

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

WALT DISNEY PRODUCTIONS

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU-2543

Claim No. CU-2544

Decision No. CU-6090

Counsel for claimant:

Donald B. Hagler, Esquire

Appeal and objections from a Proposed Decision entered on March 3, 1971;
No oral hearing requested; hearing on the record.

Hearing on the record held on April 28, 1971.

FINAL DECISION

The Commission issued its Proposed Decision in this claim on March 3, 1971, certifying a loss in the amount of \$166,704.98 for film product taken from Cuban distributors of claimant's product in Cuba; and for loss of certain sums due and payable to claimant by Cuban enterprises nationalized by the Government of Cuba. Portions of the claim asserted for loss of future film rentals, damages for copyright infringement, costs of preparation of the claims and attorney fees were denied.

Claimant objected to the Proposed Decision, through counsel, and submitted a Brief dated March 19, 1971, in support of the objections. Claimant's objections were directed only to the denial of the portion of the claim asserted for damages due claimant from the Government of Cuba for copyright infringement arising through exhibition of claimant's product subsequent to taking of the film product.

In the Proposed Decision the Commission determined that claimant's title to the film product in question was transferred to the Government of Cuba, along with the usual attributes of such ownership, on the respective dates of taking but that claimant was entitled to receive

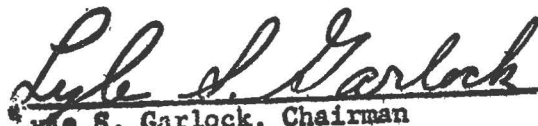
interest on the value of the property taken by the Cuban Government. Accordingly, the portion of the claim based on loss of film rentals, profits or asserted damages by infringement of copyrights, arising on the dates of loss, or for the periods following intervention in 1959 and 1965, was denied for the reason that the evidence of record contained no evidence to show that profits or damages by infringement of copyrights belonging to the claimant were taken by the Government of Cuba. (See Claim of United Shoe Machinery Corporation, Claim No. SOV-40,353, 10 FCSC Semiann. Rep. at 238; Claim of Aris Gloves, Inc., Claim No. CZ-1170, 17 FCSC Semiann. Rep. 239 [July-Dec. 1962]; Claim of Metro-Goldwyn-Mayer, Inc., Claim No. CU-2225; and Claim of Universal International Films, Inc., Claim No. CU-0574.)


Full consideration having been given to the objections of the claimant, and the entire record having been reviewed, it is

ORDERED that the Proposed Decision of March 3, 1971, be and it is hereby affirmed.

Dated at Washington, D. C.,
and entered as the Final
Decision of the Commission

MAY 12 1971


Lyle S. Garlock, Chairman


Theodore Jaffe, Commissioner

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PROPOSED DECISION

These claims against the Government of Cuba, filed under Title V of the International Claims Settlement Act of 1949, as amended, in the amended amount of \$420,018.96, were presented by WALT DISNEY PRODUCTIONS, and are based upon the asserted loss of film prints, anticipated film rentals and loss of copy-rights, and a debt of a nationalized Cuban enterprise.

Under Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 988 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since January 1, 1959 for

losses resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

Section 502(3) of the Act provides:

The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated,

intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

Section 504 of the Act provides, as to ownership of claims, that

(a) A claim shall not be considered under section 503(a) of this title unless the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss and if considered shall be considered only to the extent the claim has been held by one or more nationals of the United States continuously thereafter until the date of filing with the Commission.

The Regulations of the Commission provide:

The claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim. (FCSC Reg., 45 C.F.R. §531.6(d) (1970).)

Section 502(1)(B) of the Act defines the term "national of the United States" as a corporation or other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.

An officer of the claimant corporation, WALT DISNEY PRODUCTIONS, formerly known as Walt Disney Enterprises, has certified that the claimant was organized in the State of California and that at all times pertinent to this claim more than 50% of its outstanding shares of stock has been owned by nationals of the United States. The record, including stockholder records, establishes that 87 shareholders having addresses outside of the United States own approximately 1.66% of the outstanding shares of stock and in excess of 98% of the stock is held by shareholders who reside in and are presumed to be nationals of the United States. The Commission finds that claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

For several years prior to loss of certain film product, subject of this claim, the claimant or its subsidiary, Buena Vista Distributing Company, formerly known as Buena Vista Film Distributing Co., Inc., distributed WALT DISNEY product in various film exchanges in and outside of the United States, including the Cuban territory. The claimant utilized the services of RKO Radio Pictures, a division of RKO Teleradio Pictures, Inc., and the predecessor thereof, RKO Radio Pictures, Inc., who owned a Cuban enterprise or subsidiary known as RKO Radio Pictures of Cuba, S.A. The claimant's product was then the subject of various contracts between the Cuban subsidiary of RKO and the Cuban theatre owners or exhibitors for exhibition of the product to the public throughout the Cuban theatres.

