UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BROADWAY THEATRE CORP.	:	
	:	
v.	:	Civ. Action No.
	:	3:00CV706 (SRU)
BUENA VISTA PICTURES	:	
DISTRIBUTION, et al.	:	

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Broadway Theater Corporation ("Broadway") owns and operates the York Square Cinema ("York Square"), a medium-size, three-screen movie theater in downtown New Haven, Connecticut. Broadway sued a number of major motion picture distributors[1] ("the Distributors"), claiming that their practice of licencing certain "first-run" films exclusively to the suburban New Haven movie theaters Showcase Cinema Orange and/or Showcase Cinema North Haven (the "Showcases"), violates the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-110a et seq. The Distributors have moved for summary judgment, arguing that the challenged distribution practice, known in the motion picture industry as giving "clearance" over particular theaters, is a "reasonable, customary, pro-competitive business practice" and therefore does not violate CUTPA. Distributors further contend that Broadway's complaint is based on defective antitrust allegations, that any CUTPA challenge to the Distributors' policy is preempted by the federal Copyright Act and that CUTPA's three-year statute of limitations bars Broadway's claims. For the following reasons, the Distributors' motion is denied.

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[1]Defendants in this action are Buena Vista Pictures Distribution, Columbia Pictures Industries Inc., Dreamworks Distribution L.L.C., Lions Gate Films Inc., Metro-Goldwyn-Mayer Distribution Co., Miramax Film Corp., New Line Cinema Corp., Paramount Pictures Corp., Sony Pictures Releasing Corp., Universal Firm Exchanges Inc., Warner Bros. Distributing, and USA Films L.L.C.

STANDARD OF REVIEW

Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

When ruling on a summary judgment motion, the court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson, 477 U.S. at 255; Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); see also Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d. 520, 523 (2d Cir.), *cert. denied*, 506 U.S. 965 (1992). When a motion for summary judgment is properly supported by documentary and testimonial evidence, however, the nonmoving party may not rest upon the conclusory allegations or denials of the pleadings, but rather must present sufficient probative evidence to establish a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995). To present a genuine issue of material fact, there must be contradictory evidence "such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248.

If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he bears the burden of proof at trial, then summary judgment is appropriate. Celotex, 477 U.S. at 322. In such a situation, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322-23; *accord*, Goenaga v. March of Dimes

Birth Defects Foundation, 51 F.3d 14, 18 (2d Cir. 1995) (movant's burden satisfied if it can point to an absence of evidence to support an essential element of nonmoving party's claim). In short, if there is no genuine issue of material fact, summary judgment may enter. Celotex, 477 U.S. at 323.

DISCUSSION

Clearances as Unfair Practices

Broadway brought a one-count complaint alleging violation of CUTPA and requesting monetary and injunctive relief. CUTPA prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce." Conn. Gen. Stat. § 42-110b. It is a broad statute enacted in response to "legislative concern that the existing pattern of common-law, legislative and administrative standards is insufficient to avoid unfairness in commercial relations." 1 Robert M. Langer, John T. Morgan & David L. Belt, The Connecticut Unfair Trade Practices Act 27 (1994) ("CUTPA Treatise"). Liability under CUTPA is established using three criteria to determine if a business practice is unfair or deceptive:

> (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other businessmen].

Sporty's Farm LLC v. Sportsman's Market, Inc., 202 F.3d 489, 501 (2d Cir. 2000). "All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." Id.

The Distributors' motion for summary judgment challenges Broadway's CUTPA claims on several grounds. The Distributors claim that their granting of clearances over the York Square cannot offend public policy because the granting of such clearances is a rational business decision -- distributors prefer to license films to the higher-grossing Showcases than to smaller venues like the York Square. The Distributors, however, have not shown they would be harmed by offering first-run films to both the York Square and the Showcases, or even that they gain an economic advantage from the use of clearances. Indeed, some evidence in the record suggests that licensing the same movie to both the York Square and the Showcases might actually benefit the Distributors by increasing their total revenues for the film. In any event, the Distributors' purported preference [2] for exhibiting films in the larger Showcases over the York Square does not shield the practice of granting clearances against a CUTPA claim.

