

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

IN THE MATTER OF THE CLAIM OF

TWENTIETH CENTURY-FOX FILM CORPORATION
TWENTIETH CENTURY-FOX INTERNATIONAL
CORPORATION
TWENTIETH CENTURY-FOX INTER-AMERICA, INC.

Claim No. **CU** - 2114

Decision No. **CU**- 6050

Under the International Claims Settlement
Act of 1949, as amended

Counsel for claimants:

Royall, Koegel & Wells
By: H. Blackmer Johnson, Esq.
and Marc Pevers, Esq.

PROPOSED DECISION

This claim against the Government of Cuba, filed under Title V of the International Claims Settlement Act of 1949, as amended, in the amount of \$873,001.57, was presented by TWENTIETH CENTURY-FOX FILM CORPORATION, TWENTIETH CENTURY-FOX INTERNATIONAL CORPORATION and TWENTIETH CENTURY-FOX INTER-AMERICA, INC., and is based upon the asserted loss of film prints, anticipated film rentals, reimbursement for loss of property assigned by a former branch manager in Cuba, and the loss of the assets of a Cuban corporation known as Peliculas Fox de Cuba, S.A.

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.

The evidence of record discloses that TWENTIETH CENTURY-FOX FILM CORPORATION, a Delaware corporation, referred to hereinafter as FOX FILMS, owned all of the outstanding stock of TWENTIETH CENTURY-FOX INTERNATIONAL CORPORATION, a New York corporation, hereafter referred to as INTERNATIONAL, and of TWENTIETH CENTURY-FOX INTER-AMERICA, INC., a New York corporation, hereafter referred to as INTER-AMERICA. Further, the evidence discloses that INTERNATIONAL owned all of the stock of Peliculas Fox de Cuba, S.A., a Cuban corporation formed in 1922, referred to hereinafter as Fox-Cuba.

A corporate official of FOX FILMS, has certified that at all times from the asserted date of loss in May 1961 to the date of filing this claim in April 1967 more than 50% of its outstanding capital stock was owned by nationals of the United States. Further, the official stated that at all times during the aforesaid period more than 90% of the outstanding capital stock of all classes or of any beneficial interest in FOX FILMS has been owned directly or indirectly by nationals of the United States. The Commission finds that FOX FILMS and the other claimants herein are nationals of the United States within the meaning of Section 502(1)(B) of the Act.

For many years prior to the asserted date of loss of the property subject of this claim, FOX FILMS produced and furnished film product to INTERNATIONAL for distribution of Fox product throughout the world, and to INTER-AMERICA for distribution in areas near the United States. INTER-AMERICA utilized the services of Fox-Cuba, with whom distribution agreements were executed. Thereafter, the film product was distributed throughout Cuba as the subject of contracts between Fox-Cuba and the Cuban theatre owners or exhibitors and the product was exhibited to the public in various Cuban theatres in that territory whereby film rentals were earned by the Cuban subsidiary and the claimants.

FOX FILMS has submitted, among other things, company records showing shipment of product to Cuba and other areas and an inventory of film product in Cuba, assertedly taken by the Government of Cuba from Fox-Cuba. The inventory includes the various types of film prints which were the subject of distribution and exhibition contracts and included Fox product or other prints to which rights had been acquired by claimants herein. The inventory included 744 prints, such as 35mm feature presentations and short subjects. Based on the aforesaid evidence of record, as well as affidavits and company records submitted by officials of the claimants, the Commission finds that FOX FILMS was at all times pertinent to this claim the owner of the said film product, further itemized hereafter.

The Commission finds that Fox-Cuba was taken by the Government of Cuba pursuant to Resolution 2868, published by Cuban authorities in the Official Gazette on May 10, 1961, and the Commission further finds that the film inventory of FOX FILMS was taken at that time.

The Act provides in Section 503(a) that in making determinations with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to fair market value, book value, going concern value, or cost of replacement.

The question, in all cases, will be to determine the basis of valuation which, under the particular circumstances, is "most appropriate to the property and equitable to the claimant". This phraseology does not differ from the international legal standard that would normally prevail in the evaluation of nationalized property. It is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider.

The prints shipped to Cuba by INTER-AMERICA were made from negatives of various productions previously produced by FOX FILMS or other producers, domestic or foreign, from whom FOX FILMS or INTER-AMERICA had secured rights to the prints in question. These prints, apparently shipped to Cuba primarily in the period from 1953 to 1960, had been exhibited or were to be exhibited in various areas or exhibition zones in Havana, other cities in Cuba, or areas throughout the smaller towns and hamlets. Thus, the product was in various stages of the depletion cycle, applicable to such product, at the time of loss, with some prints apparently to be released or in active use in the aforesaid exhibition zones, others in a re-run category, while others were to be junked as no longer having utility for exhibition purposes.