Claimant has submitted, among other things, an inventory of film product forwarded to RKO in Cuba. This inventory of prints includes the titles, number of prints of each production, length of the production and other data. This product or inventory had been transmitted to the RKO subsidiary for distribution and exhibition in the Cuban territory, including 41-35mm feature presentations in color and 155-35mm prints in color involving featurettes, travelogues or cartoons, as well as 36-16mm color features or shorter subjects. Based upon the evidence of record, including the inventory, affidavits, agreements of the parties and other evidence of record, the Commission finds that claimant herein was, at all times pertinent to these claims, the owner of the film product, as more particularly itemized hereafter.

In early 1957 RKO closed its film exchanges or branches in the United States and Canada, and in mid-1958 began arrangements whereby foreign distribution exchanges would also be closed. RKO instituted negotiations to cancel the license agreement which it had formulated with its Cuban subsidiary and entered into distribution agreements with J. Arthur Rank Overseas Film Distribution, Ltd., a British company, doing business in Cuba through their subsidiary, and hereinafter referred to as Rank, to distribute RKO product in the Cuban territory. At this juncture, a Cuban Interventor took over the operation of the RKO offices in Cuba and seized not only the RKO

product but that owned by the claimant herein. The Commission finds that the property of claimant being distributed by RKO in Cuba was nationalized or otherwise taken by the Government of Cuba on February 3, 1959. (See Claim of RKO General, Inc., Claim No. CU-3341.)

The evidence also discloses that claimant made an agreement with the Rank organization in 1958 to distribute WALT DISNEY product in Cuba through Rank's subsidiary, Peliculas Rank, Ltd. Claimant has submitted evidence similar to that discussed above to establish their contract with Rank, the product forwarded to Cuba for distribution and that at all times pertinent to this claim the claimant was the owner of such film product. The inventory included 20-35mm feature presentations in color, 25-35mm prints in color of featurettes or travelogues and 5-16mm feature presentations in black and white. Based upon the evidence of record, the Commission finds that the claimant owned the aforesaid film presentations, which were in custody of the Rank organization, pursuant to the agreement between claimant and the Rank organization.

The Commission finds that the evidence, including correspondence and reports from the Rank organization and Bufete de Mendoza of Havana, establishes that the Rank organization in Cuba was nationalized or otherwise taken by the Instituto Cubano del Arte e Industria Cinematograficas, a governmental agency of Cuba, on January 1, 1965; and that the film product in the possession of Rank but owned by claimant herein was taken on that date. (See Claim of Paramount Pictures Corporation, et al, Claim No. CU-1664.)

The film product shipped to Cuba by claimant consisted of prints made from the negatives previously produced by claimant, or other producers from whom claimant secured rights to the prints in question. The product, shipped to the Cuban distributors over a period of several years prior to the respective dates of loss, had been exhibited or was to be exhibited by the aforesaid distributors in various areas of exhibition zones of Havana, large and small cities, as well as other areas of Cuba, including the towns and hamlets.

Thus, the product was in various stages of the depletion cycle, applicable to such product, on the respective dates of loss, with some prints apparently in active use on such dates of loss, others in a re-run category, while others were to be junked as no longer having utility for exhibition purposes.

The claimant has submitted affidavits and statements of company employees, with cost figures from Technicolor and others, indicating the cost of manufacturing film prints from negatives of the various film productions. Such sums relate to costs in the years immediately prior to shipment, including cost per foot of black and white prints, or those in color. These estimates also include incidental charges such as those incurred in shipment or custom expenses. Such computations by the claimant have been prepared on a replacement or cost when new basis, including incidental charges. The claimant asserts that the value of the film product held by RKO in Cuba had a "cost when new" value of \$33,942.00; and that the prints taken from the Rank subsidiary in Cuba had a claimed value of \$14,831.26 which was amended to \$25,526.98 since filing the claim.

