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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).

for transportation from the loading dock of the brewery. Petitioner assumed no further responsibility for the merchandise. For these sales the Comptroller of the City of New York assessed a deficiency for failure to pay the tax levied by the City upon all sales except where delivery was made to a common carrier for interstate transportation.[109] The Court held that the City of New York could tax receipts from the sales of a local concern, where delivery of the goods was made within this state, regardless of immediate transfer to another state by the purchaser or his agent.

The petitioner based his argument on the contention that this was a tax on the privilege of doing business and that the tax was therefore in violation of the commerce clause of the federal Constitution.[110] This argument was answered by noting that the name given the tax was of no consequence, but that the only significant issue was the nature of the operation of the tax.[111] The Court found the nature of the tax in the instant case to be identical with the nature of the tax upheld by the Supreme Court of the United States in two cases.[112] Both cases involved a tax on sales made in Indiana to non-residents of that state, who subsequent to purchase shipped the goods out of state. The tax was upheld on the ground that it was upon an event local in nature. Since the tax imposed by the City of New York is so similar to that upheld by the Supreme Court, the instant decision appears sound.

109. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK §B46-2.0(a).

110. U. S. CONST. Art. I, §8. The Court cited United States Glue Co. v. Oak Creek 247 U.S. 321 (1918); Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939); Spector Motor Service v. O'Connor, 340 U.S. 602 (1951).

111. International Harvester Co. v. Department of Treasury, 322 U.S. 340, 345-346 (1944).

112. Department of Treasury of Indiana v. Wood Preserving Corporation, 313 U.S. 62 (1941); International Harvester Co. v. Department of Treasury, *supra* note 111.