

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

IN THE MATTER OF THE CLAIM OF

METRO-GOLDWYN-MAYER INC.
METRO-GOLDWYN-MAYER INTERNATIONAL INC.

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU -2225

Decision No. CU - 6003

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 \$1,494,864.69, was presented by METRO-GOLDWYN-MAYER INC. and METRO-GOLDWYN-MAYER INTERNATIONAL INC., and is based upon the asserted loss of film prints, film rentals and the loss of a Cuban corporation known as Compania de Peliculas Metro-Goldwyn-Mayer 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.

Claim was asserted herein by METRO-GOLDWYN-MAYER INC., hereafter referred to as MGM, and METRO-GOLDWYN-MAYER INTERNATIONAL INC., hereafter referred to as MGM INTERNATIONAL, for loss of film prints, film rentals and the assets of a Cuban corporation, known as Compania de Peliculas Metro-Goldwyn-Mayer de Cuba, S.A., identified hereafter as MGM Cuba. The evidence discloses that MGM, which was known as Loew's Incorporated until February 25, 1960, a Delaware corporation, owned all of the outstanding shares of stock of MGM INTERNATIONAL, a Panamanian corporation, formerly known as Metro-Goldwyn-Mayer de Panama, S.A. until name change on September 1, 1959; and that MGM also owned all of the shares of stock of MGM Cuba, organized under Cuban laws in 1926.

The evidence of record establishes that MGM was organized in Delaware and that at all times pertinent to this claim more than 50% of claimant's

outstanding capital stock was owned by nationals of the United States. Further, an authorized officer of claimant stated that on March 20, 1967, there were 13,298 stockholders of the claimant corporation and only 136 of these stockholders had foreign addresses. The Commission finds that MGM is a national of the United States within the meaning of Section 502(1)(B) of the Act.

The evidence shows that MGM INTERNATIONAL was a Panamanian corporation and did not qualify as a "national of the United States" within the provisions of Section 502(1)(B) of the Act. Accordingly, the claim of MGM INTERNATIONAL is hereby denied.

For several years prior to the asserted date of loss of the properties, subject of this claim, claimant or its predecessor in interest distributed film product in Cuba through MGM INTERNATIONAL or the predecessor Panamanian corporation, the distributor of MGM product outside of the United States. The Panamanian corporation utilized the services of MGM Cuba, a wholly-owned subsidiary of MGM, with whom distribution agreements were executed. The film product was then distributed throughout Cuba by MGM Cuba, or by sub-distributors. MGM product was then the subject of contracts between the Cuban distributors, such as MGM Cuba, 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, copies of the distribution agreements between claimant and MGM INTERNATIONAL or their predecessors in interest, and those distribution agreements made with MGM Cuba. Claimant has also submitted an inventory of film product located in Cuba as well as official documentation with respect to the nationalization or other taking of the Cuban subsidiary.

The inventory of prints with English and Spanish titles, prepared by Cuban employees of MGM Cuba in affidavit form, includes a listing of the product which was transmitted by claimant to MGM INTERNATIONAL and MGM Cuba for distribution and exhibition in the Cuban territory. The list was prepared in Cuba with pages duly countersigned by officials of the claimant's

subsidiary firm as to the authenticity of the contents. The product in question includes feature presentations, including 550-35mm prints, of which 264 were black and white and 286 were in color; 273-35mm short subjects in black and white or in color; and 228-16mm feature presentations in black and white and in color. Based on the aforesaid evidence of record, as well as affidavits, distribution 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 itemized above.

The evidence of record establishes that MGM Cuba was formally taken by the Government of Cuba pursuant to Resolution 2868, published by Cuban authorities in the Official Gazette on May 10, 1961.

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 or MGM INTERNATIONAL were made from negatives of various productions previously produced by MGM or other producers from whom the claimant had secured rights to the prints in question. These prints, apparently shipped to Cuba primarily in the period from 1955 to 1960, had been exhibited or were to be exhibited in various areas or exhibition zones of Havana, other cities in Cuba or areas within 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.

