**Buffalo Law Review**

Volume 8 | Number 1 Article 36

10-1-1958

# Constitutional Law—Motion Picture Censorship

Buffalo Law Review

subject to state regulation. In analyzing the contracts entered into by petitioner and his publisher, the Court conceded that the publisher might be engaged in interstate commerce but held that this conclusion did not apply to Steinbeck, since there was no joint venture.[88] Significant to the Court was the fact that there was to be no sharing of losses and no merging of the parties' property, interests, skills, and risks, which are necessary elements of a joint venture. It should be noted also that petitioner had no control over the number of magazines, newspapers, books and plays which were printed and sold. Decisions affecting these matters were solely those of the publishers. Even if there were a joint venture, there is some doubt that this would bring Steinbeck entirely within the coverage of the commerce clause.[89] The Court, however, found that no such joint adventure existed and further stated that the source of the author's income was not the sales made by the publisher, but the contracts made between him and his publisher in New York City. The gross receipts from interstate sales were simply the measure of the price for the licensing of the author's rights in his literary works. The writings of Steinbeck and the licensing of certain rights thereto were separate and distinct from the subsequent sales by others of his works. A tax, therefore, measured by gross receipts on earnings derived from the contracts, affects interstate commerce so incidentally and remotely as not to amount to a regulation of such commerce.[90] The Court, citing *Western Live Stock v. Bureau of Revenue*,[91] also stated that since the performance of the contract was not within the protection of the commerce clause, the contract itself was not.

## Motion Picture Censorship

The validity of New York's motion picture licensing statute, section 122 of the Education Law, has been raised twice before the United States Supreme Court. In both instances it has been held invalid as applied. In *Joseph Burstyn, Inc. v. Wilson*[92] the Supreme Court reversed a New York Court of Appeals denial of a license for the picture "The Miracle" because it was a "sacrilegious"

88. Hasday v. Barocas, 10 Misc.2d 22, 115 N.Y.S.2d 209 (Sup.Ct. 1952). Gordon v. Garcia Sugars Corp., 241 App.Div. 155, 271 N.Y.Supp. 303 (1st Dep't 1934); Reynolds v. Searle, 186 App.Div. 202, 174 N.Y.Supp. 137 (4th Dep't 1919).

89. See Norton Co. v. Dep't of Revenue, 340 U.S. 534 (1951); Central Greyhound Lines Inc., v. Mealey, 334 U.S. 653 (1948); *but see* Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422 (1947).

90. See Ficklen v. Shelley County Taxing Dist., 145 U.S. 1 (1892).

91. 303 U.S. 250 (1938). The *Western Live Stock* case also settled the question that taxation of a local business or occupation which is separate and distinct from interstate commerce is not forbidden merely because it induces such commerce.

92. N. Y. EDUCATION LAW, §§122 and 124 require that the Board of Regents of State University issue a license for a film unless it is: ". . . obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."

movie which could not be licensed under section 122.[93] In reversing, the Supreme Court indicated that motion pictures were protected expressions under the First and Fourteenth Amendments and "sacrilegious" was too vague a standard on which to base administrative censorship of a movie. The following year in *Commercial Pictures Corp. v. Regents*,[94] a per curiam decision citing *Burstyn*, the Supreme Court reversed a denial of a license for the picture "La Ronde" which was based on that portion of section 122 requiring denial of a license for "immoral" pictures. Any meaning given to a per curiam decision is somewhat speculative, but the *Commercial* decision has been taken to indicate that, without further definition, "immoral" as a standard in the New York statute, is too vague a guide for administrative censorship and therefore denies constitutional due process.

Shortly after these Supreme Court decisions the New York Legislature attempted to cure the vagueness of section 122 by enacting section 122-a of the Education Law, which provided definitions of "immoral films" and to "incite to crime". An "immoral film" by this amendment is defined as one "the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable, or proper patterns of behavior."[95] Following the amendment of section 122 a case concerning the motion picture "Garden of Eden" came before the Court of Appeals.[96] However, the question of vagueness of the statute was not made an issue because the charge against the movie was that it was obscene, and the Court held that the picture was not obscene.

Recently in *Kingsley Int'l Pictures Corp. v. Regents*[97] the Court of Appeals reversed an Appellate Division holding that a license should be granted for the picture "Lady Chatterley's Lover." In this four-to-three decision the majority indicated that section 122-a had cured the vagueness of the standard of "immorality" of section 122 and adequately identified those pictures which were to be restricted. It rested the denial of a license on the legitimate interest of the state in protecting public morality and indicated that motion-picture licensing was the only effective means of preventing the tendency of immoral pictures to corrupt that morality.

Judge Desmond, in concurring, expressed doubt as to whether section 122-a had cured the vagueness of section 122 indicated in the *Burstyn* and

93. 343 U.S. 495 (1952), *reversing*, 303 N.Y. 242, 101 N.E.2d 665 (1951).
94. 346 U.S. 587 (1954), *reversing*, 305 N.Y. 337, 113 N.E.2d 502 (1953).
95. N. Y. EDUCATION LAW §122-a(1).
96. Excelsior Pictures Corp. v. Regents, 3 N.Y.2d 237, 165 N.Y.S.2d 42 (1957).
97. 4 N.Y.2d 349, 175 N.Y.S.2d 39 (1958), *appeal docketed* 27 U.S.L. WEEK 3087 (U.S. Sept. 30, 1958) (No. 394).

