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Chapter 220: California's Public Officials Are Banned from Requesting Donations from Production Companies, But Is it Enough to Curb Runaway Film Production?

Jennifer N. Wenker

Code Section Affected

Government Code § 14999.37 (new).
AB 1478 (Frommer); 2003 STAT. Ch. 220.

I. INTRODUCTION

Production companies filming in California have a major economic impact on California's economy.¹ For every \$18 million film that is not produced in California, California loses \$17 million in revenue and nearly 600,000 jobs.² In April 2003, filming in Los Angeles alone was estimated to provide upwards of 220,000 jobs and generate \$31.8 billion in local business and tax revenue for the city, county, and state.³

However, California appears to be experiencing a decline in film production.⁴ In 1997, production companies started the production of 637 films in California.⁵ In 1999, production companies only started 440 films in California.⁶ The drop in the number of films being produced in California is being attributed to "runaway productions."⁷ Generally, runaway productions are films that are developed in the United States, but filmed abroad because of the reduced production and location costs, as well as government incentives.⁸ However, in California, runaway productions refer to films that are developed in California, but are produced in other states.⁹

1. See MARTHA JONES, MOTION PICTURE PRODUCTION IN CALIFORNIA, 1 Cal. Research Bureau, Pub. No. 02-001, (2002) (stating "that motion picture production is of major economic importance in California" and the "18th largest industry by share of gross state product").

2. SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF AB 1478, at 1 (June 26, 2003).

3. Greg Hernandez, *California Budget Woes Send Film Incentives Program to Cutting-Room Floor*, L.A. DAILY NEWS, Aug. 1, 2003 (estimating done by the Entertainment Industry Development Corporation, who issues film permits in Los Angeles).

4. SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF AB 1478, at 1 (June 26, 2003).

5. *Id.* at 2.

6. *Id.*

7. See *id.* (using the phrase "runaway productions" is reference to the loss of "film production business to other states and countries").

8. JONES, *supra* note 1, at 35-42.

9. *Id.*

The California Legislature believes California is losing production companies' business and revenue to other states and countries that offer cheaper film permit fees and fewer obstacles in obtaining film permits.¹⁰ California's public officials are contributing to the difficulty of production companies filming in California by requiring them to donate to certain charities.¹¹ Eric Garcetti, a Los Angeles city councilmember, told Sony Pictures that he might not support the closing of Hollywood Boulevard for filming unless it paid \$10,000 for a traffic study.¹² Garcetti defended his actions by stating he was looking out for his constituents because of the amount of traffic disruptions that production companies generate when filming on location.¹³

Jackie Goldberg, Garcetti's predecessor, also demanded three production companies to each donate \$10,000 to charities in exchange for her support in closing the Glendale Freeway.¹⁴ Flying Tiger Films negotiated the amount down to \$2,500 in exchange for Goldberg's support.¹⁵ David Thornsberry, location manager for *Crocodile Dundee in Los Angeles*, was also requested by Goldberg's office to donate to a charity.¹⁶ According to Thornsberry, the production company ended up paying several thousands of dollars for fear that they would be denied a film permit.¹⁷ Imagine Entertainment was also asked by Goldberg to pay \$10,000 to film *Bowfinger* on the Glendale Freeway.¹⁸ Imagine Entertainment paid the amount, and their film permit was granted.¹⁹ Goldberg is not apologetic about asking a handful of production companies to donate to one of her five charities.²⁰ Ironically, Goldberg, now a member of the California Assembly, voted in support of Chapter 220.²¹

Although individual councilmembers do not have the power to deny film permits, production companies find obtaining certain film permits difficult without their support.²² Oftentimes, these donation requests were demanded just days before the production company started filming, forcing the production company to choose between losing money already invested in the location shoot or donating money to a charity.²³ Assemblymember Dario Frommer introduced

10. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1478, at 2 (July 23, 2003).

