing and marketing efforts will render motion picture production an unattractive investment to potential financiers,¹¹⁹ which in turn will reduce the number and diversity of motion pictures produced.¹²⁰ One distributor has noted the following:

In a society offering a variety of investment choices, this increased risk may reasonably be expected to shift some investments out of films or to affect adversely the terms on which funds may be lent. This would serve to limit the number of films which some distributors can afford to produce, resulting in an artificial limitation on the number of films available to the public.¹²¹

Of the four trade screening cases decided to date, only the district court in *Allied Artists Pictures Corp. v. Rhodes*¹²² conducted a full fact-finding proceeding examining the alleged effects of trade screening laws on motion picture licensing and production.¹²³ Regarding the potential delay occasioned by the trade screening and bidding requirements of the Ohio trade screening law, the district court considered the risk to be mini-

656 (6th Cir. 1982). Moreover, one distributor has suggested that open bidding creates an uneasiness among exhibitors. Peter S. Myers, senior vice-president of Twentieth Century-Fox Entertainment, Inc., has noted the following example:

One exhibitor bid a run in a zone, putting up a guarantee of \$75,000 and asking for clearance over a certain theatre; he put in a second bid with a \$50,000 guarantee with clearance, and a third bid of \$25,000 with another clearance. He was present when the bids were opened, saw that the highest bid was \$47,500, and withdrew his \$75,000 bid. Since bids are not binding until a contract is signed, we are left at a competitive disadvantage. Because of this practice and exhibitor apathy—many failed to show up at all—we abandoned open bidding.

Myers, *supra* note 11, at 282.

119. Sources for motion picture financing include individual and corporate investors, banks and other lending institutions, as well as the respective production-distribution companies themselves. For a discussion of the investment and financial aspects of motion picture production and distribution, see M. MAYER, *supra* note 20, at 17-26; Garey, *Elements of Feature Financing*, in *THE MOVIE BUSINESS BOOK* 95 (J. Squire ed. 1983); Weiss & Benjamin, *Feature Film Secured Financing: A Traditional Approach for Lender's Counsel*, 5 COMM/ENT L.J. 75 (1982); Mello, *Investors: You Oughta Be in Pictures*, NAT'L L.J., Aug. 24, 1981, at 21, col. 4.

120. *Allied Artists Pictures Corp.*, 496 F. Supp. at 434-35.

121. Brief of Appellant, *supra* note 92, at 25-26.

122. 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982).

123. The *Allied Artists* case involved eight weeks of discovery, followed by a four week trial. Another proceeding is scheduled to begin in Pennsylvania, where the Third Circuit Court of Appeals ordered a trial in the case challenging the Pennsylvania trade screening law. See *infra* note 134.

mal.¹²⁴ The court recognized that the law threatened to delay releases under certain circumstances, yet indicated that few pictures would be affected, that it would be unlikely for any delay to exceed four weeks,¹²⁵ and that the ability of distributors to advertise, promote, or release pictures during peak exhibition periods would not be substantially impaired.¹²⁶ The court also was not convinced that the disclosure of bidding information to exhibitors would necessarily reduce exhibitor competition for licensing terms.¹²⁷ Further, although the court noted that the law had the potential to increase the costs of motion picture distribution¹²⁸ and could operate to decrease distributors' revenues,¹²⁹ it was not persuaded that such effects were significant enough to discourage investment in motion picture productions.¹³⁰

Due to the limited time the Ohio trade screening law had been in effect prior to trial,¹³¹ distributors question whether the conclusions reached by the district court in *Allied Artists* were based on an adequate factual foundation.¹³² The district court itself recognized that one reason there was so little evidence of delays at the time of trial was that the distributors, in an at-

124. *Allied Artists Pictures Corp.*, 496 F. Supp. at 423.

125. *Id.* at 421-23, 438-39. Regarding the occurrence of delays, the district court found: "Occasionally, a film is delayed in production and is actually completed within a few days of its scheduled release date. When that occurs, the time required by the bidding process may delay a film beyond the contemplated release date." *Id.* at 422.

126. *Id.* at 424.

127. *Id.* at 449.

128. *Id.* at 423, 439.

129. *Id.* at 423-24.