Based upon the entire record, including evidence available to the Commission in this and similar claims, the Commission finds that the most appropriate basis for evaluating the film product at the time of loss is to consider not only those factors relating to cost of manufacture and shipment but those factors relating to depreciation incident to shipment, exhibition and storage in Cuba as well as public demand commensurate with prior showings of the product. The Commission has considered these factors, including those relating to depreciation or exhibition of the product, and finds that the reasonable value of the prints is as follows:

I. Film product, RKO:

41-35mm prints of feature presentations in color, at \$300.00 per print	\$12,300.00
155-35mm prints, in color, of featurettes, travelogues and cartoons, at average value of \$75.00 per print	11,625.00
5-16mm prints of feature presentations in color, at \$100.00 per print	500.00
31-16mm color prints of featurettes, cartoons and travelogues, at \$25.00 per print	<u>775.00</u>
Total	\$25,200.00

II. Film product, Rank:

20-35mm feature presentations in color, at \$300.00 per print	\$ 6,000.00
25-35mm color prints of featurettes and travelogues, at \$75.00 per print	1,875.00
5-35mm prints, black and white, feature presentations, at \$150.00 per print	<u>750.00</u>
Total	\$ 8,625.00

Accordingly, the Commission finds that claimant suffered a loss in the total amount of \$33,825.00 within the meaning of Title V of the Act, as a result of the taking of the film product by the Government of Cuba on the respective dates of taking, discussed above.

The claimant has indicated that in connection with the agreements with RKO there were gross receipts from film earnings of approximately 352,379.00 Cuban pesos (Cuban peso being on a par with the dollar), of which approximately \$194,514.00 was received by claimant under then existing contracts, according to the respective shares of the parties engaged in production, distribution and exhibition of the film product. The evidence of record does not establish that other sums were due and payable by the Cuban subsidiary of RKO at the time of loss on February 3, 1959.

With certain exceptions, noted hereafter, the evidence of record does not establish the extent to which the product was actually distributed, exhibited and exploited by Rank or the exhibitors in Cuba under the auspices

of the revolutionary government prior to January 1, 1965, when the Rank subsidiary was taken by the Government of Cuba. Evidence has not been submitted in each instance to establish exhibition of the production held by Rank, extent of attendance or box office receipts, if any, which were subject to fiscal restraints and control by the Government of Cuba. Thus, the Commission can only conclude, with the exception discussed below, that the amount assertedly accruing to claimant under their arrangements with Rank is speculative in nature and cannot be ascertained from the record.

In substantiation of sums due and payable by Rank, however, the claimant has submitted correspondence and company records of the Rank organization, as well as affidavits of their officials. This evidence establishes that at the time of the taking of the business enterprise on January 1, 1965, the Cuban subsidiary of Rank owed the claimant the sum of \$132,879.98 which was included in the bank account records and correspondence of Rank as being the separate property of the claimant. Accordingly, the Commission finds that claimant suffered a loss in the amount of \$132,879.98 within the meaning of Title V of the Act as a result of the taking by the Government of Cuba of the aforesaid Cuban enterprise on January 1, 1965. (See Claim of Kramer, Marx, Greenlee and Backus, Claim No. CU-0105, 25 FCSC Semiann. Rep. 62 [July-Dec. 1966].)

The Commission finds that the claim for the balance of film rentals, as asserted by claimant, for other income from the contracts, as described above, is speculative in nature and is hereby denied.

As stated above, product produced by WALT DISNEY PRODUCTIONS or others was transferred to RKO or the Rank organization in Cuba, pursuant to agreements between the parties, for distribution of the product in Cuba. The agreements for exhibition of the product in Cuba were apparently made on "block booking" arrangements with the Cuban exhibitors whereby contracts were made for the film product several weeks in advance. Such agreements

assertedly provide for the booking and exhibition by theatre owners of several feature presentations, with fillers or short subjects, to be furnished by claimant through their distributors in Cuba.

The claimant has asserted that when the Government of Cuba seized the film product in February 1959 from RKO or in January 1965 from Rank the claimant suffered damages by reason of the appropriation of copyright and production investment as well as that income which would have been realized from the rental, licensing and exploitation of the film product. Generally, claimant contends that the prints, aside from the physical attributes, contained a series of images which were unique and the primary things of value as the subject of the contracts between claimant and the aforesaid distributors of their product and those contracts executed in Cuba by the distributors with the theatre owners of that territory.