11. See Anita M. Busch & Steve Berry, *Film Firms Object to Donation Requests*, L.A. TIMES, Jan. 20, 2003, at B1 (stating that production companies are crying foul over elected officials using their power to demand donations to charities, which is not required by law).

12. *Id.*

13. *Don't Chase Movies Away*, L.A. TIMES, Jan. 27, 2003, at B12.

14. Busch & Berry, *supra* note 11.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. ASSEMBLY THIRD READING, FLOOR ANALYSIS OF AB 1478, at 1 (May 21, 2003).

22. Busch & Berry, *supra* note 11.

23. See *id.* (stating that days before Sony Pictures started filming, Garcetti made his traffic study request).

Chapter 220 to combat runaway productions attributable to public officials requesting charitable donations from production companies in exchange for film permits.²⁴

II. LEGAL BACKGROUND

With the amount of films lost to runaway productions, both the California Legislature and the federal government have previously attempted to resolve this problem through legislative action.²⁵

A. Federal Legislation

The only successfully enacted federal legislation in the last ten years related to runaway productions is Public Law 106-206, which became law on May 26, 2000.²⁶ Public Law 106-206 allows the Secretary of the Interior and the Secretary of Agriculture to require production companies to obtain a film permit and to pay a reasonable fee to film on federal lands.²⁷ Before Public Law 106-206, regulations prohibited the National Park Service and the United States Fish and Wildlife Service from collecting land-use fees.²⁸ However, the United States Forest Service had a “regulatory policy to collect commercial filming fees.”²⁹ Thus, Public Law 106-206 also “standardize[d] the collection of commercial film fees by agencies within the Department of Interior.”³⁰ A report by the Congressional Budget Office implied that the film industry would not be opposed to paying the fee because filmmakers say agency cooperation is an important factor for them in choosing their filming location.³¹

Congress has been unable to pass three bills that have been introduced over the last ten years to deal with runaway productions.³² A bill proposing tax credits for wages paid by production companies was introduced twice.³³ A bill “relating to the unemployment tax for individuals employed in the entertainment industry” was also introduced twice.³⁴ There was also a bill proposing United States Trade Representative Charlene Barshefsky discuss issues of runaway productions at the

24. ASSEMBLY THIRD READING, FLOOR ANALYSIS OF AB 1478, at 1 (May 21, 2003).

25. See JONES, *supra* note 1, app. F at 107-20 (describing California and federal legislation geared at the problem of runaway productions).

26. *Id.* at 107-08.

27. 16 U.S.C.A. § 4601-6d (West 2000).

28. H.R. REP. NO. 106-75 (1999).

29. *Id.*

30. *Id.*

31. *Id.*

32. See JONES, *supra* note 1, at 107-20 (describing federal legislation addressing runaway productions).

33. *Id.* at 107.

34. *Id.* at 108.

1999 World Trade Organization talks in Seattle.³⁵ However, none of these bills ever passed the committee.³⁶

B. California's Legislation

There have been several California legislative bills passed in an attempt to combat California's runaway productions.³⁷ The California Film Commission ("CFC"), a division of the former Technology, Trade and Commerce Agency,³⁸ was created in 1985 "to facilitate, retain, and attract filming in California."³⁹ However, the California Legislature proposed cutting the CFC's budget for the 2003-2004 fiscal year from \$2.9 million to \$1.2 million.⁴⁰

In spite of the reduced budget, the CFC will still provide limited services to production companies: (1) permits for State of California properties; (2) production troubleshooting services; (3) the State Theatrical Arts Resources ("STAR") partnership; (4) location assistance through the use of an online finder, CinemaScout®; (5) coordination with fifty-five regional film commissions; and (6) development assistance for film ordinances.⁴¹ The CFC will no longer provide the usual on-site California Highway Patrol ("CHP") Film Liaison to help and monitor production companies' when they film on State freeways and highways.⁴²

The STAR Partnership,⁴³ a CFC program, was created in 2001 to combat runaway productions.⁴⁴ The STAR Partnership allows production companies to have access to unused state properties at low to no cost.⁴⁵ Since 2001, productions such as *CSI*, *Judging Amy*, *Red Dragon*, *Signs*, *The Ring* and *Kill Bill* have been filmed on STAR properties.⁴⁶

35. *Id.*

36. *See id.* at 107-08 (indicating that these bills were further referred to various congressional committees but were never enacted).