130. *Id.* at 424, 434-35. The district court noted that witnesses had:

made it clear that the decision to finance and produce a particular film is not primarily motivated by considerations regarding its marketing, such as whether it should be blind bid or trade screened. . . . And Alan Hirschfield, referring to the period from 1973 to 1978, when he was president and chief executive officer of Columbia Pictures, testified that investors relied on Columbia's production and marketing expertise and did not consider what licensing and bidding procedures Columbia used.

Id. at 434. A reduction in motion picture production has not yet resulted. In fact, in 1982, 244 new feature motion pictures were released by the major companies, an increase of 21% over 1981 and the largest number since 1972. Ritzer, *supra* note 14. One analyst has even noted that the current increase in motion picture production has actually resulted in a production glut. Ritzer, *Production glut threatens industry profits: Londoner*, *The Hollywood Reporter*, Apr. 22, 1983, at 1, col. 1; see also Sansweet & Landro, *As the Money Rolls In, Movie Makers Discover It Is a Mixed Blessing*, *Wall St. J.*, Sept. 1, 1983, at 1, col. 6 (high investment interest in motion picture production).

131. The Ohio law had been in effect for approximately eight months at the time of trial. *Allied Artists Pictures Corp.*, 496 F. Supp. at 422.

132. Brief of Appellants, *supra* note 118, at 6.

tempt to lessen the initial impact of the law, "rushed" to blind bid their pictures prior to its effective date.¹³³ Thus, it appears that the facts upon which the district court relied for its conclusions may not have given an accurate indication of the actual long term effects of the law. More accurate factual findings are likely to be made in the lawsuit challenging the Pennsylvania trade screening law¹³⁴ since that law will have been in effect for over two years by the time of trial. Lawmakers, of course, should not view the factual findings made by any court as being wholly applicable to licensing and distribution within their respective states. Rather, they should make their *own* factual findings as to the effects of blind bidding and trade screening on licensing and distribution within their states before acting.

Presently, the enactment of trade screening legislation appears to have come to a halt. The last trade screening law to be enacted was the Missouri law in July, 1982.¹³⁵ Prior to the passage of that law, over a year had passed since a state trade screening law had been enacted.¹³⁶ During the 1983 legislative session, bills to enact trade practice restrictions were pending in Arizona, Colorado, Mississippi, New Hampshire, New Jersey, Texas, and Vermont; none of these bills were enacted.¹³⁷ Concern of legislators as to whether such legislation is both constitutionally and legislatively sound, as well as the lobbying efforts of distributors and state film commissions, may account for this decline in newly-enacted trade screening laws. Several bills to repeal existing laws have also been introduced.¹³⁸

133. *Allied Artists Pictures Corp.*, 496 F. Supp. at 422.

134. *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). On a motion for summary judgment, the district court held that the Pennsylvania law was unconstitutional on its face under the first amendment and federal copyright law. Although the Third Circuit Court of Appeals approved the legal analysis adopted by the district court, it reversed the district court's grant of summary judgment and remanded the case for trial due to many unresolved questions of fact.

135. MO. ANN. STAT. §§ 407.350 to -.357 (Vernon Supp. 1983).

136. The state preceding Missouri was Kansas, which passed its trade screening law in April, 1981. Prince George's County, Maryland, passed its trade screening ordinance in November, 1981. See *supra* note 60.

137. Letter from Simon Barsky, Vice President and Deputy General Counsel of the Motion Picture Association of America, to Thomas A. Bartasi (Aug. 31, 1983).

138. The Arkansas House of Representatives recently voted 73-6 to repeal its trade screening law; however, the measure failed to reach the Senate for approval before adjournment by the state legislature. Legislators must now wait until the legislature reconvenes in 1985 before the repeal measure can be reintroduced. Ritzer, *Attempt to Repeal Arkansas Blind Bidding Ban Fails, Law Stands*, *The Hollywood Reporter*,

IV

Alternatives and Suggestions

The goal of every lawmaker, when drafting legislation, is to advance the particular statutory objectives with laws that are necessary, drawn with precision, and in the public interest. This drafting objective is particularly important with respect to legislation, such as trade screening laws, that involves first amendment and commerce clause considerations because the constitutionality of such legislation is tested under legal standards that require not only the advancement of sufficient state interests but also the selection of the least restrictive means possible of advancing such interests.¹³⁹ In an effort to facilitate such draftsmanship, the following section discusses less re-

Mar. 30, 1983, at 1, col. 2. Attempts to repeal the Georgia and Tennessee laws have also been made; the Georgia bill has been referred to an interim study. Letter, *supra* note 137.

