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Trans-Lux Distrib. Corp. v. Maryland State Board of Censors[1]

Dunn v. Maryland State Bd. of Censors[2]

In *Trans-Lux,* the distributor of the movie "A Stranger Knocks" applied to the Maryland State Board of Censors for an exhibition license. The Board denied the license on the ground that the movie was obscene.[3] The Circuit Court of Baltimore City approved the finding of the Board, and the distributor appealed to the Maryland Court of Appeals on the following grounds: (1) the Maryland censorship law[4] was unconstitutional on its face; (2) the film was not obscene according to Supreme Court standards;[5] (3) the film was not obscene according to Maryland standards.[6] The court reversed, holding that the addition of the 1965 amendment[7] perfected the statute, held un-

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1. 240 Md. 98, 213 A.2d 235 (1965).
2. 240 Md. 249, 213 A.2d 751 (1965).
3. The Board found, 240 Md. at 101, 213 A.2d at 236:

> After reviewing the entire film and considering it as a whole, the Board finds that the film goes substantially beyond customary limits of candor in description and representation of sex, that it deals purposely and effectively with sex in a manner which appeals to the prurient interest, that it is without social importance, and that it lacks any identifiable artistic, cultural, thematic or other value which might be considered redemptive.

4. MD. CODE ANN. art. 66A, §§ 1–26 (1957), as amended, art. 66A, §§ 11–19 (Supp. 1965).
5. The standard laid down in Roth v. United States, 354 U.S. 476, 489 (1957) is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." In Jacobellis v. Ohio, 378 U.S. 184, 191 (1964), the Court reiterated the *Roth* test by emphasizing that a film must be "'utterly without redeeming social importance' and that 'the portrayal of sex, *e.g.,* in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press'." See also Ginzberg v. United States, 86 S. Ct. 942 (1966).
6. MD. CODE ANN. art. 66A, § 6 (1957) provides:

> (a) *Board to examine, approve or disapprove films.* — The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crime. . . .
>
> (b) *What films considered obscene.* — For the purpose of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.
>
> (c) *What films tend to debase or corrupt morals.* — For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.
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> (d) *What films tend to incite to crime.* — For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

7. MD. CODE ANN. art. 66A, §§ 1–26 (1957), as amended, art. 66A, §§ 11–19 (Supp. 1965).

constitutional by the Supreme Court in *Freedman v. Maryland,*[8] and that the film was not obscene under either Supreme Court or Maryland standards.

The facts in *Dunn,* dealing with the movie "Lorna," were substantially the same as in *Trans-Lux,* except that the sole issue on appeal was whether the Board had met its burden of proof as required by section 19 of article 66A[9] by merely exhibiting the film in court. The Court of Appeals held that it had not.

The *Trans-Lux* and *Dunn* cases focus on several problem areas concerning the Maryland movie censorship law. Three of these will be considered here: first, the constitutionality of the censorship statute; second, the burden of proof required of the Board; and finally, the community standard on which a film is to be evaluated.

The freedom of speech and expression guaranteed by the first amendment of the United States Constitution is not absolute according to the prevailing view.[10] The Supreme Court has held that "obscene" material is unprotected by the first amendment and that prior restraints on such material are not unconstitutional per se.[11] In *Freedman,*[12] the Supreme Court held section 2 of the Maryland movie censorship law[13] unconstitutional, saying that the procedure for an initial decision by the Board "fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement . . . an invalid previous restraint."[14] The Maryland Legislature subsequently amended article 66A to provide the procedural safeguard required by the Supreme Court.[15]

Despite the decision in *Trans-Lux* that the statute is now legal,[16] it *still* appears unconstitutional, since the prior restraint under section 2 is based on the standards of section 6,[17] which are so vague and overbroad as to fail to provide a constitutionally valid basis for determina-

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8. 380 U.S. 51 (1965).

9. MD. CODE ANN. art. 66A, § 19(a) (Supp. 1965), provides in pertinent part that "the burden of proving that the film should not be approved and licensed shall rest on the Board."

10. The history of this freedom is discussed in Note, *Motion Picture Censorship — A Constitutional Dilemma,* 14 MD. L. REV. 284 (1954).