37. *See id.* at 110-22 (listing all of the proposed and passed California bills since 1993).

38. *See Trade Offices Closed*, SAN DIEGO BUS. J., Aug. 11, 2003, at 4 (stating that the Technology, Trade and Commerce Agency will be phased out by January 2004 and the Business, Transportation and Housing Agency will oversee the CFC).

39. CAL. GOV'T CODE § 15363.71(a)(3) (West Supp. 2003).

40. Hernandez, *supra* note 3.

41. Letter from Karen Constine, Director, California Film Commission, to Production Community (Aug. 7, 2003) [hereinafter CFC Letter] (on file with the *McGeorge Law Review*).

42. *Compare id.* (listing the CFC's limited services), with FILM CALIFORNIA FIRST PROGRAM, OVERVIEW AND GUIDELINES, CALIFORNIA FILM COMMISSION 4 (Oct. 2002), at http://www.filmcafirst.ca.gov/cfc/Guidelines_Finalv6.pdf [hereinafter FCF PROGRAM] (copy on file with the *McGeorge Law Review*) (listing on-site CHP Film Liaison as one of the services provided by the CFC).

43. CAL. GOV'T CODE § 14999.55 (West Supp. 2003).

44. Press Release, Millimeter, STAR Program Expands Resources to Help California's Economy (Apr. 2, 2003), at http://millimeter.com/ar/video_star_program_expands/ [hereinafter Millimeter Press Release] (copy on file with the *McGeorge Law Review*).

45. FCF PROGRAM, *supra* note 42.

46. Millimeter Press Release, *supra* note 44.

Another CFC program is the multi-million dollar Film California First (“FCF”) Program.⁴⁷ Started on January 1, 2001, the FCF Program was created to “[increase] California’s competitive edge in attracting and retaining film projects.”⁴⁸ Through various reimbursement options, production companies can recover labor costs, film permit fees, public property use fees, and public equipment fees incurred while filming within California.⁴⁹

FCF Program reimbursements are given on a first-come, first-served basis depending on California’s budget.⁵⁰ For the 2003-2004 fiscal year, the FCF Program was not funded.⁵¹ Despite these budget cuts, Governor Gray Davis and the CFC called the FCF Program a success because the FCF program received over 3,500 applications and disbursed over \$21 million to production companies filming in California since January 2000.⁵²

The CFC also offers many tax incentives to production companies: (1) “[n]o state hotel tax on occupancy”; (2) “[n]o sales or use tax on production or postproduction services on motion picture or TV films”; (3) “[n]o sales or use tax on services including writing, acting, directing, casting, and storyboarding”; and (4) “[f]ive percent sales tax exemption on the purchase or lease of post-production equipment for qualified persons.”⁵³

III. CHAPTER 220

Adding to existing California programs, Chapter 220 prohibits local or state public officials who issue film permits from compelling production companies to give a charitable donation or other consideration directly or indirectly.⁵⁴ However, local agencies still have the authority to assess impact fees as a part of granting film permits.⁵⁵

Local or state public officials who continue to require charitable donations or other considerations shall be subject to a civil penalty ranging from one to five thousand dollars.⁵⁶ The local district attorney, city attorney, or the Attorney General can collect the penalty by bringing a lawsuit.⁵⁷

47. FCF PROGRAM, *supra* note 42, at 4-5.

48. *Id.*

49. *See id.* at 6-9 (describing the restrictions on reimbursement and the process for film production companies to receive their reimbursements).

50. *Id.* at 5.

51. CFC Letter, *supra* note 41; *see Hernandez, supra* note 3 (stating that for the 2002-2003 fiscal year, the FCF Program had a budget of \$7.9 million).