139. Motion pictures are a protected form of expression and any regulation affecting their dissemination, such as trade screening laws, may be subject to review under the first amendment. The courts that have examined the constitutionality of trade screening legislation under the first amendment have characterized it as content-neutral, trade regulation, only incidentally affecting expression, and thus have applied the four-pronged balancing test set forth by the United States Supreme Court in *United States v. O'Brien*, 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968), as the applicable standard of review. See *Allied Artists Pictures Corp.*, 496 F. Supp. at 433; *Associated Film Distribution Corp.*, 520 F. Supp. at 986 and 683 F.2d at 813 (on appeal); *Paramount Pictures Inc.*, 250 Ga. at —, 297 S.E.2d at 253-54. The *O'Brien* test provides:

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

O'Brien, 391 U.S. at 377 (emphasis added).

Trade screening laws also involve commerce clause considerations since interstate commerce includes the nationwide distribution of motion pictures. In analyzing the burden of the Ohio trade screening law on interstate commerce, the *Allied Artists* district court applied the two-step balancing test set forth by the United States Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), as the applicable standard of review. See *Allied Artists Pictures Corp.*, 496 F. Supp. at 440; see also *Allied Artists Pictures Corp.*, 679 F.2d at 665. The *Pike* test states:

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. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. 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.*

Pike, 397 U.S. at 142 (emphasis added).

strictive alternatives to the common provisions contained in trade screening laws.¹⁴⁰

Obviously, the least burdensome alternative to a trade screening law is no law. The need for trade screening legislation, and the benefits and burdens resulting therefrom, have been subject to much debate among distributors, exhibitors and legislators,¹⁴¹ and the fact that twenty-seven states have yet to enact such legislation is evidence as to how unsettled the issue is. The initial question lawmakers from blind bidding states should resolve is whether it is in the public interest to regulate the motion picture licensing process.¹⁴² In answering this question, legislators should determine whether the benefits of an unrestricted licensing process outweigh the alleged unfairness and harms resulting from blind and closed bidding. In addition, legislators should keep in mind that the constitutionality of three laws is still in question.¹⁴³ The following alternatives and suggestions should also be considered.

A. Mandatory Trade Screening Requirements

Exhibitors feel there is no substitute for viewing what they are licensing *prior to* licensing. However, as previously noted, the use of blind bidding may not be as unfair to exhibitors as it may appear.¹⁴⁴ Moreover, trade screening laws, in particular mandatory trade screening requirements, may have undesirable consequences on motion picture licensing in terms of delaying the release of motion pictures and increasing

140. See generally *Allied Artists Pictures Corp.*, 496 F. Supp. at 435 n.15, 440-41 (discussion of less restrictive alternatives to the Ohio trade screening law); *Associated Film Distribution Corp.*, 520 F. Supp. at 989-90 (discussion of less restrictive alternatives to the Pennsylvania trade screening law).

141. See discussion cited *supra* note 8.

142. See *Allied Artists Pictures Corp.*, 679 F.2d at 661 ("Statutes which require that buyers and sellers provide each other with accurate information about their products and services in order to counteract deceptive and misleading practices are based on legitimate state interests."); but see *Paramount Pictures Inc.*, 250 Ga. at —, 297 S.E.2d at 254-55 ("I fail to see wherein the competitive struggles of motion picture distributors and exhibitors are 'affected with a public interest' to any greater degree than similar struggles of other producers and consumers." *Id.* at 255) (Weltner, J., dissenting). See also discussion cited *supra* note 8.

143. Although the Georgia trade screening law and the trade screening and open bidding provisions of the Ohio trade screening law have been upheld, challenges made against the Pennsylvania trade screening law, the advance and guarantee restrictions of the Ohio law, and the guarantee restriction of the Utah law are still unsettled. See *supra* notes 109 and 134.

144. See *supra* text accompanying note 51.

distribution costs.¹⁴⁵ Since the box office success or failure of any picture depends upon the unpredictable response of the movie-going public, the questions posed concerning mandatory trade screening are whether the commercial potential of a picture can be ascertained with any degree of accuracy on the basis of an advance screening, and whether the suitability of a picture for an exhibitor's customers can only be determined from such a screening. The following discussion of suggested alternatives to a mandatory trade screening requirement will be helpful to those lawmakers who feel some regulation of blind bidding short of mandatory trade screening may be necessary.

