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Article 11

New York Motion Picture Censorship Law

LEGISLATION

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Authority for the censorship of motion pictures in New York State is found in Section 122 of the Education Law which provides that a license shall be issued after inspection of a film unless it or any part of 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. . . ." No motion picture (other than scientific, educational or current events films) may be exhibited in any place of amusement for pay or in connection with any business in the State of New York unless it has been licensed.

Recently, within a comparatively short period, the Supreme Court of the United States has reviewed two provisions of the New York censorship statute and found them to be unconstitutional. In *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952), the Board of Regents refused to issue a license on the ground that the picture was "sacrilegious." The Supreme Court reversed an earlier decision [*Mutual Film Corporation* v. *Industrial Commission of Ohio,* 236 U.S. 230 (1915)] and held that expression by means of motion pictures was included within the free speech and free press guarantee of the First and Fourteenth Amendments and that the standard under attack was so vague and indefinite as to offend the Due Process Clause. In *Commercial Pictures Corp.* v. *Regents of the University of the State of New York,* 346 U.S. 587 (1954), the provision for withholding a license from a film on the grounds that it was "immoral" and "tended to corrupt morals" was held unconstitutional. In a brief memorandum decision in which the *Burstyn* case was cited, the Supreme Court reversed the decision of the New York Court of Appeals which had held the provision constitutional. Ordinarily, the Supreme Court is bound by the determination of the highest court of the state in the latter's construction of the statute or any of its terms. [See *Hebert* v. *Louisiana,* 272 U.S. 312, 317 (1926)]. However, in the *Commercial Pictures* case, although there was a 4-2 decision in the Court of Appeals of New York upholding the constitutionality of the statute, the four members of the majority were unable to concur in the meaning of the term "immoral." Two judges regarded the statute as referring to "sexual immorality"; one judge construed it as meaning "contra bonos mores"; and the fourth held that the term comprised both elements. Consequently, it is not surprising that the Supreme Court could be persuaded that the term was vague and without definite content.

In both cases, appellants' primary argument was that all censorship of movies was, per se, unconstitutional. The Supreme Court, however, did not so hold. Indeed, Justice Clark, speaking in the *Burstyn* case for a unanimous Court, stated [at page 502] that "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places."

With the exception of Justice Douglas, who has consistently voiced the opinion that censorship is unconstitutional per se, [see concurring opinions in *Gelling* v. *Texas,* 343 U.S. 960 (1952), and *Commercial Pictures Corp.* v. *Regents of the University of the State of New York, supra*] and with the possible exception of Justice Black, who joined with Justice Douglas in the concurring opinion of the last cited case, the members of the Supreme Court have not committed themselves to a position adverse to a proper form of censorship. Indeed, their recorded utterances would seem to align them in favor of a properly drawn censorship statute. [See Arguments Before the Court, 22 U.S. Law Week 3181 (1954), 20 U.S. Law Week 3281 (1952)]. Justice Reed, assuming the validity of a licens-

ing system in the *Burstyn* case, concurred with the majority on the ground that that particular film was not one which the First Amendment would permit a state to exclude from public view [at page 506]. Justice Frankfurter, with whom Justices Jackson and Burton joined, concurred with the majority in the *Burstyn* case in an opinion devoted entirely to the contention that the word "sacrilegious" was so vague as to offend the Due Process requirements of the Fourteenth Amendment [at pp. 507-533]. Similarly, in his concurring opinion in the *Gelling* case, Justice Frankfurter agreed with the decision of the majority but again limited his remarks to the question of indefiniteness of the statutory standard.

It appears, therefore, that the Supreme Court would uphold the validity of a system of prior restraints if the provisions of the statute were so clear, precise, and unambiguous as to satisfy the requirements of definiteness under the Due Process Clause. [See *Winters* v. *New York*, 333 U.S. 507 (1948)]. In this connection, it should be noted that the Supreme Court of Illinois, in a decision subsequent to the *Commercial Pictures* and *Superior Films* cases, upheld the right of the City of Chicago to ban a film on the ground that it is obscene, rejecting the contention that the *Burstyn, Gelling, Commercial Pictures Corp.* or *Superior Films, Inc.* cases required a different result. The film which the Chicago censor banned on the ground of obscenity, "The Miracle," was the same film which New York unsuccessfully attempted to ban on the ground that it was sacrilegious. [See *American Civil Liberties Union* v. *City of Chicago*, 121 N.E. 2d 585 (Ill. 1954)].

In view of these two successful attacks on the constitutionality of the provisions of the New York motion picture censorship law, the New York Legislature by Chapter 620 of the Laws of 1954 amended the Education Law by adding a new Section 122-a which defines some of the terms used in Section 122. The legislation was precipitated primarily to overcome the decision of the Supreme Court in the *Commercial Pictures Corporation* case, which held that the banning of the film "La Ronde" on the grounds that it was immoral was unconstitutional. New Section 122-a which defines "immoral," "of such a character that its exhibition would tend to corrupt morals" and "incite to crime" reads as follows:

§ 122-a. Definitions.
1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, 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.
2. For the purpose of section one hundred twenty-two of this chapter, the term "incite to crime" shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

Although the Legislature omitted to define the term "sacrilegious," it may have been motivated by the difficulty of defining the term rather than by its concurrence in the unfortunate holding of the *Burstyn* case that the term admits of no precise definition. It is also significant that the Legislature omitted to define the term "obscene" probably on the well-founded belief that this term has acquired a common law meaning of sufficient precision to withstand attacks under the Due Process Clause and that it had been, inferentially at least, approved in the *Burstyn* case.

Although a more comprehensive statute might have been more desirable, to the extent that Section 122-a does define terms, it is so clearly drawn that both the motion picture industry and the censoring agency have an objective standard by which they may be guided and it would appear that the constitutional requirement of definiteness has been met.