1960 WL 98602 (U.S.) (Appellate Brief)
Supreme Court of the United States.

TIMES FILM CORPORATION, Petitioner,

v.

CITY OF CHICAGO, Richard J. Daley and Timothy J. O'Connor, Respondents.

No. 34.
October Term, 1960.
October 10, 1960.

On Certiorari from the United States Court of Appeals for the Seventh Circuit

Motion for Leave to File Brief on Behalf of Motion Picture Association of America, Inc. as Amicus Curiae and Brief as Amicus Curiae

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***1** Motion Picture Association of America, Inc. hereby respectfully moves for leave to file as *amicus curiae* in this case the brief appended hereto. The consent of the attorney for the petitioner has been obtained. On August 11, 1960 movant wrote the attorney for the respondent. A copy of that letter is appended below. No acknowledgment was received and in a telephone conversation to the respondents' attorney on August 17, 1960 movant was informed that no reply would be forthcoming.

Motion Picture Association of America, Inc., hereinafter referred to as the "Motion Picture Association" or "Association," is a corporation, organized in March, 1922 under the Membership Corporations Law of New York, for the objects, among others, of fostering the common interests of those engaged in the motion picture industry in the United States by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educational ***2** as well as the entertainment value and general usefulness of the motion picture, and by diffusing accurate and reliable information with reference to the industry.

The President of the Association is Eric A. Johnston and its membership is composed of the largest and most important companies engaged in production and distribution of motion pictures. Its distributing company members are: Allied Artists Pictures Corporation, Buena Vista Film Distribution Company, Inc., Columbia Pictures Corporation, Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Pictures Company, Inc., and Warner Bros. Pictures Distributing Corp. These companies distribute motion pictures made by them or by others for distribution by them at studios, mainly in Los Angeles, and sometimes abroad. They furnish, it is estimated, more than 90% of the motion pictures annually exhibited in motion picture theatres in cities, towns and villages throughout the United States, including the City of Chicago. The petitioner, Times Film Corporation, is not a member of the Association.

From its inception, the Association has been concerned with the moral content of motion pictures and their evaluation as to moral content by the people of the United States. The Association and its members have also been conscious of the social importance of motion pictures as a medium of mass communication and the responsibilities thereby imposed in relation to government, municipal, state and federal.

Its members, therefore, have a vital interest in the disposition of the constitutional question presented to the Court in this case. It-is believed that the brief appended hereto, which the Association requests permission to file as *amicus curiae,* contains a more complete survey of the scope and effect of censorship regulation of motion pictures in the United States, similar to the Chicago ordinance under review, than the parties plan to present for the information of the Court.

***3** WHEREFORE, it is respectfully urged that Motion Picture Association be granted leave to file herewith the appended brief as *amicus curiae.*

***1 Position and Interest of *Amicus Curiae,* Motion Picture Association**

The Motion Picture Association is a membership corporation organized in March, 1922. Its members; the major producers and distributors of motion pictures in the United States, distribute 90% of all motion pictures exhibited in motion picture theatres throughout the United States.

One of the primary objects of the Association has been to establish and maintain "the highest possible moral and artistic standards in motion picture production". [1] In furtherance of this objective, the Association has adopted a Production Code which sets forth certain standards which ***2** must be met and maintained by its members in the motion pictures made or distributed by them. [2] Nevertheless, motion pictures distributed by the members of the Association have been consistently subjected to administrative censorship by municipalities as well as by states. Association members are, therefore, vitally affected by such censorship regulations.

The Association files this brief in support of petitioner [3] because it believes that statutes such as the Chicago ordinance involved in this action which subject motion pictures to examination as to content as a condition of distribution and exhibition are contrary to the First and Fourteenth Amendments to the United States Constitution.

The Municipal Code of Chicago, Chapter 155, Sections 155-1 to 155-5, provides that no motion picture may be exhibited in a motion picture theatre in the City of Chicago unless a permit is first secured from the Commissioner of Police. The statute requires that a permit may be granted "only after the motion picture film * * * has been produced at the office of Commissioner of Police for examination or censorship" (1554).

Statutes similar to this ordinance exist in five states and approximately fifteen municipalities; modified forms of inspection and approval by governmental officials exist in twenty-four other municipalities. [4] Some of these statutes are actively enforced; others appear to be dormant or sporadically enforced. The necessity of submitting motion pictures for inspection under such censorship provisions inflicts, it is submitted, an unconstitutional restraint upon motion pictures.

***3** It is not contended that motion pictures are beyond the purview of all governmental control. The Association does not sanction nor do its members distribute any "obscene" motion pictures. Exhibition of such motion pictures is adequately prevented in most communities, including Chicago, by the presence of penal statutes prohibiting their exhibition. [5] What is challenged is the right of Chicago and other communities to adopt regulations which create administrative prior restraints (sometimes called preventive censorship) on freedom of speech by motion pictures.

Motion pictures are today the only form of communication by speech or press subjected to such licensing, contingent upon the examination of content prior to dissemination. There is no justifiable basis for this distinction.