Officials of the claimants have submitted their affidavits and statements, with cost figures from Technicolor, Pathe and other manufacturers of the prints, indicating the cost of manufacturing film product in the years immediately prior to loss, including cost per foot of black and white prints,

or those in color, along with incidental charges, such as shipping or custom expenses. Claimants have computed a value of the prints on a replacement or cost when new basis, with incidental charges added thereto; and the total value of the product in Cuba was asserted to be in the amount of \$345,588.00 at the time of loss.

Based upon the entire record, including evidence available to the Commission concerning the value of similar property in Cuba, the Commission finds that the most appropriate basis for evaluating the film product at the time of loss is to consider factors relating to cost of manufacture and shipment, as well as depreciation incident to the shipment, exhibition and storage of the product in Cuba. The Commission has considered these factors, including those relating to depreciation of the film products, and finds that the reasonable value of the prints is as follows:

35mm Features

Black and White, 239 prints, at \$150.00 per print	\$ 35,850.00
Color, 431 prints, at \$300.00 per print	129,300.00

Color Shorts

Color shorts, 74 prints, at \$50.00 per print	<u>3,700.00</u>
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Total	\$168,850.00
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The Commission finds that FOX FILMS suffered a loss in the amount of \$168,850.00 within the meaning of Title V of the Act when the Government of Cuba seized the film product on May 10, 1961.

As indicated above, INTERNATIONAL also suffered a loss when the Government of Cuba seized its wholly owned subsidiary, Fox-Cuba, on May 10, 1961. Since Fox-Cuba was organized under the laws of Cuba, it does not qualify as a corporate "national of the United States" within the meaning of Section 502(1)(B) of the Act, supra. In this type of situation, it has been held that an American stockholder is entitled to file a claim for the value of its ownership interest. (See Claim of Parke, Davis & Company, Claim No. CU-0180, 1967 FCSC Ann. Rep. 33.)

INTERNATIONAL has submitted evidence pertaining to the value of the Cuban subsidiary, including affidavits, correspondence and a certified balance sheet, dated April 1, 1961, which was prepared immediately before the date of loss; trial balances, notes thereto and profit and loss statements. Claimants have also submitted supplementary information with respect to the assets and liabilities of Fox-Cuba, including banking statements, statements of accounts due and payable, showing not only assets but certain debts payable to a claimant herein by the Cuban subsidiary at the time of loss, as more particularly discussed hereafter.

The balance sheet of Fox-Cuba, dated April 1, 1961, reflects the following (the peso being on a par with the dollar):

ASSETS

Cash

Cash in Bank No. 1	\$197,548.69
Cash in Bank No. 2	9,612.15
Cash in Bank No. 3	8,335.17
Petty Cash	<u>200.00</u>

Total Cash \$215,696.01

Accounts Receivable

Exhibitors	\$107,760.03
Others	<u>29.55</u>

Total Accounts Receivable 107,789.58

Inventories

11,866.24

Fixed Assets

Land		1,600.00
Buildings	39,200.00	
Less - Reserve for Depreciation	<u>588.00</u>	38,612.00
Furniture Equipment, etc.	24,659.24	
Less - Reserve for Depreciation	<u>21,164.39</u>	<u>3,494.85</u>

Total Fixed Assets 43,706.85

Prepaid Expenses

Court Stamps	10.00
Unexpired Insurance	640.62
Advances	80.00
Deposits for Rent, Light, etc.	530.00
Document Stamps	50.00
Postage Stamps	<u>80.00</u>

Total Prepaid Expenses 1,390.62

Total Assets \$380,449.30

LIABILITIES AND CAPITAL

Accounts Payable and Accrued Liabilities

Accounts Payable	\$ 456.74	
Accrued Taxes - Local	5,332.85	
Accrued Taxes - Inter-America	<u>3,224.27</u>	
Total Accounts Payable and Accrued Liabilities		9,013.86

Fixed Liabilities (At Long Term)

Property to be Paid		38,760.00
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Advance Payments from Exhibitors

Credit Balances		792.30
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Financial Accounts

Twentieth Century-Fox Inter-America, Inc.		286,843.57
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Capital Stock

Authorized 500 Shares at \$50.00		
Issued 500 Shares at \$50.00		25,000.00

Surplus or Deficit Account

Profit or Loss Prior Years	\$ 14,070.47	
Profit or Loss Current Year	<u>5,969.10</u>	20,039.57

Total Liabilities and Capital		<u>\$380,449.30</u>
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The Commission finds that the above balance sheet appropriately reflects the financial status of the Cuban firm on or about May 10, 1961, the date of loss. Since this is a Cuban enterprise, it is necessary to establish the net worth of this subsidiary and the Commission finds that Fox-Cuba had a net worth of \$45,039.57 on May 10, 1961, the date of loss. The Commission also finds that INTERNATIONAL suffered a loss in this amount within the meaning of Title V of the Act.

