

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

IN THE MATTER OF THE CLAIM OF

RKO GENERAL, INC.

Claim No. **CU** - 3341

Decision No. **CU** - 6030

Under the International Claims Settlement  
Act of 1949, as amended

Counsel for claimant:

Regan, Goldfarb, Powell & Quinn  
By Paul J. Quinn, 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 amended amount of \$228,796.75, was presented by RKO GENERAL, INC., and is based upon the asserted ownership and loss of film product, anticipated film rentals and other losses in Cuba.

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 claimant, RKO GENERAL, INC., hereafter referred to as RKO, a Delaware corporation, was formerly known as RKO Teleradio Pictures, Inc., and as RKO Radio Pictures, Inc. The evidence of record shows that at all times from the asserted date of loss in February 1959 to the date of filing this claim in May 1967 the stock of RKO was held by The General Tire & Rubber Company, an Ohio corporation. A corporate official of the parent corporation has certified that at all times pertinent to this claim in excess of 99% of all outstanding shares of stock were held by nationals of the United States. The Commission finds that RKO, a subsidiary of The General Tire & Rubber Company, is a national of the United States within the meaning of Section 502(1)(B) of the Act.

Claim was asserted by RKO for loss of film prints and anticipated film rentals following loss of the film product in February, 1959. For several

years prior to the asserted date of loss of the film products subject of this claim, claimant, or its predecessors in interest, distributed films in Cuba through its wholly-owned subsidiary, RKO Radio Pictures of Cuba, S.A. RKO product was then the subject of contracts between the Cuban subsidiary and the Cuban theatre owners or exhibitors for exhibition of the product to the public throughout the various Cuban theatres.

Claimant has submitted, among other things, an inventory of film product located in Cuba. This inventory of prints, including English and Spanish titles, number of prints, manufacturer and other data, is a list of the product which was transmitted by RKO to its Cuban subsidiary for distribution and exhibition in the Cuban territory. The product in question included feature presentations, including 233-35mm prints of which 148 were black and white and 85 were in color; 28-35mm short subjects in black and white; 17-16mm feature presentations of which 16 were black and white and 1 in color; and trailers and accessories for the aforesaid product. Based upon the evidence of record, including the inventory, affidavits, agreements and other evidence of record, the Commission finds that claimant herein was, at all times pertinent to this claim, the owner of the film product, as itemized above.

In early 1957 RKO had closed down its film exchange branches in the United States and Canada, and in mid-1958 began arrangements whereby foreign distribution exchanges would be closed. RKO instituted negotiations to cancel the license agreement which it had formulated with its Cuban subsidiary and had entered distribution agreements with the J. Arthur Rank Organization to distribute their product in Cuba. At this juncture, a Cuban Interventor took over the operation of the offices of the subsidiary in Havana and began the distribution of RKO product in Cuba. The Commission finds that the property of the claimant was nationalized or otherwise taken by the Government of Cuba on or about February 3, 1959.

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 RKO were made from negatives of productions previously produced by RKO or other producers from whom claimant secured rights to the prints in question. The product, apparently shipped to Cuba primarily in the period from 1954 to 1959, had been exhibited or was to be exhibited in various areas or exhibition zones of Havana, large and small cities, as well as other areas of Cuba. Thus, the product was in various stages of the depletion cycle, applicable to such product, at the time of loss, with some prints apparently in active use, others in a re-run category, while others were to be junked as no longer having utility for exhibition purposes.

The claimant has submitted evidence pertaining to the cost of manufacturing film product, including data as to cost per foot of average length black and white prints, or those in color. Claimant has computed valuation of the prints in an amount of \$228,796.75, which is based upon anticipated film rentals which would possibly have been realized had not the Government of Cuba intervened. Claimant has also included data showing amounts claimed, as an alternative basis of claim, which were computed on a replacement cost basis of the product. Generally, the claimant has asserted that the valuation of the prints should be based on a replacement cost basis, with trailers, accessories, custom duties and shipping charges, all in the total amount of \$168,280.84.