The Scope and Effect of Motion Picture Regulation Throughout the United States

The number of governmental bodies imposing censorship on motion picture films was naturally affected by this Court's pronouncement in *Joseph Burstyn Inc. v. Wilson,* 343 U. S. 495, that motion pictures are entitled to the protection and guarantees of the First Amendment. The *Burstyn* decision and this Court's *per curiam* decisions subsequent to it were not, however, interpreted with any uniformity by censoring communities. Some communities believed the decisions completely invalidated all motion picture censorship. [6] Other communities believed only vague ***4** and indefinite standards had been affected by the decisions. [7] Indeed, the Pennsylvania legislature recently enacted a new Motion Picture Control Act, [8] which has been

declared unconstitutional by the-Dauphin County Court of Common Pleas. *Twentieth Century-Fox v. Boehm, William Goldman Theatres, Inc. v. Dana,* -- District and County Rep. (2) -- (July 31, 1960).

In the belief that the *Burstyn* decision had made prior approval of motion pictures by a censor invalid, several municipalities repealed or modified their censorship ordinances.[9] But even though the invalidity of motion picture censorship has been recognized by some communities, many others continue to make the distribution and exhibition of motion pictures contingent upon the approval of a government official.

Laws similar to the Chicago ordinance exist in four states[10] and fifteen municipalities.[11] The officials entrusted with the power to grant or deny licenses and permits may vary from the Chief of Police to members of women's organizations.[11] In some instances power is vested in one individual. In other instances the power is vested in a board appointed by the Mayor or City Council. Although ***5** there may be variation as to technicalities,[12] in each instance one provision is constant--no picture may be shown until it has been licensed by the governmental authority.

Another type of control is found in those ordinances which do not require a license or a permit before exhibition but require instead that notice of all films to be exhibited be given to a censoring body prior to exhibition. The 1959 Pennsylvania Motion Picture Control Act and the ordinances of six municipalities[13] have adopted this type of control. The amount of notice required varies from community to community.[14]

The procedure following the receipt of notice also varies. In some communities all pictures are examined before exhibition; in others only the "questionable" pictures are previewed before exhibition. In still other communities motion pictures are reviewed only during exhibition at a motion picture theatre and are censored at that time. All pictures are or may be subject to content examination and approval by a governmental official before dissemination, thereby imposing a prior restraint upon the distribution of motion pictures.[15]

There are, in addition, ordinances which require neither licenses nor advance notice. Motion pictures are examined as to content at a regular performance by appointed ***6** censors. This type of control is found in approximately 18 communities.[16]

Some communities[17] couple the power to ban or require deletions in objectionable motion pictures with the power to revoke licenses granted to motion picture theatres.[18] If the censoring body so recommends, or violations of the ordinances regulating the content of motion pictures occur, a theatre's license may be suspended or revoked.[19]

Although the number of communities imposing some type of control on motion picture content prior to dissemination has dwindled, there is still a residual part of censorship remaining. Indeed, even those ordinances which are now dormant, experience shows, can be reactivated with little difficulty if a particular motion picture for some reason offends persons or groups in the community.

It is submitted that, in the same manner as the constitutional freedom of all other manner of speech is abridged by the requirement of a license based upon prior examination of content, so a motion picture ordinance on its face ***7** abridges that basic right if it bars expression until a license is issued after inspection of content.

This Court has said in *Board of Education v. Barnette,* 319 U. S. 624, 639:
"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. *The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First is much more definite than the test when only the Fourteenth is involved.* Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard." (Emphasis added.)

And in *Thornhill v. Alabama,* 310 U. S. 88, the Court, after adverting to the pervasive threat inherent in the very existence of the power to license which "constitutes the danger to freedom of discussion," stated:
"Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." 310 U. S. at pages 97-8.

Instances of arbitrary refusal simply aggravate the initial denial of due process. [20]

***8 Examination of and Restrictions on the Content of Speech Prior to Dissemination Have Not Been Tolerated by This Court with Respect to Any Other Media of Communication**

The areas touched and affected by speech are numerous. The various media of communication--books, newspapers, magazines, radio and television--the solicitation of union members, the espousing of political and religious dogma through the use of sound trucks, handbills, and "soap box" oration, and lobbying for the passage of legislation all involve the basic right of freedom of speech. Motion pictures, too, have gained their rightful place with other media of communication and are now entitled to the protection and guarantees of the First Amendment. *Joseph Burstyn, Inc. v. Wilson, supra; Kingsley Pictures Corp. v. Regents,* 360 U. S. 684.

In each of these areas some regulation and controls have been evolved, as indeed they must be when various interests of the community must be balanced. [21] It is, however, highly significant that regulations of speech such as those imposed by the Chicago ordinance, requiring examination and approval as to the *content* of speech have never been sanctioned in any area of speech except motion pictures, even by those Justices of the Court who do not consider speech entitled to a "preferred position". Indeed, such requirements have been characterized by this Court as "licensing and censorship" and have been consistently disapproved. There is no valid reason why any distinction should be made with respect to motion pictures.