Officials of MGM have submitted their affidavits and statements indicating the cost of manufacturing film product in the years immediately prior to loss, including cost per foot of average length black and white feature presentations, or those in color. Claimant has computed a value of the prints which is based on factors of depreciation and claimant has also included data showing the amounts claimed which were computed on a replacement cost basis of the product, subject of the claim. Generally, the claimant has asserted that the valuation of prints seized in Cuba, on a replacement cost basis, was reached by attributing to each 35mm print, in black and white a cost of \$300.00 and in color a cost of \$600.00; to 35mm short subjects an approximate cost of \$70.00 for each print; and to 16mm feature presentations a sum of \$130.00 to \$265.00 per print.

Based upon the entire record, the Commission finds that the most appropriate basis for evaluating the prints at the time of loss is to consider factors concerning cost of manufacturing such prints and the depreciation incident to shipment, exhibition and storage in Cuba. The Commission finds that the reasonable value of the prints, including costs incidental to manufacture and factors relating to depreciation, is as follows:

264-35mm prints of feature presentations in black and white, at \$150.00 each	\$ 39,600.00
286-35mm prints of feature presentations in color, at \$300.00 each	85,800.00
59-35mm prints of short subjects in black and white, at \$35.00 each	2,065.00
214-35mm prints of short subjects in color, at \$50.00 each	10,700.00
120-16mm prints of feature presentations in black and white, at \$50.00 each	6,000.00
108-16mm prints of feature presentations in color, at \$100.00 each	<u>10,800.00</u>
Total	\$154,965.00

Accordingly, the Commission finds that claimant suffered a loss in the amount of \$154,965.00, 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 May 10, 1961.

As indicated above, the claimant also suffered a loss when the Government of Cuba seized MGM Cuba on May 10, 1961. Since the Cuban subsidiary MGM 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 such ownership interest. (See Claim of Parke, Davis & Company, Claim No. CU-0180, 1967 FCSC Ann. Rep. 33.) The evidence of record herein discloses that claimant owned all of the outstanding shares of stock of the Cuban subsidiary.

The claimant has also submitted evidence pertaining to the value of the Cuban subsidiary, including a certified balance sheet dated April 8, 1961, with data concerning fixed assets and reserves as well as a Profit and Loss Statement. Claimant has submitted supplementary information with respect to the assets and liabilities of MGM Cuba, such as correspondence with The Royal Bank of Canada concerning accounts with the Havana branch of that bank, and five Certificates of Deposit, issued by the Havana branch, showing claimant had deposited bonds of the Government of Cuba in Havana in 1960, with a nominal value of approximately \$97,000.00.

The balance sheet of the Cuban firm MGM Cuba, dated April 8, 1961, contains the following information (the peso being on a par with the dollar):

ASSETS

CURRENT

Cash in bank, a/c No. 1	\$194,582.83	
Cash in bank, a/c No. 2	<u>5,000.00</u>	\$199,582.83
Petty Cash in Post Office Account		770.00
Marketable Securities -		
Government of Cuba Bonds		95,170.00
Accounts Receivable-Film Rentals		63,345.01
Interest Receivable		213.36
Advances & Receivables -		
Officers & Employees		267.33
Prepaid Insurance		241.02
Other Current Prepayments		1,983.31

FIXED ASSETS

Total Cost	\$ 35,343.89	
Accumulated Depreciation	<u>- 33,183.65</u>	
Net Value-Fixed Assets		2,160.24

NON-CURRENT

Trade Deposits Receivable		<u>150.00</u>
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TOTAL ASSETS

\$363,883.10

LIABILITIES and CAPITAL

CURRENT

Accounts Payable-Trade		\$ 1,658.42
Other Accrued Expenses		6,997.17
Taxes Payable-Income (MGM N.Y.)	\$ 3,571.50	
Taxes Payable-Other than (MGM CUBA)	<u>2,358.55</u>	5,930.05
Income		1,897.77