52. CFC Letter, *supra* note 41.

53. FCF Program, *supra* note 42.

54. CAL. GOV'T CODE § 14999.37(a) (enacted by Chapter 220).

55. *Id.* § 14999.37(b).

56. *Id.* § 14999.37(c).

57. *Id.* § 14999.37(d).

IV. ANALYSIS OF THE NEW LAW

A. Chapter 220's Purpose

Chapter 220 strikes down one more hurdle that production companies have encountered in obtaining film permits, thus giving production companies one less reason to leave California.⁵⁸ Film permits can now be issued without the common threat of public officials requesting production companies to pay additional unforeseen expenses to charities.⁵⁹

However, Chapter 220 may not be enough to keep production companies from leaving California.⁶⁰ California's Legislature has limited who is eligible for reimbursement and placed maximum caps on amounts recoverable in reimbursement programs.⁶¹ Rather than employing defensive measures to deter film flight, California should use incentive programs to encourage production companies to remain in or come back to California.⁶² So California can create more aggressive legislation, Canada and North Carolina provide good models of successful and unsuccessful incentive programs for California to study when drafting more aggressive legislation.⁶³

B. Canada's Incentive Programs

The United States views Canada as the most aggressive foreign country in attracting film production.⁶⁴ In 2001, Canada continued to increase the amount of film productions produced in Canada.⁶⁵ Canada has gained \$635 million in their overall value of production whereas the United States has suffered a corresponding loss of \$683 million since 1998.⁶⁶ In 1998, the United States experienced 285 runaway productions; 232 of those productions went to Canada.⁶⁷

58. Press Release, Assemblymember Dario Frommer, Assemblymember Introduces Bill to Stem Runaway Film Production, Curb Solicitation of Donations by Public Officials (Apr. 1, 2003) [hereinafter Frommer Press Release] (copy on file with the *McGeorge Law Review*).

59. *Contra* Busch & Berry, *supra* note 11 (describing several instances where production companies were forced to make charitable donations in order to obtain necessary film permits).

60. See Jenica Yurcic, *Co-Productions: The Future Feature*, 5 VAND. J. ENT. L. & PRAC. 76, 76 (2003) (stating that "history suggests that California's current efforts will prove ineffective").

61. See *id.* at 80 (stating that the "conditions restricting funding make it nearly impossible for the FCF to lower the costs of film production in California substantially enough to retain production or attract new productions").

62. See *id.* at 80-83 (arguing that California should create a single financial incentive plan to encourage the global film industry and capitalize on the growing need for digital post-production services).

63. *Id.* at 81-83; JONES, *supra* note 1, at 94-97.

64. JONES, *supra* note 1, at 42.

65. THE CENTER FOR ENTERTAINMENT INDUSTRY DATA AND RESEARCH, THE MIGRATION OF FEATURE FILM PRODUCTION FROM THE U.S. TO CANADA AND BEYOND-YEAR 2001 PRODUCTION REPORT 3 (2002), at <http://www.ceidr.org> [hereinafter CEIDR REPORT] (copy on file with the *McGeorge Law Review*).

66. *Id.*

67. JONES, *supra* note 1, at 48.

One reason that United States' films are going to Canada is because the Canadian dollar has been continuously growing weaker against the United States dollar.⁶⁸ Between 1994 and 2003, the Canadian dollar ranged from a little over \$1.30 to \$1.60 against the United States dollar.⁶⁹ On August 29, 2003, the exchange rate was \$1.39 Canadian dollar to one United States dollar.⁷⁰ This currency exchange rate gives production companies substantial savings by going to Canada.⁷¹ Thus, California could attract business back by reducing production costs through financial incentives to combat against the weak Canadian dollar.⁷²