***9 A. The Written Word or "Press"**

1. NEWSPAPERS, MAGAZINES, AND BOOKS

The abhorrence of systems of censorship found its genesis in attempts to control the content of the written word or "press". Indeed, it is inconceivable today that newspapers, magazines or books could be required to submit their proposed issues to police officials for inspection prior to distribution. Every attempt to subject newspapers, magazines or books to examination as to content prior to distribution has been found by this Court to violate our constitutional traditions. *Near v. Minnesota,* 283 U. S. 697, clearly established the immunity of newspapers from any content examination and restraint. Attempts by the Postmaster General to control the content of a magazine prior to its distribution were rightfully characterized as "censorship" and struck down in *Hannegan v. Esquire, Inc.,* 327 U. S. 146. [22] Indeed, Congress in enacting the postal laws clearly attempted to avoid "any semblance of censorship".

"When Congress has been concerned with the *content of matter* passing through the mails it has enacted criminal statutes making obscene or fraudulent or seditious literature non-mailable in any class." (Emphasis added) (327 U. S. 146, 156).

Recently some state legislatures, in an attempt to regulate the content of comic books have enacted laws which require examination, approval and licensing of comic books prior to distribution. The scheme presented by these comic book ordinances parallels that of the Chicago and similar motion picture ordinances. Magazines must be submitted to a government official or body for approval prior to their ***10** distribution to the public. No court has sanctioned regulating comic book content if the

ordinance required prior inspection by a police officer or administrative board. Such systems have been disavowed as prior restraints, violative of the First and Fourteenth Amendments. *Adams v. Hinkle,* 51 Wash. 2d, 263, 322 P. 2d 844 (1958). [23]

It is significant that the Senate subcommittee investigating the correlation of crime comic books and juvenile delinquency, although recognizing the possible dangers and impact of this medium, flatly rejected any suggestion of governmental censorship as totally repugnant to the principles of free speech. [24]

In those instances where this Court has sanctioned methods of controlling the content of books it has specifically exempted any system which might be deemed licensing or censorship. Justice Frankfurter, speaking for the majority, in *Kingsley Books, Inc. v. Brown,* 354 U. S. 436, said:

> "Just as *Near v. Minnesota,* supra, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 U. S., at 708, it likewise made clear that 'the protection even as to previous restraint is not absolutely unlimited.' Id., at 716. *To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship.*" 354 U. S. at page 441. (Emphasis added.)

***11 2. HAND BILLS**

Similarly, attempts by municipal or state governments to condition the distribution of "handbills" upon advance "permission" or "license" subject to an administrative decision as to content have been consistently characterized by this Court as censorship and found violative of the Constitution.

Beginning with the ordinance before the Court in *Lovell v. Griffin,* 303 U. S. 444, which provided that no pamphlets could be distributed without the permission of the City Manager, through the California ordinance, rejected by this Court in *Talley v. California,* 362 U. S. 60, providing for the identification of the author or sponsor of the handbill or pamphlet, all ordinances conditioning the dissemination of ideas upon the approval of an official have been voided as "administrative censorship" abridging freedom of press and speech guaranteed by the First and Fourteenth Amendments. [25]

In the recent *Talley* case it is significant that even those Justices who believed the ordinance valid if it merely rqeuired identification, recognized the possible invalidity if it encroached upon and restrained speech prior to distribution (see Clark, J. dissenting, p. 71).

The disposition by this Court of the "handbill" ordinances is highly apposite to the instant case. The ordinances examined there and the Chicago motion picture ***12** ordinance here both condition distribution on examination by an administrative official who has the power to grant or withhold the necessary license or permit. Such systems constitute "license and censorship in its baldest form." *Lovell v. Griffin,* 303 U. S. at page 452.

B. The Spoken Word

The spoken word, like the written word, cannot be subject to content examination prior to utterance. Whether speech emanate from a sound truck, or from a radio, whether it be a labor organizer soliciting members or a "religious fanatic" espousing his views in the park, this Court has never allowed an administrative censor to determine in his discretion what may or may not be spoken.

1. SOUND TRUCKS

This Court's disposition of ordinances regulating speech emanating from sound trucks cogently emphasizes the Court's refusal to sanction any regulation of the content of speech prior to its exercise. In *Saia v. New York,* 334 U. S. 558, a city ordinance provided that a loud speaker or amplifier could be used for speeches only if the Chief of Police determined that the proposed speech related to "items of news and matters of public concern" and thereafter granted a permit for their use. The language of the Court in striking down that ordinance applies equally to the Chicago motion picture censorship ordinance:
"The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine." 334 U. S. at page 561.