*Commercial* decisions, but accepted such a construction in order to uphold the validity of the statute and subject it to Supreme Court review. Dissenting opinions by Judges Dye, Fuld, and Van Voorhis maintained that section 122 as defined by section 122-a was so vague a guide for administrative censorship that it denied constitutional due process. In addition Judge Dye indicated that existing penal laws were adequate to prevent the evils of legally offensive pictures,[98] and Judge Van Voorhis that the case should have been disposed of by remanding and requiring the deletion of certain obscene scenes rather than by absolute denial of a license.

Until the *Burstyn* decision the protections of the First Amendment through the Fourteenth had not been extended to motion pictures.[99] That decision specifically extended the right of freedom of expression to them, but recognized that the standards to be applied to them might differ from those applied to other media. It also posed, without answering, the question of whether a clearly drawn statute requiring denial of a license to a motion picture because of obscenity might be upheld. However, since this case, no motion picture licensing statute has been upheld, all being turned down for vagueness.[100]

In the light of the *Burstyn* decision, the *Kingsley* case raises two questions: whether clearly identified motion pictures portraying sexually immoral acts as desirable or acceptable conduct can be constitutionally restricted, and whether sections 122 and 122-a are not over-broad and inclusive of protected movies, and clearly identify those movies to be restricted.

Recently in *Roth v. United States,* the Supreme Court held that obscene expression is not protected by the First and Fourteenth Amendments.[101] In upholding post-publication criminal convictions for mailing and selling obscene literature the Court set out the following test of obscenity: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[102] The Court recognized that all expression dealing with sex is not obscene and that some expression dealing with it has literary and social value. Whether sexually immoral expressions which are not obscene can be restricted depends on whether the probability of their producing a substantial evil justifies the limiting of freedom of expression. It would seem that few, if any, expressions dealing

98. N. Y. PENAL LAW §§1141 and 1141-a provide for criminal prosecution; N. Y. CODE CRIM. PROC. §22-a provides for injunctive relief after publication. See Brown v. Kingsley Books, 1 N.Y.2d 177, 151 N.Y.S.2d 639 (1956), *aff'd,* 354 U.S. 436 (1957).

99. Mutual Film Corp. v. Industrial Comm. of Ohio, 236 U.S. 230 (1915).

100. Gelling v. Texas, 343 U.S. 960 (1952); Superior Films v. Dep't of Education, 346 U.S. 587 (1954); Holmby Prods. v. Vaughn, 350 U.S. 870 (1955); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957).

101. 345 U.S. 476 (1957).

102. *Id.* at 490.

with sex which are not obscene within the *Roth* definition pose sufficient probability of evil to justify restriction.[103] It is doubtful that "Lady Chatterley's Lover" is obscene by the *Roth* test and, if it is not, it is even more doubtful that it can be restricted because of the danger which it presents.

A different problem from that of the type of movies which can be restricted is that of identification of those movies which can be restricted. No standard of restriction of freedom of expression may be so broad as to include within its terms protected expression.[104] In addition any provision for prior restraint of expression is particularly suspect because of the increased possibility of unconstitutional application.[105] When the means of restriction are administrative censorship, the standard to be applied must be specific enough to divest the censor of any discretion and clear enough to allow him to differentiate between protected and unprotected expression without reference to his own moral standards.[106]

The standards provided by sections 122 and 122-a would seem to be both overbroad and insufficient as a guide for a censor. Movies that fall within that portion of the definition dealing with portrayal of sexually immoral acts as desirable or acceptable may not be obscene, and may have such literary or social value as to require protection. Moreover, the New York statute basically defines "immorality" as "sexual morality" and to define that term and thereby determine if a license should be issued, the censor has no recourse but to apply his own standard of morality.

In view of the doubt as to whether movies such as "Lady Chatterley's Lover" may be constitutionally restricted, and the vagueness and indefiniteness still present in the New York standard, it is probable that the *Kingsley* case is destined to reversal in its pending appeal before the United States Supreme Court.[107]

## Interstate Commerce — Gross Receipts Tax

The petitioner in *Schaefer Brewing Co. v. Gerosa*[108] sold its product within the limits of the City of New York to out-of-state distributors who arranged

103. See Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 363-387.
104. Winters v. New York, 333 U.S. 507 (1948).
105. Near v. Minnesota, 283 U.S. 697 (1931); Kingsley Books v. Brown, 354 U.S. 436 (1957).
106. Cantwell v. Connecticut, 310 U.S. 296 (1940); Kunz v. New York, 340 U.S. 290 (1951); Staub v. Baxley City, 355 U.S. 313 (1958).
107. Kingsley Int'l Pictures Corp. v. Regents, 4 N.Y.2d 349, 175 N.Y.S.2d 39 (1958), *appeal docketed* 27 U.S.L. WEEK 3087 (U.S. Sept. 30, 1958) (No. 394).
108. 4 N.Y.2d 423, 176 N.Y.S.2d 276 (1958).