11. Freedman v. Maryland, 380 U.S. 51 (1965); Jacobellis v. Ohio, 378 U.S. 184 (1964); Roth v. United States, 354 U.S. 476 (1957); Burston v. Wilson, 343 U.S. 495 (1952); Near v. Minnesota, 283 U.S. 697 (1931).

12. 380 U.S. 51 (1965).

13. MD. CODE ANN. art. 66A, § 2 (1957).

14. 380 U.S. at 60. The Court stated its reasons as follows, *id.* at 59–60:

> First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. . . . Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination.

15. MD. CODE ANN. art. 66A, § 19(a) (Supp. 1965).

16. 240 Md. at 102–04; 213 A.2d at 237–38.

17. See note 6 *supra.*

tion of obscenity.[18] This contention was raised in the *Freedman* case[19] but was not considered by the Maryland Court of Appeals and was expressly left undecided by the Supreme Court.[20]

Section 6(a) of article 66A requires the Board to disapprove those films which are obscene, or tend to debase or corrupt morals, or tend to incite to crime. Subsection (b) states that a film is obscene if its "effect" or "purpose" is "to arouse *sexual* desires" and if the "probability of this effect is so great as to *outweigh* whatever other merits the film may possess."[21] The vagueness and overbroadness of this subsection is evident on its face. The subsection speaks only of *sexual* desires, but the Supreme Court has said that "sex and obscenity are not synonymous."[22]

Furthermore, subsection (b) requires a *weighing* of the "other merits" of the film against the "probability" of arousing sexual desires. In *Jacobellis v. Ohio,* the Court rejected such a criterion, saying "a work cannot be proscribed unless it is 'utterly' without social importance."[23] Subsection (c)'s definition of what tends to debase or corrupt morals is substantially the same as that of the New York statute[24] which was found unconstitutional in *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*[25] The definition of which films tend to incite to crime in subsection (d) is questionable in the light of *Winters v. New York,*[26] in which the Supreme Court held a statute unconstitutionally vague because it suppressed material which might tend to incite to crime.

Clearly, section 6 is faulty, but it would be of little value to pursue the point in any greater detail here. It is doubtful that the question will ever be squarely presented to the Maryland Court of Appeals or the Supreme Court because the Court of Appeals has directed the Board and the lower courts to use the constitutionally legitimated obscenity test laid down by the Supreme Court in the *Roth* and *Jacobellis* cases.[27] There is a distinct possibility that the Maryland

18. No attempt is made here to define "obscenity," but merely to consider it as defined in *Roth* and *Jacobellis vis-à-vis* section 6 of the Maryland censorship law. See notes 5 and 6 *supra.* For further discussion of the meaning of "obscenity," see ERNST & SCHWARTZ, PRIVACY: THE RIGHT TO BE LEFT ALONE 199–225 (1962); KRONHAUSEN, PORNOGRAPHY AND THE LAW (2d ed. 1964); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 111 (1960); Note, *Offense of Obscenity: A Symposium of Views,* 51 KY. L.J. 577 (1963).

19. Freedman v. State, 233 Md. 498, 501–02, 197 A.2d 232, 233 (1963).

20. 380 U.S. at 56.

21. See note 6 *supra* (emphasis added).

22. 354 U.S. at 487. See also A Book, Etc. v. Massachusetts, 86 S. Ct. 975 (1966).

23. 378 U.S. at 191.

24. N.Y. EDUCATIONAL LAW § 122 provided that a film cannot be licensed if, among other things, it "would tend to corrupt morals. . . ."

25. 360 U.S. 684 (1959).

26. 333 U.S. 507 (1948).

