

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

IN THE MATTER OF THE CLAIM OF

UNIVERSAL INTERNATIONAL FILMS, INC.

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU-0574

Decision No. CU-6101

Counsel for claimant:

Girard A. Jacobi, 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 \$1,099,412.00, was presented by UNIVERSAL INTERNATIONAL FILMS, INC., and is based upon the asserted loss of film prints, anticipated film rentals and loss of copyrights, as well as the loss of the assets of a Cuban corporation known as Peliculas Nueva Universal 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 establishes that Peliculas Nueva Universal de Cuba, S.A., a Cuban corporation, hereafter referred to as Cuba-Universal, was a wholly-owned subsidiary of UNIVERSAL INTERNATIONAL FILMS, INC., claimant herein, a Delaware corporation, which filed this claim on November 23, 1965. The outstanding shares of stock of claimant were owned by Universal Pictures Company, Inc., a Delaware corporation, hereafter referred to as Universal. The evidence also discloses that Decca Records, Inc., a New York corporation, owned approximately 93% of the outstanding stock of Universal, the parent corporation of claimant; and that in excess of 98% of the outstanding shares of stock of Decca Records, Inc., was owned by nationals of the United States.

On January 1, 1966, Decca Records, Inc., was merged into and became a division of MCA, Inc., a Delaware corporation. Thereafter, Universal (Delaware) was merged into a new corporation known as Universal City Studios, Inc., a California corporation and a wholly-owned subsidiary of MCA, Inc. The evidence also establishes that .0452% of the outstanding shares of common stock of MCA, Inc. and 1.305% of the outstanding preferred stock of MCA, Inc. were held by nonresidents of the United States, including United States nationals and nonnationals; with the balance of the stock, in excess of 98% of all outstanding shares, owned by United States nationals at all times pertinent to this claim. The Commission finds that Decca Records, Inc., MCA, Inc. and claimant herein were nationals of the United States within the meaning of Section 502(1)(B) of the Act (and see Claim of MCA, Inc., Claim No. CU-3323).

For many years prior to the asserted date of loss of the property, subject of this claim, Universal produced and furnished film product to claimant, pursuant to agreement, for distribution in various areas, including the Cuban territory. Thereafter, the Universal film product was distributed throughout Cuba as the subject of contracts between Cuba-Universal and the Cuban theatre owners or exhibitors. The product was then exhibited to the public in various Cuban theatres in that territory whereby film rentals were earned by the Cuban subsidiary and claimant.

Claimant has submitted, among other things, company records and affidavits of company employees showing shipment of film product to Cuba, assertedly taken by the Government of Cuba from Cuba-Universal. The inventory includes the various types of film prints which were the subject of distribution and exhibition contracts and included Universal product or other prints to which rights had been acquired by claimant herein. The inventory included 418-35mm prints of feature productions, with 1,376 trailers, 122-35mm short subjects, 221-16mm feature productions with 221 trailers and 4-16mm short subjects. Based on the evidence of record, including affidavits, correspondence,

contracts and company records submitted by officials of the claimant, the Commission finds that claimant was at times pertinent to this claim the owner of the said film product, further itemized below.

The Commission finds that Cuba-Universal 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 claimant 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 claimant were made from negatives of various productions previously produced by Universal or other producers from whom Universal or claimant 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 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 claimant 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. Claimant has 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 \$200,702.00 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, 238 prints, at \$150.00 per print	\$ 35,700.00
Color, 180 prints at \$300.00 per print	54,000.00
1,376 trailers, at \$15.00 per trailer	20,640.00

35mm Short Subjects

Black and white, 73 prints, at \$35.00 per print	2,555.00
Color, 49 prints, at \$50.00 per print	2,450.00

16mm Features

Black and white, 188 prints, at \$50.00 per print	9,400.00
Color, 33 prints, at \$100.00 per print	3,300.00
221 trailers, at \$5.00 per trailer	1,105.00

16mm Short Subjects

Black and white, 4 prints, at \$15.00 per print	<u>60.00</u>
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Total	\$129,210.00
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The Commission concludes that claimant suffered a loss in the amount of \$129,210.00 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, claimant also suffered a loss when the Government of Cuba seized its wholly-owned subsidiary, Cuba-Universal, on May 10, 1961. Since Cuba-Universal 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.)