1. *Waiver Provisions*

One criticism made against mandatory trade screening is that it prevents exhibitors from either negotiating or bidding for a motion picture prior to its completion and screening, regardless of how much information they may have about a picture or how willing they are to license it sight unseen. It may not always be necessary for exhibitors to view motion pictures in order to make informed licensing judgments as to commercial potential and audience suitability. For instance, some motion pictures, particularly those based on popular or well known subject matter, such as a *Star Wars*, *Rocky*, or *James Bond* sequel, or those which are the product or creation of a reputable talent, such as George Lucas or Steven Spielberg, guarantee by their subject matter or talent alone a certain degree of box office success. For example, George Lucas' *Star Wars* sequel, *Return of the Jedi*, recently set an opening-day and one-day box office record by grossing \$6.2 million on its first day of release.¹⁴⁶ Requiring mandatory trade screenings for these pictures may become more of a burdening formality to anxious exhibitors than a beneficial licensing provision.

Possible alternatives to mandatory trade screening would be to provide exhibitors with the opportunity to waive the trade screening requirement, to allow blind bidding in certain limited situations when the risks associated with the method are reduced to what may be perceived to be an "acceptable" level,

145. See *supra* notes 112-21 and accompanying text.

146. Caulfield, *A Record 1st-Day Gross of \$6 Million for 'Jedi'*, Los Angeles Times, May 27, 1983, § VI, at 1, col. 1. See also Pollock, *'Jedi' Pulls In \$41 Million in First Six Days*, Los Angeles Times, June 1, 1983, § IV, at 1, col. 3.

or to allow each distributor the opportunity to blind bid a specified number of motion pictures per year.¹⁴⁷ Of the several states that presently provide waiver provisions, the South Carolina law provides the broadest waiver provision by allowing exhibitors within any particular county to waive the trade screening requirement for any motion picture if all exhibitors within that county agree to such a waiver.¹⁴⁸ An even broader waiver would be to allow any willing exhibitor to waive the trade screening requirement and to negotiate or bid for a picture without a prior screening. Another alternative that should be considered is a border-waiver provision, similar to the one included in the West Virginia law, designed to avoid placing exhibitors at a competitive disadvantage in their respective exhibition markets.¹⁴⁹

2. *Advance Disclosure—Cancellation Provision*

Another alternative to mandatory trade screening would be to allow distributors the opportunity to blind bid any motion picture but, at the same time, require them to make certain disclosures or guarantees regarding such pictures prior to negotiations or bidding, and to provide exhibitors with a statutory right of cancellation. Under this alternative, any exhibitor who enters into an exhibition license under the blind bidding method is given the right to cancel the license if, upon viewing the completed motion picture, the exhibitor discovers that its content does not conform to the pre-licensing information provided by its distributor. A bill introduced in the New Jersey legislature has incorporated this alternative.¹⁵⁰ Under the proposed "Movie Suitability Advance Disclosure Act,"¹⁵¹ a distributor would be allowed to blind bid any motion picture provided its bid solicitation included the audience to which the picture

147. See *supra* notes 70-81 and accompanying text.

148. S. C. CODE ANN. § 39-5-540 (Law. Co-op. Supp. 1982). See *supra* note 79 and accompanying text.

149. See *supra* notes 80-81 and accompanying text.

150. The Missouri trade screening law partially incorporates this alternative. Although not every motion picture may be blind bid, when it is allowed and undertaken, the distributor must specify the audience to which the picture is directed and the anticipated rating. MO. ANN. STAT. § 407.357 (Vernon Supp. 1983). See *supra* notes 71-75 and accompanying text. The right to cancel exhibition licenses for non-conforming blind bid pictures must also be made available to exhibitors under the Missouri law. See *infra* note 157 and accompanying text.