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

148-35mm prints of feature presentations in black and white, at \$150.00 each	\$22,200.00
85-35mm prints of feature presentations in color, at \$300.00 each	25,500.00
28-35mm prints of short subjects in black and white, at \$35.00 each	980.00
1,653 trailers at \$15.00 each, with certain advertising accessories	24,795.00
1-16mm print of feature presentation in color, at \$100.00	100.00
16-16mm prints of feature presentations in black and white, at \$50.00 each	<u>800.00</u>
Total	\$74,375.00

Accordingly, the Commission finds that claimant suffered a loss in the amount of \$74,375.00, 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 February 3, 1959.

Claimant has asserted that RKO shipped 14-35mm color prints and trailers of feature presentations to Cuba which were prepared at a cost of \$13,095.53; that the prints were not released for exhibition in Cuba but were removed by Cuban employees of RKO from the vaults when the take-over of the RKO film exchange in Havana appeared imminent; and that the product was hidden and then destroyed by the Cuban RKO employees in October, 1960, when it was found impossible to ship the product out of Cuba. Claimant states that these feature presentations included the following productions:

All Mine to Give  
Jet Pilot  
Naked and The Dead  
Rodan  
Stage Struck

The Commission has carefully considered the claim asserted for loss of the product shipped to Cuba and later destroyed by RKO employees. The Commission is constrained to deny this portion of the claim for the reason that such product was not the subject of nationalization, expropriation, intervention or other taking of, or special measures, within the contemplation of the Act (Section 503(a), supra) since the Government of Cuba did not, in fact, take this product. Accordingly, this portion of the claim is hereby denied.

Claimant has also asserted that it had assembled prints for four additional feature presentations which were ready for shipment to Cuba but were not shipped because of the confiscation of RKO property by the Government of Cuba. Claimant states that these feature presentations would have grossed \$40,000.00, and included the following productions:

Enchanted Island  
From the Earth to the Moon  
Mysterians  
Verboten

As indicated above, claimant has asserted a claim for loss of anticipated film rentals from the released and unreleased product prepared for or shipped to Cuba, including product in the vaults which was seized by the Government of Cuba, as well as the feature presentations destroyed by RKO employees or not shipped to Cuba. The claimant has asserted that the prints, aside from their physical attributes, 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 contracts between claimant and RKO Cuba, and those contracts between the Cuban distributor and exhibitors in Cuba.

Additionally, the record indicates that product owned by claimant was distributed pursuant to agreements between claimant and RKO Cuba. Thereafter, agreements were made for exhibition of the product in Cuba, apparently on a

"block booking" arrangement, with the Cuban exhibitors whereby the film product was booked under exhibition contracts for several weeks in advance. Such agreements provided for the booking of several feature presentations, with fillers, trailers and short subjects which were to be furnished by the distributor, as forwarded by the claimant.

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 February 3, 1959, 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 claimant since its title in and to the enterprise and film product was extinguished when the Government of Cuba intervened. However, claimant is 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 February 3, 1959, is denied for the reason that the record contains no

evidence to show that any profits 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]; and Claim of Metro-Goldwyn-Mayer, Inc., Claim No. CU-2225.)

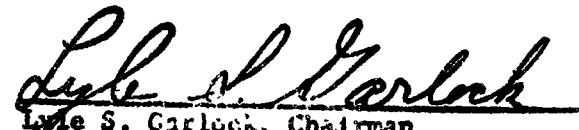
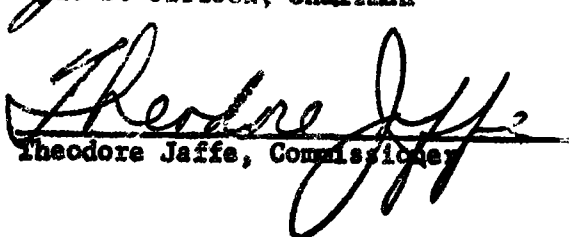
The Commission has decided that in certifications of loss on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim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

CERTIFICATION OF LOSS

The Commission certifies that RKO GENERAL, 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 Seventy-four Thousand Three Hundred Seventy-five Dollars (\$74,375.00) with interest at 6% per annum from February 3, 1959, to the date of settlement.

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

JAN 12 1971

  
Lyle 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.

TICE: 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. 1.5(e) and (g), as amended (1970).)