The Distributors also claim that the practice of granting clearances generally does not offend public policy and therefore cannot violate CUTPA. The use of clearances, the Distributors argue, does not offend public policy because other cases challenging clearances have upheld the practice. The Distributors cite several cases in which antitrust challenges to clearances have failed. See Theee Movies of Tarzana v. Pacific Theaters, 828 F.2d 1395 (9th Cir. 1987); Soffer v. National Amusements, 1996 WL 194947 (D. Conn. 1996). The Distributors contend that, because these

[2] The record does not suggest that the Distributors prefer clearances over the York Square, but rather that clearances are a required condition of the Showcases' bids to license certain movies available through the Distributors; the Distributors apparently acquiesce to the Showcases' demands for clearances. These circumstances certainly affect the degree of unfairness of Distributors' actions, but do not eliminate the possibility of CUTPA liability against the present defendants.

antitrust decisions have found clearances to be pro-competitive, the use of clearances cannot be an unfair practice under CUTPA. This argument fails for at least two reasons: the existence of genuine issues of material fact concerning the level of competition among the relevant theaters and the differing standards governing antitrust and CUTPA cases.

Notwithstanding the Distributors' arguments, the practice of granting clearances may violate public policy if the theater over which a clearance is granted is not in substantial competition with the licensed theater. If the theaters are in substantial competition, the clearances at issue would not violate public policy; if the theaters are not in substantial competition, the clearances might well violate public policy. In the landmark antitrust decision United States v. Paramount, 334 U.S. 131 (1948), the Supreme Court held that "there should be no clearance between theaters not in substantial competition." Id. at 146. In Theee Movies of Tarzana v. Pacific Theaters, 828 F.2d 1395 (9th Cir. 1987), the Ninth Circuit elaborated on the reasoning behind Paramount. The court explained that clearances between theaters in substantial competition are pro-competitive. This is because theaters that are denied a licence to a certain movie will show alternative movies, thus providing consumers more movies to choose among and encouraging competition among movies for box office dollars. Id. at 1339-1401. Nothing in Paramount or Theee Movies, however, suggests that a clearance between theaters not in substantial competition would be consistent with the antitrust laws or with public policy in general.

There are genuine issues of material fact whether the York Square and the Showcases serve substantially the same geographic market and whether they are in substantial competition. Broadway presents evidence that the York Square services, at least in part, a discrete urban population. Spodick

deposition, Defs.' Ex. 2 at 76.17- 77.11, Pl.'s Ex. 12. Much of that population does not drive. Koch Declaration, Pl.'s Ex. 25. Because public transportation to suburban theaters is sparse and inconvenient, Broadway argues that a significant portion of New Haven's population has no access to first-run films that play only in suburban New Haven theaters. Id. Additionally, because New Haven's urban center contains a high proportion of racial minorities, senior citizens, students and individuals with disabilities, Broadway alleges that the Distributors' practice disadvantages these populations. Id., Pl.s Ex. 17. In contrast, the Distributors' offer evidence that the theaters service the same population. Hoover Declaration (the York Square and Showcase North Haven are 6.8 miles apart).[3] Based on the evidence presented in connection with the motion for summary judgment, a genuine issue of material of fact exists regarding whether or not Broadway and the Showcases are in substantial competition, whether they service substantially the same geographic market and, consequently, whether the practice of granting clearances over the York Square offends public policy.[4] Resolution of these issues may require expert testimony and certainly will require a more fully developed factual record than the one now before the court.

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[3] Plaintiff's exhibits are numbered according to the tab number they appear after in Plaintiff's Exhibits and Declarations in Opposition to Defendants' Motion for Summary Judgment. At times these numbers differ from the number listed for the same exhibit in Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment.

[4] The Distributors cite evidence that both the York Square and the Showcases advertise in the New Haven Register newspaper as support for the proposition that the cinemas draw from the same, greater New Haven market. The Register also includes listings for movie theaters throughout Connecticut and carries ads for movie theaters in Fairfield County. Additionally, both the Showcases and the York Square list show times in the Connecticut Post, a newspaper with a readership drawn primarily from Fairfield County. Evidence of ad placement in the same Connecticut papers provides little, if any, support for the Distributors' contentions that the York Square and Showcases serve the same geographic market and that they are in substantial competition.