In *Kovacs v. Cooper,* 336 U. S. 77, decided six months later, the Court, in a 5-4 decision, held constitutional an ***13** ordinance "forbidding the use on public streets of any sound trucks which emitted "loud and raucous noises." But the regulation in the *Kovacs* case did not provide for any examination or determination with respect to the content of the speech being limited to prohibiting disturbances by "loud and raucous noises." Those Justices sanctioning this type of regulation of "speech" distinguished if from content censorship. Justice Reed speaking for the majority, said: "When ordinances undertake censorship of speech or religious practices *before permitting their exercise* the Constitution forbids their enforcement." 336 U. S. at page 82. (Emphasis added.)

And Justice Frankfurter, concurring in the result, recognized that sound trucks could be regulated "so long as a legislature does not prescribe *what ideas* may be noisily expressed *and what may not be.*" 336 U. S. at page 97. (Emphasis added.)

And Justice Jackson in sustaining the ordinance emphasized that no infringement of free speech "arises unless such regulation or prohibition *undertakes to censor* the contents of the broadcasting." 336 U. S. at page 97. (Emphasis added.)

2. THE "SOAP BOX" ORATOR

Traditionally the "Soap Box" Orator has epitomized freedom of speech. The diverse methods employed to regulate the activities of these "orators" were reviewed by this Court in *Niemotko v. Maryland,* 340 U. S. 268; *Feiner v. New York,* 340 U. S. 315; and *Kunz v. New York,* 340 U. S. 290. [26] Here again, a distinction can be drawn between this Court's treatment of ordinances requiring official approval as to content and those regulating speech by some other method.

***14** In both *Niemotko* and *Kunz* it was necessary to obtain permits or licenses from governmental officials before public meetings could be held. The permits could be granted or withheld in the discretion of the official. In both instances the Court held the discretionary power of the official to control the right to speak invalid as a prior restraint on the exercise of First Amendment rights.

In the *Feiner* case, on the other hand, there was no ordinance requiring the petitioner to secure a permit or license before he made his speech, only a penal statute forbidding incitement of a breach of the peace. The Court upheld petitioner's conviction under the penal statute. The result surely would have been different if Feiner had been required to submit the content of his speech to police officials before mounting his "soap box."

For, clearly, one of the basic criteria in determining whether free expression of ideas may go untrammeled is "the method used to achieve such ends."

> "*A licensing standard which gives an official authority to censor the content of a speech differs toto coelo from one limited by its terms or by nondiscriminatory practice to considerations of public safety and the like.* Again, a sanction applied after the event assures consideration of the particular circumstances of a

situation. The net of control must not be cast too broadly." (Frankfurter, J., concurring in *Niemotko, Kunz* and *Feiner*, 340 U. S. at page 282. (Emphasis added.)

3. SOLICITING FOR LABOR UNIONS

This Court's treatment of ordinances controlling the solicitation of members by labor union organizers emphasizes the reluctance of the Court to sanction any prior regulation of content of speech. *Thomas v. Collins*, 323 U. S. 516; *Staub v. Baxley*, 355 U. S. 313.

In the *Thomas* case a Texas statute required all labor organizers to register with and receive a card from the ***15** Secretary of State before soliciting members. The statute did not, unlike those in previous licensing cases, vest any discretion in the issuing authorities to censor the activity. Yet a majority of this Court held that the conditioning of the exercise of the right of free speech upon even a mere registration was an invalid restriction and "quite incompatible with the requirements of the First Amendment." 323 U. S. at page 540.

And here, too, even the dissenting members of the Court, who would have upheld the validity of the Texas statute, recognized that there would be little question as to its invalidity "if the statute attempted to define a necessary qualification of an organizer; *purported to regulate what organizers might say;* limited their movements or activities; assayed to regulate time, place or purpose of meetings; or *restricted speakers in the expression of views*" 323 U. S. at page 556. (Emphasis added.)

And in *Staub v. Baxley, supra*, this Court had little difficulty with the validity of an ordinance requiring a permit from the Mayor before soliciting union members.

Justice Whittaker speaking for the majority held that "the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays 'a forbidden burden upon the exercise of liberty protected by the Constitution.' "[27] 355 U. S. at page 325.

4. BROADCASTING

With the advent of broadcasting as a new medium of communication, Congress recognized that unlike other ***16** media of expression, the air waves were not available to all, and thus by necessity broadcasting must be subject to a unified and comprehensive regulatory system of permits and licenses. *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 144 (1939); *Nat. Broadcasting Co. v. U. S.*, 319 U. S. 190.

But in imposing controls upon the air waves, Congress specifically prohibited any encroachment on freedom of speech. Section 326 of the Communications Act of 1934 provides:
"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals made by any radio station and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications." (47 USC 326).

Some control over content of broadcasting programs does exist, but it is effected not by prior censorship, but by controls imposed subsequent to release. The distinction is clearly drawn in *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153 (3rd Cir. 1950), *cert. den.* 340 U. S. 929. Chief Judge Biggs in denying the Pennsylvania Board of Censors the right to censor motion pictures shown on television under the method here, which he characterized as "antique," said:
"It is clear from the foregoing that Congress was concerned with the content of the programs of all broadcasting stations including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions for

the transgressor who should broadcast an indecent or obscene program. *Congress did not intend to control in advance the broadcasting of radio programs* but it did intend to prevent the transmittal of obscene matter through the ether. Program control ***17** was entrusted to the Federal Commission and it is an effective one." (p. 156) [28] (Emphasis added.)