27. In both *Trans-Lux* and *Dunn,* the Court of Appeals said that "even if the Maryland standards in section 6 were violated by the film, the Board could not constitutionally refuse to license it under the Roth-Alberts Rule. . . ." 240 Md. at 114, 213 A.2d at 244; 240 Md. at 253–54, 213 A.2d at 753. The Board's findings in the *Trans-Lux* case were exactly the same as in the *Dunn* case and indicate that the Board does in fact apply the *Roth-Alberts* test. See note 3 *supra.* The *Roth-Alberts* test is applied in the Circuit Court of Baltimore City, as shown by Maryland State Bd. of Censors v. Sanza, 156 The Daily Record (Baltimore) 30, p. 3 (Feb. 7, 1966) and Maryland State Bd. of Censors v. Hewitt, File #A47722/1965/A–865 (Nov. 15,

Court of Appeals may be faced with a further question in the light of three cases involving allegedly obscene printed matter just decided by the Supreme Court. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,*[28] the Court's opinion, announced by Justice Brennan, reiterated the *Roth* definition of obscenity and listed the three elements of obscenity:

a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex;

b) The material is patently offensive because it affronts community standards relating to the description or representation of sexual matters; and

c) The material is utterly without redeeming social value.[29]

The Court accepted the lower court's determination that the book, better known as *Fanny Hill,* possessed a "modicum of social value" and reversed, holding that this "modicum" was sufficient to make the material sub-standard in the federal view of obscenity.[30]

Mishkin v. New York[31] involved an interpretation of the "prurient appeal" element of obscenity, based on the appellant's contention that the nature of the material was such that it would not appeal to the "average person's" prurient interest, but rather would "disgust and sicken" him.[32] The Court rejected the contention, holding that the prurient appeal requirement is flexible and that in regard to material of this type, the requirement is to be applied "in terms of the sexual interests of its intended and probable recipient group."[33]

The further question that will face courts on the issue of movie censorship is raised by *Ginsburg v. United States,*[34] in which the appellant was convicted of mailing obscene material in violation of the federal obscenity statute.[35] Justice Brennan, delivering the opinion of the Court, spoke of the three elements of obscenity and seemed to add the further elaboration that, if after the material has been considered in the light of the three elements of obscenity, obscenity *vel non* remains a close question, then a showing of "exploitation of interests in titillation by pornography . . . with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters . . . may support the determination that the material is obscene even though in other contexts the material would escape such con-

1965). In the latter case Judge Byrnes said, "Our Court of Appeals declared in Dunn . . . that Article 66A, section 6 of the Maryland Code (1957) is no longer controlling in the determination of whether or not a motion picture may be denied a public viewing in this State. In that case (Dunn) the court held that the present test to be applied in deciding this issue is the one formulated by the Supreme Court in . . . Roth and Jacobellis."

28. 86 S. Ct. 975 (1966).
29. *Id.* at 977.
30. *Id.* at 978.
31. 86 S. Ct. 958 (1966).
32. *Id.* at 963.
33. *Id.* at 964.
34. 86 S.Ct. 942 (1966).
35. 18 U.S.C. § 1461 (1964).

demnation."[36] In other words, promotion which casts the shadow of salaciousness over the material may be considered the equivalent of an admission, by such promotion, of the material's obscenity. The question here, of course, is the application of this further elaboration on obscenity to movie censorship.

In *Freedman,* the Supreme Court held that the burden of proving that a film was obscene lay on the Board.[37] But what is this burden? Is a mere showing of the film sufficient? Clearly it is not, save in the rare case where the film "screams its obscenity;"[38] beyond this, the burden is uncertain. Maryland's Court of Appeals has discussed certain examples of the types of evidence that should be received, but not how much is necessary. The court has said, "[N]either the judge . . . in the circuit court . . . nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded these constitutional standards or tests without enlightening testimony on these points."[39] In *Trans-Lux,* such "enlightening testimony" showed, *inter alia,* that the United States Bureau of Customs had determined that the film was not obscene, that the film had been exhibited in other areas without apparent harmful effect, that the film had won numerous foreign awards and that the film had been favorably received by many prominent critics.[40] But this testimony was produced by the distributor, who did not have the burden of proof. Is it to be inferred, then, that negative testimony of this type must be produced by the Board? The court also cited two other Maryland cases[41] to further clarify the problem, but those cases only considered evidence which should not have been *excluded* when offered by the defendant, not what was *required* by the plaintiff to meet his burden. In summary, we know definitely only that the burden of proving the film obscene is on the Board and that mere exhibition of the film generally is insufficient.