According to the balance sheet, there was an intercompany indebtedness of the Cuban subsidiary payable to INTER-AMERICA, consisting of an account in the amount of \$286,843.57. Accordingly, the Commission finds that claimant INTER-AMERICA suffered a loss in the amount of \$286,843.57 within the scope of Title V of the Act as a result of the taking of the Cuban corporation by the

Government of Cuba on May 10, 1961. (See Claim of Kramer, Marx, Greenlee and Backus, Claim No. CU-0105, 25 FCSC Semiann. Rep. 62 [July-Dec. 1966].)

Claimant INTER-AMERICA has submitted an assignment dated April 1, 1961, executed by Thomas E. Sibert, former branch manager of the claimant in Cuba, whereby Mr. Sibert assigned to claimant all of his property which he left in Cuba at or about the time that the Cuban subsidiary was taken by the Government of Cuba. The evidence establishes that Mr. Sibert left Cuba at the time of loss of the Cuban firm and the property, having a value of \$10,000.00, was taken by the Government of Cuba after he left Cuba. In the absence of evidence to the contrary, the Commission finds that the property formerly owned by this employee was taken by Cuba on June 15, 1961, and that claimant INTER-AMERICA as the assignee of the property, suffered the loss in the total amount of \$10,000.00. (See Claim of General Motors Corporation and General Motors Acceptance Corporation, Claim No. CU-3088.)

Product owned by FOX FILMS or others was transferred to INTERNATIONAL, INTER-AMERICA and Fox-Cuba, pursuant to agreements between the parties, for distribution of the product throughout the world, including 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 products several weeks in advance. Such agreements assertedly provide for the booking and exhibition by the theatre owners of several feature presentations, with fillers or short subjects, which were to be furnished by the distributors.

The claimants have asserted claim for loss of prospective earnings or film rental income which might have been realized by claimants had not the Government of Cuba seized their property in May 1961. FOX FILMS contends that the prints, aside from the physical attributes, as discussed above, contained a series of images on the film which not only were unique in nature but were the primary things of value as the subject of the contracts between INTER-AMERICA and the subsidiary, Fox-Cuba, and those contracts executed between Fox-Cuba and the exhibitors or theatre owners in Cuba.

The Commission has carefully considered the claim asserted for loss of anticipated film rental income had not the Government of Cuba intervened. However, claims based on the loss of prospective earnings are generally 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 period beginning May 10, 1961, is not compensable under the Act. The profits or earnings of the Cuban enterprise, if any, which may have been realized during the period in question did not belong to the claimants since their title in and to the enterprise and film product was extinguished when the Government of Cuba intervened. However, claimants are being allowed interest on the value of the property taken by the Cuban Government, as discussed hereafter. Accordingly, the portion of the claim based on film rental or profits for the period following intervention on May 10, 1961, is denied for the reason that the record contains no evidence to show that any profits belonging to the claimants 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]; and Claim of Metro-Goldwyn-Mayer, Inc., Claim No. CU-2225.)

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 case it is so ordered:

<u>From</u>	<u>On</u>
TWENTIETH CENTURY-FOX FILM CORPORATION May 10, 1961	\$168,850.00
TWENTIETH CENTURY-FOX INTERNATIONAL CORPORATION May 10, 1961	45,039.57
TWENTIETH CENTURY-FOX INTER-AMERICA, INC. May 10, 1961 June 15, 1961	286,843.57 10,000.00

CERTIFICATIONS OF LOSS

The Commission certifies that TWENTIETH CENTURY-FOX FILM CORPORATION 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-Eight Thousand Eight Hundred Fifty Dollars (\$168,850.00) with interest thereon at 6% per annum from May 10, 1961 to the date of settlement;

The Commission certifies that TWENTIETH CENTURY-FOX INTERNATIONAL CORPORATION 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 Forty-Five Thousand Thirty-Nine Dollars and Fifty-Five Cents (\$45,039.55) with interest thereon at 6% per annum from May 10, 1961 to the date of settlement; and

The Commission certifies that TWENTIETH CENTURY-FOX INTER-AMERICA, INC. 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 Two Hundred Ninety-Six Thousand Eight Hundred Forty-Three Dollars and Fifty-Seven Cents (\$296,843.57) 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

FEB 3 1971


Lyde S. Castor, 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.

NOTICE: 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. 531.5(e) and (g), as amended (1970).)