In addition, antitrust laws and CUTPA outlaw different types of conduct. A practice may be violative of an "established concept of unfairness" even if it is not violative of any statute or the common law. Thus, the fact that a practice is not outlawed by the antitrust laws does not necessarily preclude that practice from CUTPA's reach as otherwise "unfair." See Sorisio v. Lenox, Inc., 701 F. Supp. 950, 963 (D. Conn.), *aff'd*, 863 F.2d 195 (2d Cir. 1988) (plaintiff's claim of a violation of public policy failed because antitrust law had not been violated and defendant's conduct was not otherwise unfair); 1 CUTPA Treatise 23 ("[T]here may be some instances in which CUPTA could be a significant addition to antitrust law."). The fundamental purpose of antitrust laws is to protect competition, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws, however, were enacted for the protection of *competition*, not *competitors*.") (internal quotation omitted), while the purpose of CUTPA is to protect consumers, competitors and businesses. See Salmon Bros. Realty Corp. v. Yost, 2001 WL 1232054 at *2 (Conn. Super. Sept. 26, 2001) ("purpose of CUTPA is to protect... competitors and other business people from unfair competition") (citing Larsen Chelsey Reality Co. v. Larsen, 232 Conn. 480, 496-98 (1995)). Thus, an antitrust claim will fail if the plaintiff can show only harm to a competitor, while that harm would be sufficient to sustain a CUTPA claim if the other elements of CUTPA have been met.

The Distributors also contend that Broadway's CUTPA claim must fail because there is no substantial injury to consumers, competitors or other businesses. See Sporty's Farm, 202 F.3d at 501. The record before the court contains evidence from which a jury could conclude that the Distributors' use of clearances causes substantial injury within the scope of CUTPA. If the York Square and the Showcases have different primary markets, then the challenged use of clearances may

injure consumers by denying a specific population access to many first-run movies. Furthermore, the practice may unfairly disadvantage the York Square, vis-a-vis its competitors, as well as other businesses. Broadway offers evidence that, when viewed in Broadway's favor, indicates that the Distributors use clearances to harm independent or small theaters. For example, while the Distributors provide the Showcases clearances over the York Square and the only other independently owned movie theater in New Haven County, they do not grant clearances over competing, chain-owned movie theaters in Connecticut. In Westbrook and Old Saybrook, the Distributors license the same, first-run movies simultaneously to two, nationally owned multiplexes within six miles of one another. Pl.'s Ex. 8. In Branford, the Distributors had traditionally granted the Showcases clearances over a local, independently owned theater. When the locally owned Branford theater closed and was replaced with a nationally owned Hoyts theater, the Distributors ended their practice of granting the Showcases clearance over Branford. Spodick deposition, Defs.' Ex. 2 at 286.12-24. A jury could find that, although the Distributors are willing to license films at the same time to the New Haven suburban Showcases and Hoyt theaters, they persist in granting clearances over the York Square. A jury could also find that the Distributors' use of clearances is an unfair practice aimed at promoting large, national-chain movie theaters over smaller or independently owned theaters, regardless of whether the independent theater is in substantial competition with the national theater and regardless of whether the independent theater can provide the Distributors revenues equivalent to the national multiplexes. Thus, a genuine issue of material fact remains whether the challenged business practice causes injury to consumers, competitors and/or other businesses.

Additionally the Distributors argue that the challenged clearances cannot violate CUTPA because the practice is not immoral, unethical, oppressive, unscrupulous or deceptive. As discussed above, a business practice can be an unfair or deceptive practice under CUTPA based on the degree it meets any or all of the following criteria: (1) it offends public policy; (2) is immoral, unethical, oppressive or unscrupulous; (3) it causes substantial injury to consumers, competitors or other businesses. Id. Consequently, even if the Distributors' practices are not immoral, unethical, oppressive, unscrupulous or deceptive, summary judgment must be denied because a genuine issue of material fact exists regarding whether, under the circumstances of this case, the challenged practices are unfair, offend public policy, and/or cause substantial injury to consumers, competitors and/or other businesses.

Copyright Preemption

The Distributors argue that, even if Broadway can sufficiently satisfy all of the elements of CUTPA, the claim should be dismissed because it is preempted by federal copyright law. Most of the precedent cited by the Distributors involves the dismissal of redundant state law claims in cases where the plaintiff brought federal copyright claims and state law claims based on the same facts.[5] Those cases have no relevance to the case at hand, in which plaintiff has not, and could not, allege a copyright violation.

[5] The Distributors cite, *inter allia*, Computer Associates v. Altai, 982 F.2d 693, 716 (2d Cir. 1992); Harper & Row v. Nation Enterprises, 723 F.2d 195, 200 (2d Cir. 1983); Titan Sports v. Turner Broadcasting Systems, 981 F. Supp. 65, 69 (D. Conn. 1997).