5. LOBBYING

Finally, it should be noted that even with respect to the registration of lobbyists before Congress, which this Court sanctioned in *United States v. Harriss,* 347 U. S. 612, the Federal Regulation of Lobbying Act [29] provides only for "a modicum of information" as to the lobbyist and does not invest any power or authority in the Clerk of the House or the Secretary of the Senate to prevent the appearance of any lobbyist. Such power would clearly constitute an abridgement of the First Amendment. As the Court said in the *Harriss* case "the restraint was at most an indirect one resulting from the criminal libel laws." 347 U. S. at page 626.

Thus even in this sensitive area of vital national interest the Court has never sanctioned any regulation which required the submission and examination of speech for approval prior to its exercise but has limited its sanction to an identification statute which operates only as a deterrent.

C. Conclusion

Governmental authorities have adopted diverse methods of regulating speech, dependent upon the medium involved and the circumstances indicating the need for regulation. The evaluation of the methods employed and the degree of control which has been permitted by this Court vary from a vitiation of mere identification requirements (*e.g., Thomas v. Collins, supra; Talley v. California, supra*) to a sanction of injunctive remedies against further dissemination (*Kingsley Books, Inc. v. Brown, supra*). In no instance, however, has any Justice of this Court sanctioned ***18** a regulation of speech which requires submission of all matter to a governmental official for his approval of its content prior to distribution. Such a system, in every area of speech, has been "deemed licensing or censorship," and rejected as unconstitutional wherever encountered, except up to now as to motion pictures. There such regulations have not been wholly stricken. But neither have they been sustained.

There is no Justifiable Basis for a Distinction in Treatment of Motion Pictures and Other Media of Communication

For more than a decade now this Court has consistently and unanimously ruled that motion pictures are speech and part of the press and thus entitled to the immunity the Constitution grants from laws abridging the freedom of speech and press. [30]

Observations made in some earlier individual opinions in the Court that different media of communication might require different methods of control [31] were restated and ***19** evaluated by Justice Clark writing for the Court in *Joseph Burstyn Inc. v. Wilson,* as follows:

"Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." 343 U. S. at pp. 502, 503.

Motion pictures may present their "own peculiar problems" but it is not apparent that the features of this medium are so distinguishable as to require a deviation from the long-established basic principles of freedom of speech.

The advocates of a difference in treatment usually base their arguments on the so-called "impact" of the medium, and the amount of exposure afforded motion pictures as opposed to other media. We urge that neither of these arguments has any substantial validity. The impact of motion pictures upon the individual cannot be determined with any precision. Indeed, during its investigation of juvenile delinquency, the Kefauver Committee studied the influence of motion pictures, crime comic books and television on youth and concluded:

> "Exactly what the influence of the motion picture, or any mass media might be is a very complex problem about which specialists do not specifically agree. Other factors that must be taken into consideration are, firstly, that the impact of the movie depends greatly on what the personality makeup of the child already is; and secondly, that the impact must be seen in the perspective of the total environment, an environment which includes the school, the neighborhood, the gang, the church, the newspaper, the comic booklets, the radio programs, other movies, and, above all, the family." [32]

***20** Nor can it be determined with any accuracy whether any one medium delivers more or less of an impact on society than another, thereby requiring a difference in treatment. [33]

An English study in censorship offers the following as to comparisons:

> "There are two further reasons for the severity of our film censorship: first, there is a commonly accepted theory that what is seen on a cinema screen is in some way more potent than what is seen in print. For the literally illiterate this is obviously true, but there is no clear evidence that the theory as applied to the greater part of the population has anything approaching absolute validity. Second, national pudency tends to apply a much stricter moral code to public entertainment, entertainment enjoyed in the mass, than to private pastimes. Because of this a man, woman or child who is debarred from seeing Marlon Brando on the rampage in the cinema is quite free to read, in domestic privacy, an obscenely angled account of similar violence and immorality in a Sunday newspaper." [34]

The impact of a medium is dependent to a large extent on the technical skill of the particular production (*i.e.*, the direction, the actors, the scenery, the script) be it television, motion pictures, or drama. A technically bad motion picture may have little impact, while a well produced drama or television play, or a well written book may achieve an immeasurable impact. But, indeed, the reverse may be equally true.

***21** "Crime comic books" may have as great an impact on certain segments of the population as either motion pictures or television. [35] The impact of one medium as compared to another must differ as to each individual. It is not capable of measurement and therefore cannot form any logical basis for establishing a difference in treatment.

