

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

IN THE MATTER OF THE CLAIM OF

UNITED ARTISTS CORPORATION

**Under the International Claims Settlement
Act of 1949, as amended**

Claim No. CU -2352

Decision No. CU -6103

Counsel for claimant:

Morris L. Kingston, 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 \$1,313,436.88, was presented by UNITED ARTISTS CORPORATION and is based upon the asserted loss of film product, film rentals and the loss of a Cuban corporation known as United Artists Corporation of 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 establishes that UNITED ARTISTS CORPORATION was organized in the State of 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. An officer of the claimant corporation has certified that both on the asserted date of loss in Cuba and on the date of filing this claim in 1967, in excess of 99% of the outstanding shares of stock of the claimant corporation were owned by persons with addresses in the United States, presumed to be nationals of the United States. The Commission finds that the claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

For several years prior to the asserted date of loss of the properties subject of this claim, claimant distributed film product in the Cuban

territory pursuant to an agreement with its wholly owned subsidiary, United Artists Corporation of Cuba, S.A., a Cuban corporation, hereinafter referred to as United Artists-Cuba. The film product was then distributed throughout Cuba by United Artists-Cuba pursuant to contracts between the said subsidiary and the Cuban theatre owners or exhibitors for exhibition to the public.

The claimant has submitted invoices, control sheets, inventories, affidavits, company records and copies of the distribution agreements, all of which establish that claimant forwarded film product to Cuba pursuant to their agreement with the Cuban subsidiary; claimant has also submitted an inventory of the 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 titles, prepared by the claimant at the time of loss in 1961, includes a listing of the product which was transmitted by claimant to the Cuban subsidiary for distribution and exhibition in the Cuban territory. The inventory indicates the number of prints, footage and includes 657 prints of feature presentations, with 175 35-mm prints in color and 482 35-mm prints in black and white.

The claimant considers that formal title to the film prints was held by the independent producers with whom claimant had agreed to release and distribute such prints. Costs of the prints were advanced by claimant and any recovery against such prints would be applied to claimant's production and distribution advances against the pictures before the agreed payment to producers could be determined.

The prints were held and controlled by the claimant and the Commission holds that claimant had an equitable interest in the prints for which it had advanced such funds.

The evidence of record establishes that United Artists-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 were made from negatives of various productions previously produced by claimant 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 1953 to 1960, had been exhibited or were to be exhibited in various areas of exhibition zones throughout Cuba. Thus, the product was in various stages of the depletion cycle, 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 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. These sums relate to costs in the years when shipment was made, including cost per foot of black and white prints or those in color; and include incidental charges, such as those incurred in shipment or custom expenses. The computations of the claimant have been prepared on a replacement or cost-when-new basis, including the incidental charges. The claimant asserts that the value of the film product held by United Artists-Cuba had a "cost when new" or claimed value of \$192,567.52, which was amended by claimant to the sum of \$275,138.77 after filing this 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 relating to depreciation incident to shipment, exhibition and storage in Cuba, as well as public demand commensurate with prior showings of the subject 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 feature presentations at the time of loss was as follows:

175	35-mm prints in color, at \$300.00 per print	\$ 52,500.00
482	35-mm prints in black and white, at \$150.00 per print	<u>72,300.00</u>
	Total	\$124,800.00

Accordingly, the Commission finds that claimant suffered a loss in the total amount of \$124,800.00 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 United Artists-Cuba on May 10, 1961. Since the Cuban subsidiary 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 claimant has also submitted evidence pertaining to the value of the Cuban subsidiary, including a certified balance sheet dated November 26, 1960, with data concerning fixed assets and reserves. Claimant has submitted supplementary information with respect to the assets and

liabilities of United Artists-Cuba, such as banking statements, revised accounts receivable and other material prepared on or about May 10, 1961, as discussed hereafter.