The question of what community standard is to be used is intertwined with the burden of proof question, since in applying the test for obscenity a contemporary community standard must be used.[42] In *Trans-Lux* the Maryland court declined to decide whether the community involved is local or national, preferring to wait for further clarification by the Supreme Court.[43] Justice Brennan in *Jacobellis,* joined by Justice Goldberg, said that an interpretation of the community standards laid down in *Roth* as "local" was incorrect. He went on to trace the history of the term and said, "We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Con-

36. 86 S. Ct. at 950.

37. 380 U.S. at 58.

38. 240 Md. at 257, 213 A.2d at 754–55.

39. *Id.* at 255, 213 A.2d at 754.

40. *Id.* at 109–13, 213 A.2d at 241–43.

41. Yudkin v. State, 229 Md. 233, 182 A.2d 798 (1962); Levine v. Moreland, 229 Md. 231, 182 A.2d 484 (1962). See also Smith v. California, 361 U.S. 147 (1959); *In re* Harris, 16 Cal. Rptr. 889, 366 P.2d 305 (1961).

42. See note 5 *supra.*

43. 240 Md. at 105, 213 A.2d at 238.

stitution."[44] On the other hand, Chief Justice Warren and Justice Clark retorted, "There is no provable national standard, and perhaps there should be none."[45] Because of the closeness of opinion in *Jacobellis* on this point, the Maryland Court of Appeals has taken no definite stand as to which standard is applicable.[46] A local standard was apparently recognized in a recent lower court decision in Maryland, where the court based its finding of obscenity in part on the testimony and opinion of a local panel of jurors, local clergymen and local lay witnesses.[47] On appeal, the consideration of the question by the Maryland Court of Appeals was precluded by a finding of procedural irregularities in the lower court.[48] Although the court has avoided the question thus far, Judge Hammond's dissenting opinion in *Monfred v. State*[49] may indicate which standard they will recognize. Judge Hammond, in speaking of the *Roth* test said, "There can be little doubt, I believe, that 'community standards' means not state or local communities but rather the standards of society as a whole."[50] Lockhart and McClure, in their much cited article, interpret the *Roth* opinion in the same manner.[51]

In conclusion, it appears that a film cannot be restrained in Maryland unless it violates the test for obscenity laid down in *Roth* and that the Board must show such violation; how this is to be shown is, however, not certain. Neither is it certain which community standard the Board must show the film violated. The problems discussed here give rise to a further question: is movie censorship in Maryland necessary, *i.e.*, it is necessary that films such as "Bambi" or "Mary Poppins" be previewed and approved before the public is exposed to them? Would not an injunctive proceeding, as used with books and other obscene material,[52] be sufficient? It would certainly eliminate the substantial expense incurred by the maintenance of a Censorship Board and the necessity of previewing every film to be shown in Maryland, easing even more the burdens and delays of litigation which concerned the Supreme Court in the *Freedman* case.[53]

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44. 378 U.S. at 192–93.

45. 378 U.S. at 200. Justice Harlan also indicated in dissent that the standard should be local; Justices White, Black, Douglas and Stewart remained silent on this point.

46. 240 Md. at 105, 213 A.2d at 238.

47. Maryland State Bd. of Censors v. Hewitt, File #A47722/1965/A-865, Balto. City Cir. Ct. (Nov. 15, 1965).

48. Hewitt v. Maryland State Bd. of Censors, 241 Md. 283, 216 A.2d 557 (1966). Judge McWilliams, for the court, said the procurement by the trial judge of the jurors' opinions was contrary to the intent of the statute to provide for an adversary proceeding, and that "in the light of . . . vigorous and persistent objections and Judge Byrnes' admission that the opinion of the jurors should be *'given great weight'*," the admission of the opinion was reversible error. 241 Md. at 291–92, 216 A.2d at 561.

49. 226 Md. 312, 173 A.2d 173 (1961).

50. *Id.* at 328–29, 173 A.2d at 181.

51. Lockhart & McClure, *supra* note 18, at 111–13.

52. MD. CODE ANN. art. 27, § 418A (Supp. 1965), provides that the States' Attorneys for the counties and Baltimore City can bring an action to enjoin the sale or distribution of an obscene book. While the difficulties with "obscenity" would still remain, at least censorship with its inherent problems would be eliminated.

53. 380 U.S. at 59.