A second argument advanced for maintaining a distinction is the amount of exposure afforded motion pictures. [36] We certainly do not argue that exposure, that is, the size of the audience reached, should in any way be determinative of the operation of the First Amendment, but, even assuming the validity of the premise, the argument falls when used as a basis for maintaining a different treatment of motion pictures and other media. Television and comic books, for example, are at least as readily accessible as motion pictures. Television may be viewed without any payment; the average comic book may be purchased for ten cents, or scanned while standing in the drug store or at the newsstand. On the other hand, motion pictures can only be seen upon payment of an admission price. [37]

Indeed, recent studies show that exposure to television, for example, far exceeds that of other media. [38] In July, 1960, there were 45,760,000 television homes. It is estimated ***22** that each set is viewed by 3.6 persons on an average of 5.7 hours per

day. [39] This means on an average of over 135 million people watch television daily. On the other hand, motion picture theatre attendance is estimated at 41,800,000 per *week.* [40]

Certainly it is not contended that television or any medium of communication should in any way be subjected to prior examination as to content, merely because it reaches a large number of people. It is merely urged that the argument when used to support a distinction in the treatment of motion pictures has no validity.

There are differences in media of communication. At one time, one medium may reach the greatest number of people and have the greatest impact; at another time, a different medium may find the greatest audience and have the greatest impact. But these differences cannot and do not justify any distinction in the treatment. All media must be free from any prior restraint.

This Court in *Burstyn* refrained from announcing how far its setting aside of *Mutual Film Corp. v. Ohio,* 236 U. S. 230, reached in relation to the prevention of the showing of obscene films. It cited in a footnote (343 U. S. 495, 506 fn. 20) dicta from *Near v. Minnesota,* 283 U. S. 697, 716; *Chaplinsky v. New Hampshire,* 315 U. S. 568, 571-2, and *Kovacs v. Cooper,* 336 U. S. 77, 82, which appeared to bear upon permissible or impermissible constitutional limits when "prevention" is the goal.

***23** In *Kingsley Books, Inc. v. Brown, supra,* the Court by the narrowest of margins upheld the power of the state to prevent by court injunction the further distribution of obscene publications theretofore published. Although the majority opinion quoted the dictum from *Near,* referred to in the footnote in *Burstyn,* its reliance was not on application of the dictum but upon the demonstration that the technique for prevention by judicial process the state adopted "*studiously withholds restraint upon matters not already published and not yet found to be offensive.*" 354 U. S. at p. 445. (Emphasis added.)

The claim to freedom from Chicago's requirement that a motion picture be submitted for inspection prior to public showing will at the very least, in recognition that speech and cultural interests are involved, meet at the start with a "momentum of respect." (Justice Frankfurter concurring in *Kovacs v. Cooper,* 336 U. S. at p. 95.) And although the Court may carefully refrain from imposing what would be its own policy, as it analyzes the ordinance's operation and effect, the availability of alternative "more moderate control" deserve to be taken into account. [41] (Justice Frankfurter concurring in *Dennis v. United States,* 341 U. S. 494, at p. 542, quoting with approval Mr. Paul Freund's "On Understanding the Supreme Court.")

Fair inferences of what has been happening as a matter of experience under the Chicago censorship can be drawn from examination of the cases listed in Appendix C to the petition for certiorari herein. It is believed that they negate the conclusion of Judge Campbell, who dismissed the complaint herein, arrived at by him in *Zenith International Film Corp. v. Chicago,* 183 F. Supp. 623 (D. Ill., 1960), that the ***24** Chicago Police and City Hall censorship of motion pictures is the only feasible method of dealing with obscenity or other possible unlawfulness in motion pictures. [42]

Since the municipality of Chicago effectively excludes from public view within its boundaries motion pictures not already exhibited and not yet found to be offensive, the Court should find that the command of the First and Fourteenth Amendments forbids Chicago to do so.

CONCLUSION

For the reasons advanced above, we most respectfully urge that the decision of the Court of Appeals for the Seventh Circuit be reversed and petitioner be afforded the relief requested.

Appendix not available.

Footnotes

1 By-laws, Motion Picture Association, Art. 1, Sec. 3.

2 For a discussion of the Motion Picture Association and the Production Code see "Self-Policing of the Movie and Publishing Industry", Hearings before Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 86th Cong., 2nd Sess. (1960).

3 Petitioner has consented to the filing of this brief.

4 See Appendix "A".

5 See Ill. Rev. Stat., Chap. 38, Sec. 470. The Illinois Courts have sanctioned the use of a preliminary injunction at the instance of a city to prohibit the exhibition of an allegedly "obscene" motion picture. *Aurora v. Warner Bros. Pictures Dist. Corp.*, 16 Ill. App. 2d 273, 147 N. E. 2d 694 (1958). See as to the experience of the motion picture "Baby Doll" involved in that case, Gellhorn, American Rights--Constitution in Action (1960), p. 183 ff.

6 Ohio: *RKO Radio Pictures v. Ohio, Capitol Enterprises v. Ohio,* 162 Ohio St. 263, 122 N. E. 2d 769 (1954). Massachusetts: *Brattle Films, Inc. v. Commissioner of Public Safety,* 333 Mass. 58, 127 N. E. 2d 891 (1955).