The Commission has carefully considered the claim asserted for loss of anticipated film rental income had not the Government of Cuba intervened. Further, the Commission has considered the claim for damages for copyright infringement arising on the respective dates of loss or after taking through exhibition of the product by agencies of the Government of Cuba. It is to be noted that generally such claims are not allowed under international law. Edwin M. Borchard discusses this matter in his recognized treatise entitled "Diplomatic Protection of Citizens Abroad". In Section 172 thereof, Mr. Borchard cites the historic "Alabama Arbitration", and goes on to say:

"This award (in the Alabama case), including the finding that 'prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies,' has been regarded as a reliable precedent by numerous other arbitral tribunals, which have disallowed indirect claims based upon loss of anticipated profits, loss of credit, and similarly consequential elements of loss."

"Acts of Congress authorizing domestic commissions to distribute international awards have followed the general rule excluding anticipated profits and indirect losses from consideration as elements of damage. *** Domestic commissions have reached the same conclusion without specific direction from Congress."

The Commission finds that the portion of the instant claim based on prospective film rentals for the periods beginning either in February 1959 or in January 1965 are not compensable under the Act. The profits or earnings of the Cuban enterprises, if any, pursuant to agreements between claimant and the other parties and which may have been realized after taking of the product, did not belong to the claimant or the other contracting parties since title in and to the Cuban distributing firms and the film product of claimant was extinguished when the Government of Cuba intervened. Likewise, an infringement of claimant's copyrights to the productions does not arise at the time of taking or through subsequent exhibition by Cuban authorities of such product. Claimant's title to the prints was transferred to the Government of Cuba along with the usual attributes of such ownership on the respective dates of taking. However, the Commission finds that claimant is entitled to receive interest on the value of the property taken by the Cuban Government, as discussed hereafter.

Accordingly, the portion of the claim based on loss of film rentals, profits or asserted damages by infringement of copyrights, arising on the dates of loss, or for the periods following intervention in 1959 and 1965, is denied for the reason that the record contains no evidence to show that any profits or damages by infringement of copyrights belonging to the claimant were taken by the Government of Cuba. (See Claim of United Shoe Machinery Corporation, Claim No. SOV-40,353, 10 FCSC Semiann. Rep. at 238; Claim of Aris Gloves, Inc., Claim No. CZ-1170, 17 FCSC Semiann. Rep. 239 [July-Dec. 1962]; Claim of Metro-Goldwyn-Mayer, Inc., Claim No. CU-2225; and Claim of Universal International Films, Inc., Claim No. CU-0574.)

A portion of these claims is based upon expenses incurred in the preparation of these claims and attorney fees. No specific provision is made in the statute for the inclusion in the certification of loss of such expenses or fees incurred by claimant in filing or proceeding with the claims. After consideration of the statute and the legislative history of the Act, the Commission finds that expenses or fees, expended or to be expended by claimant, in the filing and processing of a claim under Title V of the International Claims Settlement Act of 1949, as amended, were not intended by Congress to constitute a loss resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against property of nationals of the United States by the Government of Cuba. Thus, the Commission concludes that such claim is not within the meaning of Section 502(3) of the Act and this portion of the claims is hereby denied. (See Claim of Mary Pauline Seal, Claim No. CU-0059, 1967 FCSC Ann. Rep. 57; Claim of E. R. Squibb & Sons Inter-American Corporation, Claim No. CU-2469; Claim of The University of Chicago, Claim No. CU-2590.)

The Commission has decided that in certifications of loss on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim No. CU-0644), and in the instant claim it is so ordered.

<u>FROM</u>	<u>ON</u>
February 3, 1959	\$ 25,200.00
January 1, 1965	141,504.98

CU-2543
CU-2544

CERTIFICATION OF LOSS

The Commission certifies that WALT DISNEY PRODUCTIONS suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of One Hundred Sixty-six Thousand Seven Hundred Four Dollars and Ninety-eight Cents (\$166,704.98) with interest thereon at 6% per annum from the respective dates of loss to the date of settlement.

Dated at Washington, D. C.,
and entered as the Proposed
Decision of the Commission

MAR 3 1971


Lyda S. Garlock, Chairman


Theodore Jaffe, Commissioner

The statute does not provide for the payment of claims against the Government of Cuba. Provision is only made for the determination by the Commission of the validity and amounts of such claims. Section 501 of the statute specifically precludes any authorization for appropriations for payment of these claims. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.

ICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. (e) and (g), as amended (1970).)