Canada provides a good example of successful incentive programs from which California can learn to attract production companies back to California.⁷³ On July 30, 1997, the Canadian Federal Government unveiled the Film or Video Production Services Tax Credit ("PSTC").⁷⁴ The PSTC allows a sixteen percent tax credit for "salaries and wages paid to Canadian residents or taxable Canadian corporations [...] for services provided to production in Canada."⁷⁵ Production companies are not limited by a cap on the amount that can be claimed under the PSTC.⁷⁶

Production companies have also been attracted to Canada because of their film and television tax shelters.⁷⁷ However, on April 1, 2002, the Canadian Government eliminated their tax shelters.⁷⁸ Finance Minister Paul Martin ended the tax shelters because hundreds of millions of dollars were lost in tax revenue through abuse of the system.⁷⁹ Investors would contribute to financing a movie and, because of the costs associated with film production, investors could record a loss.⁸⁰ Then, investors would write off the loss on their taxes.⁸¹ Usually, the film

68. CEIDR REPORT, *supra* note 65, at 6; *see* JONES, *supra* note 1, at 41 (showing the Canadian dollar has been consistently weaker than the United States dollar since 1990).

69. Federal Reserve Bank of St. Louis, *Canadian/U.S. Foreign Exchange Rate*, at <http://research.stlouisfed.org/fred2/series/EXCAUS> (last updated Sept. 2, 2003) (copy on file with the *McGeorge Law Review*).

70. *See* Bank of Canada, *Currency Conversion Results*, at <http://www.bank-banque-canada.ca/en/exchform.htm> (last visited Aug. 30, 2003) (copy on file with the *McGeorge Law Review*) (calculating the current exchange rate for Aug. 29, 2003).

71. Press Release, Voice of America, Vancouver, Toronto Take Slice out of US Film Industry (Dec. 24, 2002) (copy on file with the *McGeorge Law Review*).

72. *See id.* (stating that the film industry "responds to global economics" and substantial savings when production companies are given a tight budget).

73. JONES, *supra* note 1, at 42; *cf.* Yurcic, *supra* note 60, at 83 (stating that California does not have to imitate Canada's available incentives because "California has unique attributes that it can use to devise its own incentive plan").

74. Canadian Audio-Visual Certification Office, *Film or Video Production Services Tax Credit (PSTC)*, at http://www.patrimoinecanadien.gc.ca/progs/ac-ca/progs/bcpac-cavco/progs/cisp-pstc/index_e.cfm (last modified July 11, 2003) (copy on file with the *McGeorge Law Review*).

75. *Id.*

76. *Id.*

77. CEIDR REPORT, *supra* note 65, at 7.

78. *Id.*

79. Jason Kirby, *Starr Power*, CANADIAN BUS., Sept. 16, 2002, at 51.

80. *Id.*

would become profitable, allowing investors to benefit from the tax shelter and to earn a profit from the movie.⁸² Canada's decision to end its tax shelters resulted in a reduction in production companies filming in Canada in 2002.⁸³

In contrast, California's FCF Program has a maximum \$300,000 cap on reimbursements.⁸⁴ These reimbursements are only available when using certain government agencies.⁸⁵ Likewise, the CFC offers no tax credit for salaries or wages and Chapter 220 only deters public officials from bribing film production companies for film permits.⁸⁶

C. Other States' Incentive Programs

Forty-one states in the United States have incentives for film production companies.⁸⁷ These incentives range from sales and income tax breaks, production cost rebates, few to no permits, and a state hotel tax exemption after production companies' employees stay a certain number of days.⁸⁸

North Carolina is one of the most aggressive states pursuing the film industry market.⁸⁹ In 2001, the United States Department of Commerce ranked North Carolina third among all states in film and television production.⁹⁰ North Carolina "has more studio production complexes and soundstages than any other state outside California."⁹¹ North Carolina also has an excellent filmmaking school.⁹² North Carolina provides an eighty-three percent tax break on their sales and use tax for items bought or rented by production companies filming in North Carolina.⁹³ North Carolina also boasts a no-fee permit for all filming on state property.⁹⁴

However, California might not want to completely model North Carolina's programs too closely. Not all of North Carolina's economic incentive programs are going unchallenged, which might result in North Carolina losing production companies' business.⁹⁵ In February 2003, the Institute for Justice-North Carolina

81. *Id.*

82. *Id.*

83. Brendan Kelly, *Few Projects Migrate to the North*, VARIETY, Sept. 2, 2002, at A8.

84. See FCF Program, *supra* note 42, at 5 n.2, 6 (showing a summary of the specific limits on production companies for personnel reimbursement, film permit fees, public property use fees, and public equipment).