7 Pennsylvania: *Hallmark Productions v. Carroll,* 384 Pa. 348, 121 A. 2d 584 (1956); Kansas: *Holmby v. Vaughn,* 177 Kan. 728, 282 P. 2d 412, rev'd 350 U. S. 870. New York: *Commercial Pictures Corp. v. Regents,* 305 N. Y. 336, 113 N. E. 2d 502, rev'd 346 U. S. 587.

8 Act of September 17, 1959, P. L. 902, §1-14, 4 Purdon's Penna. Stat. Anno. §70.1-70.14.

9 See for example, Springfield, Mo. Council Bill No. 451, Resolution No. 2395 dissolving the Board of Censors, dated 3/29/54; Repeal of Sec. 15.02 of Palo Alto, Calif. Ordinance No. 5 which provided for 7 days advance notice to and approval by Board of Commercial Amusements, March 22, 1954; Repeal of Pine Bluff, Ark. censorship ordinance, April 24, 1954.

10 Kansas Gen. Statutes Ann., Sec. 51-101 to 51-114, 74-2201 to 74-2209; Maryland Ann. Code, Art. 66A §1-26; New York Educ. Law, §§ 122-132; Virginia Code, Title 2, Sec. 98-116.

11 See Appendix A, I, *infra.*

12 For a detailed discussion of the operation of Censorship Boards, See, *Entertainment: Public Pressures and the Law.* 71 Harv. L. Rev. 326, 328-334.

13 See Appendix A, II, *infra.*

14 Pennsylvania requires 48 hours; Birmingham, Alabama, 24 hours; West St. Paul, Minnesota, 7 days; Lansing, Michigan, 3 days; Spokane, Washington, 15 days; and Gary, Indiana and Memphis, Tennessee "as far in advance as possible". (Citations of municipal ordinances are found in Appendix A.)

15 The requirement of advance notice was held to constitute an unconstitutional prior restraint in *Twentieth Century-Fox v. Boehm, supra.*

16 See Appendix A, III. Under some of these ordinances all motion pictures are inspected; under others, only those about which specific complaints have been received. Some boards cannot ban, but can require exhibitors to post notices re the suitable audiences. (See Abilene, Texas, Ord. No. 907, 1/15/59.) Kansas City, Mo. provides that a license granted by the Motion Picture Reviewer may be revoked if during the regular exhibition fifteen citizens complain to the Board of Appeals. (Kansas City, Mo. Rev. Ordinances Chap. 51, § 51-1.5 (1956). Cf. Revocation of "The Miracle" license, *Joseph Burstyn Inc. v. Wilson* (*supra*).

17 See Appendix A, Footnote 5.

18 These licenses issued before a theatre may operate are generally based on health and safety regulations.

19 Whether revocation of a license to do business because of the content of "speech" constitutes such a restraint of speech as to be deemed "censorship" is not at this time questioned. Cf. *Hannegan v. Esquire,* 327 U. S. 146; cases arising under §312(a) of Communications Act of 1934.

20 Not all arbitrary exclusions from view and hearing are remedied by judicial process even though judicial process be invoked. See, for example, *United Artists Corp. v. Board of Censors,* 189 Tenn. 397, 225 S. W. 2d 550 (1949), cert. den. 339 U. S. 952 (1950), discussed in Kupferman and O'Brien *Motion Picture Censorship--The Memphis Blues,* 36 Cornell L. Q. 273, *274-278; RD-DR Corporation v. Smith,* 183 F. (2d) 562 (5th Cir. 1950), cert. den. 340 U. S. 853, involving the bar by the City of Atlanta of the motion picture "Lost Boundaries".

21 Identification of publishers may be required (*Lewis Publishing Co. v. Morgan,* 229 U. S. 288); certain written matter may be declared non-mailable (18 U. S. C. § 1461, *Roth v. Goldman,* 172 F. (2d) 788 (2nd Cir. 1949); *Roth v. United States,* 354 U. S. 476); the publication of obscene or criminally libelous speech may be punished (*Alberts v. California,* 354 U. S. 476; *Beauharnais v. Illinois,* 343 U. S. 250; *Chaplinsky v. N. H.,* 315 U. S. 568).

22 Even the District Court which approved the actions of the Postmaster General was careful to characterize the Postmaster's actions as "grouping or classifying" rather than "censoring" which it defined as subjecting matter to scrutiny prior to release for the purpose of deleting objectionable portions. *Esquire v. Walker,* 55 F. Supp. 1015, 1021 (D. D. C. 1944).

23 Moreover even those ordinances limiting regulation to criminal sanctions for the sale of crime magazines and books have been struck down. See *Winters v. New York,* 333 U. S. 507, and list of statutes struck down by the *Winters* decision (dissenting opinion of

Frankfurter, J.); *Butler v. Michigan,* 352 U. S. 380; *Katzec v. Los Angeles,* 52 C. 2d 360, 341 P. 2d 310 (1959); *Siegel Enterprises v. Hepbron* (Baltimore Superior Court, 1960).

24 "Comic Books and Juvenile Delinquency," Interim Report of the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, 84th Cong., 1st Sess. (1955), p. 23.