Claimant has submitted evidence pertaining to the value of the Cuban subsidiary, including affidavits, correspondence and a certified balance sheet, dated March 25, 1961, which was prepared immediately before the date of loss; and trial balances, notes thereto and similar material concerning the operation of the subsidiary. Claimant has also submitted supplementary information with respect to the assets and liabilities of Cuba-Universal, including banking data, statements of accounts due and payable, showing not only assets but certain debts payable to claimant herein by the subsidiary at the time of loss.

The balance sheet of Cuba-Universal, dated March 25, 1961, reflects the following (the peso being on a par with the dollar):

Assets

Cash balances	\$103,986.75
Trade accounts receivable	35,652.11
Capital assets	15,320.52
Reserve for depreciation	(14,625.14)
Deposits on leases	200.00
Deferred charges	2,665.48
Item in suspense	(160.43)
Deposit, account in New York	<u>100,000.00</u>
Total	\$243,039.29

Liabilities

Trade accounts payable	\$ 491.85
Accrued liabilities	4,258.09
Advanced payment on film, deposits	320.93
Other liabilities	882.97
Capital Stock	100,000.00
Operating Surplus	5,565.74
Account with affiliated Company Universal International Films, Inc.	<u>131,519.71</u>
	\$243,039.29

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 Cuba-Universal had a net worth of \$105,565.74 on May 10, 1961, the date of loss. However, the "Deposit a/c New York" is a deposit made by Cuba-Universal with claimant in New York for faithful performance by the subsidiary in connection with agreements between the parties. This deposit in New York, being outside the jurisdiction of the Government of Cuba, was not taken by the Government of Cuba when Cuba-Universal was taken on May 10, 1961. Accordingly, the net loss was \$5,565.74.

The balance sheet reflects an indebtedness of the Cuban subsidiary to the claimant, consisting of an account in the amount of \$131,519.71. The Commission finds that this sum was due and payable to the claimant. (See Claim of Kramer, Marx, Greenlee and Backus, Claim No. CU-0105, 25 FCSC Semiann. Rep. 62 [July-Dec. 1966].)

The Commission concludes that claimant suffered a loss in the total amount of \$137,085.45 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.

As stated above, product produced by Universal or others was transferred to claimant, pursuant to agreements between the parties, for distribution of the product in various areas, including Cuba. Thereafter, 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 and the Cuban subsidiary.

The claimant has asserted that when the Government of Cuba seized the film product in May 1961 it 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 Cuba-Universal and those contracts executed in Cuba 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 date 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 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 claimant since title in and to the Cuban enterprise and film product 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 day of taking. 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 loss of film rentals, profits or asserted damages by infringement of copyrights, arising on the date of loss, or 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 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]; 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 claim it is so ordered.

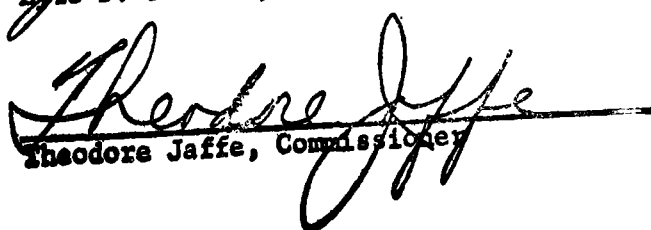
CERTIFICATION OF LOSS

The Commission certifies that UNIVERSAL INTERNATIONAL FILMS, 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 Sixty-six Thousand Two Hundred Ninety-five Dollars and Forty-five Cents (\$266,295.45) with interest at 6% per annum from May 10, 1961, to the date of settlement.

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

MAR 11 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.

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).)