The Distributors do cite one related, though distinguishable, case, Orson Inc. v. Miramax Film Corp., 189 F.3d 377 (3d Cir. 1999). In Orson the Third Circuit, sitting en banc, reviewed the Pennsylvania Feature Motion Picture Fair Business Practices Law. That Pennsylvania statute contained a number of restrictions on motion picture licensing, including a prohibition on blind bidding and a ban on the use of minimum guarantees.[6] The court upheld the vast majority of the Pennsylvania law. The panel, however, ruled that the Copyright Act preempted a provision prohibiting a licensing agreement, "which grants an exclusive first-run for more than 42 days without providing for expansion in the same geographical area." Id. at 381. The court reasoned that the provision interfered with a copyright owner's right to refuse to license to a given party, because in order to license at anyone after the initial 42 days, the distributor had to license to a second, competing party. Id. 385-86.

Broadway's CUTPA claim does not interfere with the Distributors' copyright rights to distribute to whom they choose. Broadway challenges the Distributors' use of clearances in the New Haven vicinity as unfair. If Broadway were to succeed on its claim and the Distributors were enjoined from including clearances over the York Square in license agreements with the Showcases, the Distributors would still have the right to distribute and license only to parties of their choosing. Even without clearances, were Broadway and a distributor unable to reach a mutually satisfactory licensing arrangement on a given film, neither party would be required to enter into such an arrangement. As the court noted in Orson,

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[6] In blind bidding a distributor licenses a film "prior to its completion and without offering exhibitors a chance to trade screen the final product." Orson, at 384. Minimum guarantees are the minimum return an exhibitor agrees to pay a distributor, regardless of what the film grosses.

> The right to transfer or license copyrighted material for use by others under ... the Copyright Act has never encompassed a right to transfer the work at all times and at all places free and clear of all regulations; it has meant that the copyright owner has the *exclusive right* to transfer the material for a consideration to others.

Id. at 386 (emphasis in original) (quoting Warner Bros. v. Wilkinson, 533 F. Supp. 105 (D. Utah 1981)).

The Copyright Act does not prohibit regulation of unfair competition, even if the competition touches upon copyrighted material. See 1 CUTPA Treatise 81. Indeed, the federal Copyright Act preempts any state law creating "rights that are equivalent to any of the exclusive rights within the general scope of copyright." 17 U.S.C. § 301(a). CUTPA does not create rights equivalent to those established by the Copyright Act. Nor would restraining the granting of clearances requested by a competing theater necessarily interfere with the right to license a copyrighted work. Accordingly, the Distributors' preemption argument fails.

Statute of Limitations

Connecticut General Statutes section 42-110g(f) provides that a CUTPA action "may not be brought more than three years after the occurrence of a violation." The Distributors contend that Broadway's claim is barred by the statute of limitations because the Distributors have granted clearances over the York Square for decades and Broadway has had notice of this practice since the beginning. Broadway counters that each license is a separate contract that starts the statute anew. Consequently, Broadway bases its claim only on those licenses entered into during the statutory period. Pl.'s Opposition to Summary Judgment at 14.

Broadway's reasoning comports with this District's holding in Duprey v. Connecticut DMV, 191 F.R.D. 329, 342 (D. Conn. 2000). In Duprey, a group of handicapped citizens brought an action under the Americans with Disabilities Act against the Connecticut Department of Motor Vehicles for charging a fee on handicap parking permits, a practice that had been going on for much longer than the three-year statutory period. The court concluded that each time the Department of Motor Vehicles charged plaintiffs for a handicapped parking permit "there was a separate violation of the ADA, which started the running of the statute of limitations." Id. A similar result is appropriate in this case. Because each license constituted a discrete alleged CUTPA violation, Broadway's claims based on license agreements entered into within the three years prior to the filing of the complaint are not time barred. To conclude otherwise would insulate standardized or repeated unfair trade practices from challenge once they had been instituted for three years. Such a result would run counter to CUTPA's broad mandate to eliminate "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b. Because of the statute of limitations, however, Broadway's potential damages are limited to harm suffered as a result of actions taken by the Distributors within the three-year statutory period.

CONCLUSION

For the forgoing reasons, Defendants' Motion For Summary Judgment [Doc. #33] is DENIED. It is so ordered.

Dated at Bridgeport this 19th day of September 2002.

/s Stefan R. Underhill

Stefan R. Underhill
United States District Judge