151. Movie Suitability Advance Disclosure Act, Assembly No. 1767 (introduced July 8, 1982; not enacted) [hereinafter cited as Disclosure Act].

is directed and the anticipated rating for the picture.¹⁵² If the actual rating is more restrictive than the rating indicated by the distributor, or if the motion picture does not substantially conform to the pre-licensing information provided by the distributor, the exhibitor may void the exhibition license.¹⁵³ Furthermore, if the distributor does not give the exhibitor adequate notice that the picture does not conform to the anticipated rating or to other pre-licensing information, the distributor would be liable to the cancelling exhibitor for liquidated damages.¹⁵⁴ The legislative statement accompanying this bill suggests the reasons for adopting this alternative over mandatory trade screening:

This bill is based on the premise that there is not sufficient reason to legislatively outlaw "blind" bidding, nor to single out film exhibition for such a restriction while it is permitted in many other areas of business such as bidding on unwritten novels or memoirs for publication or film rights or bidding on sealed auction lots of abandoned property or mineral rights of unexplored geographical formations. Furthermore prior legislative evidence has been persuasive that the public interest would be adversely affected by the probability that first run films would be released several weeks later in New Jersey than in neighboring states if "blind" bidding were outlawed solely on this side of the State boundary.¹⁵⁵

The advantage of this alternative is that it enables distributors to blind bid their motion pictures when it is necessary, while protecting exhibitors from becoming contractually committed to unsuitable pictures. Although this alternative would not provide exhibitors with the opportunity to review the quality and nature of a motion picture prior to licensing, it does give a distributor an incentive to be as accurate and truthful as possible with any pre-licensing information made available to exhibitors, since any cancellations may leave that distributor holding a completed picture without a screen to show it on at the time of release. Exhibitors may, however, be reluctant to exercise a right of cancellation for two reasons. First, for fear that it will strain future business dealings with distributors. Second, because, upon cancellation of an exhibition license, the cancelling exhibitor would be placing himself in the unde-

152. *Id.* at § 3.

153. *Id.* at § 4a.

154. *Id.* at § 5b.

155. *Id.* at § 4.

sirable position of having to search for a last minute replacement picture to fill his screen. The Missouri trade screening law, the only law that presently includes a cancellation provision,¹⁵⁶ provides some relief for the cancelling exhibitor by requiring that every exhibition license entered into under blind bidding contain a provision stating the amount of damages for which the distributor is liable in the event the license is cancelled.¹⁵⁷ Although this provision still places a cancelling exhibitor in the awkward position of having to search for a replacement picture, it does attempt to provide compensation for this inconvenience. The proposed New Jersey law also attempts to provide relief for the cancelling exhibitor, however, unlike the Missouri provision, the New Jersey proposal allows a distributor to avoid liability for liquidated damages by providing an exhibitor with written notice at least fifteen days prior to the scheduled exhibition date that the licensed motion picture does not conform to pre-licensing disclosures.¹⁵⁸ This provision is based on the premise that liquidated damages are not warranted when a fifteen day advance notice is given, since the exhibitor will then have sufficient time to secure a replacement picture should he choose to cancel the exhibition license.

3. *Alternative Statutory Remedies*

The enactment of anti-deception or misrepresentation statutes directed specifically at the motion picture licensing process is another suggested alternative to mandatory trade

156. See *supra* note 150.

157. The Missouri law provides in relevant part:

A license agreement is voidable by the exhibitor if the released motion picture does not substantially conform to the information provided by the distributor about the motion picture in the invitation to bid, or if the rating given by the Classification and Rating Administration is more restrictive than the rating indicated by the distributor in the invitation to bid, and all money received by the distributor from the exhibitor before the release of the motion picture under the terms of the license agreement, shall be returned to the exhibitor within seven days. All license agreements entered into as a result of blind bidding shall contain a provision stating the amount of damages payable to the exhibitor by the distributor in the event the license agreement is voided under the terms of this section.

MO. ANN. STAT. § 407.357 (Vernon Supp. 1983). A cancellation provision was also included in the 1968 stipulation with the major distribution companies. Under this provision, a distributor was allowed to blind bid any motion picture provided the exhibition license gave the exhibitor a right to cancel the license. See *supra* note 57.

158. Disclosure Act, *supra* note 151, at § 5.

screening.¹⁵⁹ Under this alternative, distributors would be allowed to blind bid their motion pictures, yet be liable for exhibition losses incurred as a result of misleading representations made to exhibitors.