INTER-COMPANY ACCOUNTS

Metro-Goldwyn-Mayer International Incorporated: Local Currency Schedule		286,585.73
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DEFERRED

Common Stock		2,000.00
Earned Surplus at close of last fiscal year		58,448.21
Profit or Loss from Theatre Operations		<u>365.75</u>

TOTAL LIABILITIES AND CAPITAL

\$363,883.10

The Commission finds that the above balance sheet, the last one prepared by MGM Cuba, reflects the financial condition of the Cuban subsidiary at the time such firm ceased to actively operate in Cuba and appropriately reflects the financial condition of the firm prior to 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 it is the finding of the Commission that such firm had a net worth of \$60,813.96 on May 10, 1961, the date of loss.

As indicated in the balance sheet, there were intercompany debts of the Cuban subsidiary due and payable to MGM INTERNATIONAL, consisting of an account in the total amount of \$286,585.73. As discussed previously herein, MGM INTERNATIONAL is a Panamanian corporation and is not qualified to assert a claim for loss of this intercompany indebtedness. However, Section 505(c) of the Act provides as follows:

A claim under section 503(a) of this title based upon an indirect ownership interest in a corporation, association, or other entity for loss shall be considered, subject to the other provisions of this title, only if at least 25 per centum of the entire ownership interest thereof at the time of such loss was vested in nationals of the United States.

The evidence of record shows and the Commission finds that MGM INTERNATIONAL was a wholly-owned subsidiary of claimant. In similar situations, the Commission has found that a claim for loss of an indebtedness payable to a wholly-owned subsidiary may be asserted by the parent corporation. (See Claim of Avon Products, Inc., Claim No. CU-0772, Amended Proposed Decision, 1967 FCSC Ann. Rep. 35.) Accordingly, the Commission finds that claimant herein also suffered a loss in the amount of \$286,585.73 within the scope of Title V of the Act as a result of the taking of the Cuban corporation by the Government of Cuba. (See Claim of Kramer, Marx, Greenlee & Backus, Claim No. CU-0105, 25 FCSC Semiann. Rep. 62 [July-Dec. 1966].)

Product owned by the claimant was distributed pursuant to the agreements between the wholly-owned subsidiaries of claimant, including MGM INTERNATIONAL and MGM Cuba. The agreements for exhibition of the product in Cuba were made on "block booking" arrangements with the Cuban exhibitors whereby contracts were made for the film products 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 claimant has included in its amended claim a sum for loss of prospective earnings or anticipated profits which might have been realized by claimant had not the Government of Cuba seized their property on May 10, 1961. 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 the contracts between claimant and the subsidiaries, including MGM Cuba, and those contracts between the distributor and exhibitors in Cuba.

Claims based on 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 profits 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 its title in and to the enterprise and film product was extinguished in 1961. However, claimant is being allowed interest on the value of its property, as discussed hereafter. Accordingly, the portion of the claim based on profits for the period following May 10, 1961, 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; and Claim of Aris Gloves, Inc., Claim No. CZ-1170, 17 FCSC Semiann. Rep. 239 [July-Dec. 1962].)

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.

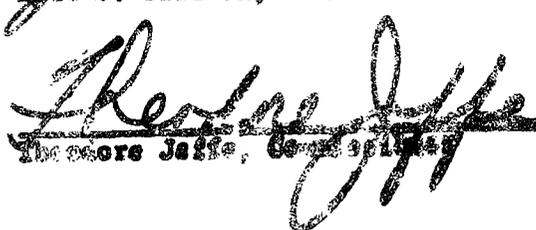
CERTIFICATION OF LOSS

The Commission certifies that METRO-GOLDWYN-MAYER 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 Five Hundred Two Thousand Three Hundred Sixty-four Dollars and Sixty-nine Cents (\$502,364.69) 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

JAN 6 1971


Louis 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 received 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. 31.5(e) and (g), as amended (1970).)