85. *Id.* at 5 n.2.

86. *Id.* at 5; CAL. GOV'T CODE § 1499.37(a) (enacted by Chapter 220).

87. See JONES, *supra* note 1, at 43 (charting film incentive programs by state).

88. *Id.*

89. *Id.* at 42.

90. U.S. DEPARTMENT OF COMMERCE, THE MIGRATION OF U.S. FILM AND TELEVISION PRODUCTION 38 (Mar. 2001), at <http://www.ita.doc.gov/media/filmreport.htm> (copy on file with the *McGeorge Law Review*).

91. JONES, *supra* note 1, at 42.

92. *Id.*

93. *Id.* at 94.

94. *Id.*

95. See Institute for Justice North Carolina Chapter, *Calling "Cut!" on Taxpayer Subsidies to*

Chapter (“IJ-NC”) filed a lawsuit against North Carolina.⁹⁶ The IJ-NC claimed that North Carolina’s taxpayers are contributing to a Film Industry Development Account that pays up to \$200,000 to production companies filming in North Carolina, which violates North Carolina’s Constitution.⁹⁷ North Carolina’s Constitution requires that North Carolinians benefit when public funds are spent and not private production companies.⁹⁸

The lawsuit was dismissed on procedural grounds so the court did not decide the constitutional issue.⁹⁹ Although North Carolina has one of the most aggressive tax incentive programs in the United States, North Carolina’s appellate courts might eventually decide the constitutional issue as the IJ-NC has stated that it will appeal the court’s decision.¹⁰⁰

V. CONCLUSION

Chapter 220 eliminates one more bureaucratic hurdle that production companies faced in the past while obtaining film permits in California.¹⁰¹ There is still much needed legislation, like Canada’s or North Carolina’s incentive programs, to curb the amount of runaway productions. California cannot afford to have further runaway productions, as production companies have a significant impact on California’s economy.¹⁰² Regardless, California’s Legislature has at least taken one more positive step in the right direction.¹⁰³ Enactment of Chapter 220 will further protect the film industry by prohibiting the practice of giving charity donations in exchange for film permits.¹⁰⁴

Filmmakers, at http://www.ij.org/media/ivs/north_carolina/hollywood/background.shtml (last visited Aug. 31, 2003) (copy on file with the *McGeorge Law Review*) (calling on the courts to “re-affirm the public purpose doctrine and call ‘Cut!’ on [...] Hollywood giveaway[s]”).

96. Mark Schreiner, *State Sued over Film Incentives*, MORNING STAR, Feb. 21, 2003, at 1A.

97. Press Release, Institute for Justice North Carolina Chapter, Wake County Judge Dismisses Challenge to North Carolina Hollywood Subsidy Scheme (Aug. 12, 2003), at http://www.ij.org/media/ivs/north_carolina/hollywood/8_12_03pr.shtml (copy on file with the *McGeorge Law Review*).

98. See *id.* (reporting that the General Assembly left the Film Industry Development Account in place while replacing the original statute authorizing the account with another statute containing language proclaiming that the account was for a public purpose).

99. *Id.*

100. *Id.*

101. Frommer Press Release, *supra* note 58.

102. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1478, at 1 (July 23, 2003) (stating that “California’s \$32.3 billion annual film industry is a vital part of the State’s economy”).

103. See Yurcic, *supra* note 60, at 77 (arguing that “California should devise an incentive plan to attract film production projects”).

104. SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF AB 1478, at 2 (June 26, 2003).

* * *