For example, a New Mexico statute provides:

Any producer and/or distributor, who misrepresents, either orally or otherwise, the merit or box office value of any motion picture or pictures, at the time of sale or lease of any product, or part thereof, shall be held accountable therefor and if such producer and/or distributor shall refuse or fail to make adjustment, the producer and/or distributor shall be civilly liable in damages, both actual and punitive, to the person or persons damaged, including all costs and attorneys' fees.¹⁶⁰

However, until more statutes similar to the New Mexico statute are enacted, exhibitors must proceed against distributors under their states' general misrepresentation and consumer protection laws.

This alternative to mandatory trade screening would allow distributors to blind bid their motion pictures, reduce the risk of loss assumed by exhibitors from the alleged misleading nature of the practice, and give distributors an incentive to provide exhibitors with accurate pre-licensing information. This alternative would, however, fail to further the objective of facilitating informed licensing judgments by exhibitors as to the commercial potential and audience suitability of motion pictures prior to licensing. Moreover, the cost, time, and proof problems associated with initiating such actions every time box office expectations are not realized, as well as the negative effect such actions may have on future business dealings with distributors, would likely deter some exhibitors from seeking such relief.¹⁶¹

*Presidio Enterprises, Inc. v. Warner Bros. Distribution Corp.*¹⁶² provides an example as to how an exhibitor may proceed successfully against a blind bidding distributor under a consumer protection statute. In this case, a Texas exhibitor brought an action under the Texas Deceptive Trade Practices-

159. Brief for Appellees at 25, *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3d Cir. 1982).

160. N.M. STAT. ANN. § 57-5-15 (1981).

161. For an example of a comprehensive statute directed specifically at the motion picture licensing process, see N.M. STAT. ANN. §§ 57-5-1 to -5-22 (1978).

162. No. A-79-CA-290 (W.D. Tex. filed July 25, 1983).

Consumer Protection Act¹⁶³ against Warner Bros. for economic losses allegedly sustained in connection with its exhibition of the Warner Bros. motion picture *Swarm* in 1978. Since Texas has not enacted a trade screening law, Warner Bros. was able to license this picture under the blind bidding method. The plaintiff-exhibitor based its winning bid on some very optimistic representations communicated by Warner Bros. while the picture was still being produced regarding the nature and potential box office success of *Swarm*.¹⁶⁴ Upon exhibition, the picture turned out to be a flop, which prompted the plaintiff-exhibitor to bring its misrepresentation action against Warner Bros. for the recovery of box office losses allegedly sustained from the picture's exhibition. The jury returned a verdict for the plaintiff-exhibitor and judgment was so rendered.¹⁶⁵ Although this decision does not make the use of blind bidding illegal in Texas or anywhere else, it does put blind bidding distributors on notice that the over-selling of unseen and unlicensed motion pictures may no longer be tolerated by injured exhibitors. Moreover, it establishes that an exhibitor can be successful under state law in remedying wrongs that may occur under the blind bidding method.

4. *Partial Screenings*

Requiring a distributor to trade screen only a sample or portion of every motion picture before licensing can begin is yet another alternative to mandatory trade screening. When trade screening is presently required, a distributor must show exhibitors the picture in its final form. This alternative would enable distributors to advance license their pictures, while providing exhibitors with the opportunity to sample the quality and nature of pictures prior to licensing. However, since a few selected film clips are not always indicative of the nature or quality of the entire picture, it is questionable whether this

163. TEX. BUS. & COM. CODE ANN. § 17.00-.63 (Vernon 1982). This lawsuit was also based on common law fraud and negligent misrepresentation.

164. Fourth Amended Complaint at 3-19, *Presidio Enterprises, Inc. v. Warner Bros. Distribution Corp.*, No. A-79-CA-290 (W.D. Tex. filed Feb. 28, 1983). It was alleged in the complaint that Warner Bros. promoted *Swarm* to exhibitors as being "bigger than *The Towering Inferno*" and "more exciting than *The Poseidon Adventure*," two prior box office blockbusters, when in fact Warner Bros. allegedly had undisclosed marketing studies that indicated less than average audience interest in the picture and revenue projections that were far short of blockbuster status. *Id.*

165. The case is presently being appealed.

alternative would allow exhibitors to make informed licensing decisions any better than blind bidding does.