The balance sheet of the Cuban firm, United Artists-Cuba, dated November 26, 1960, reflects the following (the peso being on a par with the dollar):

Assets

Current and working assets:	
Cash	\$ 236,135.68
Accounts receivable:	
Exhibitors (less reserve)	54,422.74
Others	448.60
Inventory of accessories	4,761.18
Total current and working assets	\$ 295,768.20
United Artists Corporation, New York	27,758.59
Capital assets:	
Furniture and fixtures - at cost (less depreciation)	1,325.03
Leasehold improvements (less amortization)	114.14
Electricity deposit	400.00
Deferred charges	272.00
	<u>\$ 325,637.96</u>

Liabilities

Current liabilities:	
Accounts payable - producers	\$ 136,353.38
Accrued taxes	10,165.70
Other accrued liabilities	2,745.37
Exhibitors' advance payments	3,212.83
Provision for profits tax	19,338.76
Total current liabilities	\$ 171,816.04
Deferred credits	93.14
Capital stock:	
Authorized, issued and outstanding -	
20 shares of \$100.00 each	2,000.00
Surplus	151,728.78
	<u>\$ 325,637.96</u>

The Commission finds that the above balance sheet, the last one prepared by United Artists-Cuba, reflects the financial condition of the Cuban subsidiary at the time such firm ceased to actively operate in Cuba and, with certain supplemental information discussed hereafter, appropriately

reflects the financial condition of the 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 the subsidiary.

The claimant has submitted two banking statements showing that United Artists-Cuba maintained two accounts in Cuban financial institutions which were (1) a film rental account, and (2) an account of the company sales manager. The film rental account, according to the bank statement, had a balance of \$268,263.19 on May 10, 1961, the date of taking; and the last entry of the second account was entered on April 29, 1961, showing a balance of \$3,138.23. Thus, the Commission finds that the cash on hand on the date of loss was in the amount of \$271,401.42.

Additionally, the claimant has submitted a revised "accounts receivable" computation, dated May 16, 1961, which reflects the following information:

Balance per Auditors' report November 26, 1961	\$ 60,036.59
Less: Reserve for Doubtful Accounts	<u>5,613.85</u>
Net Accounts Receivable	\$ 54,422.74
Add: Billings to April 29, 1961	<u>143,015.18</u>
	\$ 197,437.92
Less: Collections to April 29, 1961	<u>136,454.55</u>
Net Accounts Receivable	<u>\$ 60,983.37</u>

The Commission finds that the amount of \$60,983.37 was the net accounts receivable of the Cuban enterprise on the date of loss.

Thus, the Commission finds that the revised current and working assets are as follows:

Cash	\$ 271,401.42
Accounts Receivable	60,983.37
Others	448.60
Inventory - accessories	<u>4,761.18</u>

T O T A L \$ 337,594.57

However, the Commission also finds that the asset item designated as "United Artists Corporation, New York", in the amount of \$27,758.59, was beyond the jurisdiction of the Government of Cuba and could not be the subject of intervention or other taking by that government. Thus, the

Commission is constrained to find that this sum must be omitted as an asset in reaching the net worth of the Cuban enterprise.

Thus, the Commission finds that the total assets of the Cuban subsidiary were in the amount of \$339,705.74; that after deducting the liabilities in the total amount of \$171,816.04, the Cuban subsidiary, United Artists-Cuba, had a net worth of \$167,889.70 on the date of loss; and that claimant suffered a loss in that amount within the meaning of Title V of the Act.

According to the balance sheet, there were intercompany debts of the Cuban firm payable to "producers", in an amount of \$136,353.38. The claimant has submitted evidence, such as copies of agreements with the Cuban subsidiary, to establish that this account was due and payable to the claimant. The Commission has held that debts of nationalized enterprises are within the purview of the Act. (See Claim of Kramer, Marx, Greenlee and Backus, Claim No. CU-0105, 25 FCSC Semiann. Rep. 62 [July-Dec. 1966].) Thus, the Commission finds that the claimant suffered an additional loss in the amount of \$136,353.38 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.

Product subject of this claim was distributed pursuant to the agreement between claimant and its wholly-owned subsidiary, United Artists-Cuba. Thereafter, 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 the 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 subsidiary, United Artists-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 to the enterprise and interest in the film product were 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 [Jan.-June 1959]; 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.

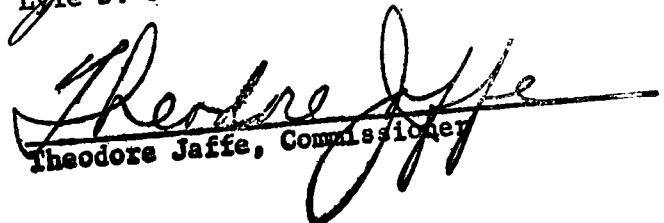
CERTIFICATION OF LOSS

The Commission certifies that UNITED ARTISTS 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 Four Hundred Twenty-nine Thousand Forty-three Dollars and Eight Cents (\$429,043.08) 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).)