25 See *Schneider v. State,* 308 U. S. 147, permit required from Chief of Police who may ban distribution if applicant is "not of good character"; *Largent v. Texas,* 318 U. S. 418, permit required from Mayor if he deems it "proper or advisable"; *Cantwell v. Connecticut,* 310 U. S. 296, certificate required from Secretary of Public Welfare Council who may determine whether it is a "religious cause" or "bona fide charity". Cf. *Murdock v. Pennsylvania,* 319 U. S. 105, license required from Burgess of town. On the other hand, where approval as to content was not a factor, the ordinances have been sustained. *Breard v. Alexandria,* 341 U. S. 622.

26 See also *Hague v. CIO,* 307 U. S. 496, where an ordinance required a permit from the Director of Public Safety before any public meeting could be held on the streets.

27 Again, even the dissenting Justices did not depart from this now well established principle. Justices Frankfurter and Clark based their dissent not on the application of First Amendment principles but on the failure of petitioners to meet certain procedural requirements.

28 See also *KFKB Broadcasting Assn v. FRC,* 47 F. 2d 670 (D. C. Cir., 1931); *McIntire v. Wm. Penn Broadcasting Co.,* 151 F. 2d 597, 599 (3rd Cir., 1945).

29 2 U. S. C. §§261-270.

30 Since 1912 motion pictures have been entitled to copyright under the provision of the Constitution empowering Congress to promote the progress of useful arts by securing to "authors" rights in their "writings". United States Constitution Article 1, section 8, clause 8. Act of August 24, 1912, 37 Stat. 488, 17 U. S. C. 5(1) (m). See Opinion of U. S. Attorney General, December 18, 1958, upholding the policy of the Register of Copyrights for policy reasons not to screen writings, including motion pictures offered for registration, to determine whether registration should be denied on grounds of obscenity.

31 See *Saia v. New York,* 334 U. S. 558, 566 (Justice Frankfurter's dissent); *Kovacs v. Cooper,* 336 U. S. 77, 96-97 (Justice Frankfurter's concurring opinion); *Kunz v. New York,* 340 U. S. 290, 307-308 (Justice Jackson's dissent). But see *Superior Films v. Department of Education* (Justice Douglas' concurring opinion):
"Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas." 346 U. S. at p. 589.

32 Committee on the Judiciary, *Motion Pictures and Juvenile Delinquency,* S. Report No. 2055, 84th Cong., 2nd Sess. (1956), p. 62.

33 See Alpert, *Censorship of Obscene Literature,* 52 Harv. L. Rev. 40, 72, 74; Jahoda, *The Impact of Literature: A Psychological Discussion on Some of the Assumptions in the Censorship Debate (1954),* p. 44. Cf. Kern, *Motion Pictures and the First Amendment,* 60 Yale L. J. 696, 706-708.

34 Wilcox, *The Small Knife,* Sight and Sound, London, Vol. 25 (New Quarterly Series), No. 4, Spring, 1956, pp. 206, 209.

35 See the description of the Chicago campaign against comic books in Twomey, *The Citizens' Committee and Comic Book Control: A Study of Extragovernmental Restraint,* 20 Law and Contemporary Problems 621. See also, *Comic Books and Juvenile Delinquency,* Interim Report of the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary (84th Cong., 1st Sess. (1955)).

36 It has been suggested that this factor, instead of overcoming the arguments against prior restraint, in fact, reinforces them. See Emerson, *The Doctrine of Prior Restraint,* 20 Law and Contemporary Problems, 648, 669.

37 The average motion picture admission price is 50¢ (Film Daily Yearbook (1959), p. 105).

38 See Committee on the Judiciary, *Television and Juvenile Delinquency,* S. Report No. 1466, 84th Cong., 2nd Sess. (1956). p. 5.

39 "July Television Homes," Television Magazine, July, 1960, p. 74. Communication, CBS to MPA, June 1960.

40 Film Daily Yearbook (1959), p. 97. In 1959 there were 31,619,000 readers of Life Magazine per issue; 35,131,000 of Readers Digest; and 23,547,000 of Saturday Evening Post, Alfred Pollitz Media Studies, *Ad Page Exposure in Four Magazines* (1959). The newsstand sale of the paperback edition of "God's Little Acre" is estimated at 8,500,000, of "Peyton Place" at 8,000.000. (Cowley, *The Paperback Title Fight.* The Reporter Magazine, July 7, 1960, p. 46.)

41 It is common knowledge that few motion pictures exhibited in Chicago are made there. Since they are transported there by interstate carrier--railroad, motor, airplane, and the mails--the Federal Obscenity and Postal Exclusion laws apply. See IS U. S. C. §§ 1461, 1462.

42 The French motion picture, THE LOVERS, held obscene by Judge Campbell in the *Zenith* case, seems to have been effectively dealt with by punitive action in other communities where the picture was thought to be offensively obscene. See New York Times, Nov. 28, 1959; Variety, June 15, 1960.

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