B. Competitive Bidding Guidelines

As previously discussed, the majority of trade screening laws contain competitive bidding guidelines that distributors are required to follow once bidding is initiated.¹⁶⁶ These guidelines purport to insert elements of fairness and openness into the competitive bidding process, while removing suspicion held by exhibitors of the manipulation of bids by distributors.¹⁶⁷ As with a trade screening requirement, the least restrictive alternative to a regulated bidding process is no regulation. The question posed is whether there is a legitimate need to disclose what was once the private business dealings between two groups. The trade screening laws of six states, while requiring that motion pictures be trade screened, do not regulate the bidding process in any manner.¹⁶⁸

Under an unrestricted bidding process, exhibitors must seek relief under antitrust laws, fair trade laws, or other available statutes from any unfair or discriminatory manipulation of bids by distributors. The cost, time, and proof considerations confronting exhibitors under this alternative may deter most from initiating such actions. Moreover, the objectives of bringing "orderliness and openness" to the licensing process and of reducing suspicion of unfair dealings would not be achieved. Although the present guidelines seem to provide the most effective and least restrictive means of furthering these objectives, some of the guidelines may be overly burdensome with respect to their rebidding provisions.

The rebidding provision is the section contained in bidding guidelines that instructs distributors as to what licensing options are available to them if a satisfactory bid is not returned by solicited exhibitors from the initial round of bidding.¹⁶⁹ Of the three types of rebidding provisions, mandatory rebidding is obviously the most burdensome on motion picture licensing and distribution in that compliance may result in increased licensing delays and costs. In the absence of mandatory rebid-

166. See *supra* notes 41, 67-68 and accompanying text.

167. See *supra* notes 39-40 and accompanying text.

168. The six states are Georgia, Idaho, Montana, Oregon, Tennessee, and Utah. See *supra* notes 60 and 118.

169. See *supra* notes 99-108 and accompanying text.

ding, when distributors do not receive any acceptable bids from their initial solicitation, they are free either to enter into negotiations with selected exhibitors and promptly complete licensing or to rebid the picture. Mandatory rebidding, however, takes away a distributor's negotiation option by requiring additional, time-consuming rebiddings should the initial round of bidding fail to produce any satisfactory bids. This tends to delay the licensing of motion pictures beyond the time it takes to comply with general trade screening and bidding requirements and to increase distribution costs. These considerations may compel a distributor to accept a less than satisfactory bid rather than resort to the time and cost of rebidding. Existing mandatory rebidding provisions also fail to address the situation in which a distributor receives *no* bids from solicited exhibitors. Apparently, in such instances, distributors must rebid the picture to uninterested exhibitors until an acceptable bid, or any bid for that matter, is received.

Such factors suggest that mandatory rebidding may be overly restrictive. Legislators must determine whether there is a demonstrated need to "lock" distributors into the bidding process once it is undertaken. The optional and intermediate rebidding provisions contained in several trade screening laws offer less restrictive alternatives to mandatory rebidding.¹⁷⁰ In addition, the intermediate rebidding provision makes it clear to distributors that they may enter into negotiations if no bids are returned from solicited exhibitors.

C. Restrictions on Advance and Guarantee Payments

As previously discussed, four trade screening laws indirectly prohibit the use of guarantee payments in exhibition licenses.¹⁷¹ Two of these laws also prohibit the use of advance payments.¹⁷² These payments allow distributors to spread a portion of the financial risks and market uncertainties associated with the distribution and exhibition of motion pictures to the exhibition component, while providing exhibitors with competitive licensing terms with which to improve their ability to obtain exhibition licenses for popular motion pictures.¹⁷³ Advance payments also serve the function of providing distrib-

170. See *supra* notes 104-08 and accompanying text.

171. See *supra* notes 89-95 and accompanying text.

172. See *supra* notes 84-88 and accompanying text.

173. See *supra* text accompanying notes 29-34.

utors with a means of securing the performance of licensing obligations by exhibitors.¹⁷⁴

The primary objectives underlying the enactment of trade screening legislation are to bring fairness, openness, and competition to the motion picture licensing process. Prohibiting the use of advance and guarantee payments does not seem necessary to achieve those objectives and is subject to criticism. First, there is nothing inherently unfair or deceptive about accepting or soliciting guarantee payments as a means of fostering competition among exhibitors and of spreading the risks associated with motion picture distribution and exhibition. Nor is it unfair to allow distributors the opportunity to request refundable advance payments from exhibitors as a means of securing the performance of licensing obligations.¹⁷⁵ Many commercial relationships require the advancement of returnable funds, particularly where poor performance of contractual obligations by one of the parties is common. Second, such restrictions may make it more difficult for new or small exhibitors to enter and compete within established exhibition markets.¹⁷⁶ Third, by prohibiting these payments, distributors and producers alone must bear the risk of financial loss from unsuccessful motion pictures, of market uncertainties, and of slow or nonperforming exhibitors. It is one thing to reduce the risks assumed by exhibitors by restricting the use of blind bidding, but it seems unreasonable for legislators to allow them to operate nearly risk-free.¹⁷⁷

It might be argued that the payment of advances and guarantees is unfair to exhibitors when made in conjunction with blind bidding, since they are then advancing funds and guaranteeing returns for a product they have not had the opportunity to examine. However, this risk seems to be an inherent aspect of the motion picture business when considered with the risks producers and distributors assume when they commit large sums of money, in advance, for the rights to novels and plays or for the production of pictures, relying solely on the reputations of writers, actors, producers, and directors. In addition,

174. See *supra* text accompanying note 35.

175. See discussion cited *supra* note 35.

176. See *supra* note 94 and accompanying text.

177. Even when left unrestricted, the risks assumed by the large theatre chains are sometimes minimal due to their ability to compel distributors to renegotiate terms on unsuccessful motion pictures. See Statfeld, *supra* note 8, at 30-31.

the risk assumed by exhibitors is reduced when a motion picture is trade screened prior to licensing since exhibitors, having been given the opportunity to view the picture, may then base their decision of whether and how much money should be advanced or guaranteed on their own assessment and business judgment. Accordingly, a more reasonable and less restrictive alternative to complete prohibition would be to require that motion pictures be trade screened before advance and guarantee payments could be included in exhibition licenses. This alternative might not only promote competition and "informed" decisionmaking among exhibitors, but would also allow the risks of the movie-making business to be shared among the entire industry.¹⁷⁸ The fact that only four out of twenty-three trade screening laws presently prohibit the use of advance and guarantee payments further indicates that such restrictions are neither necessary nor desirable.¹⁷⁹

V

Conclusion

The various forms of trade screening laws and the alternatives discussed in this survey and analysis provide legislators contemplating the enactment or revision of such legislation with numerous drafting options. Regulation can be extensive,¹⁸⁰ minimal,¹⁸¹ or nonexistent; trade screening can be made mandatory, waivable, or blind bidding can be numerically limited; rebidding can be made mandatory or optional; and the use of guarantee and advance payments can be prohibited or left unrestricted. The threshold issue legislators must resolve is whether it is necessary and wise to regulate blind and closed bidding.¹⁸² Although trade screening laws have been enacted in twenty-three states, the legislatures of many

178. A provision that requires distributors to make interest payments to exhibitors on advance payments should also be considered by legislators. See generally Comment, *Interest on Security Deposits—Benefit or Burden to Tenant?* 26 U.C.L.A. L. Rev. 396 (1978) (analysis of legislatively mandated interest payments on security deposits held by landlords).

179. In addition, these restrictions may prove to be unconstitutional both as an impermissible restraint on price under the commerce clause (see *Allied Artists Pictures Corp.*, 679 F.2d at 663-665 (Ohio restrictions)) and as being overbroad under the first amendment (see *Associated Film Distribution Corp.*, 520 F. Supp. at 990, *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982) (Pennsylvania restrictions)).

180. See, e.g., PA. STAT. ANN. tit. 73, §§ 203-1 to -11 (Purdon Supp. 1983-1984).

181. See, e.g., OR. REV. STAT. § 646.890 (1979); Disclosure Act, *supra* note 151.

182. See discussion cited *supra* notes 8 and 142.

blind bidding states have been unconvinced that there is a need to regulate the motion picture licensing process or that the alleged unfairness resulting from blind and closed bidding outweighs the marketing and distribution efficiencies associated with an unrestricted licensing process. If a determination is made that such regulation is warranted, the objective of lawmakers should be to draft a law that, while bringing "fairness and openness" to the licensing process, does not unnecessarily burden that process. Consideration of the various statutory provisions and alternatives discussed in this survey will provide a basis for achieving such draftsmanship.

