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# A Proposal for Modification of the Ontario Appellate Practice

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# A Proposal for Modification of the Ontario Appellate Practice

*by Sidney B. Jacoby**

*Professor Jacoby reviews the procedural differences between appellate practice in the United States and Ontario. Generally, greater emphasis is placed on written argumentation in the United States practice, and this, in turn, allows for time limitations to be imposed on advocates when they present their oral arguments to the court. The author concludes that there are certain advantages in the procedure followed in the United States, and offers suggestions on how Ontario might modify its own practice to gain these same benefits.*

IN ONTARIO THERE is no limitation by statute or rule of the time for oral argument on appeals, and the practice of the United States of requiring appellate briefs, as such, is not followed. When an appeal is taken to the Ontario Supreme Court, the appellant is required to file an "Appeal Book," the "Appellant's Statement," and the "exhibits and evidence," all "within thirty days after setting down the appeal, or within fifteen days after the evidence is ready, whichever is later."[1] The "Appellant's Statement" is to consist of "a statement of the relevant facts," the "points intended to be argued" and "a concise statement of the law relied upon in support of such points; including the cases or authorities intended to be cited."[2]

A comparison with the American practice shows the differences. Of course, appellate practice in the United States varies in the different states, but not importantly for our purposes. It may be desirable to set forth primarily the federal appellate procedure.[3] The Federal Rules of Appellate Procedure specify what the record on appeal is and how it is to be transmitted to the court of appeals.[4] Disregarding details, the original papers filed in the district court and the transcript of its proceedings shall constitute the record on appeal,[5] and generally the record is to be transmitted by the clerk

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[1] SUPREME COURT OF ONTARIO RULES OF PRACTICE 498(b) [hereinafter cited as ONT. SUP. CT. R.]. Generally, the "Appeal Book" contains the formal papers (notice, pleadings, etc.), the exhibits material to the hearing, evidence not transcribed, and other material documents. *Id.*

[2] *Id.* at 501-(1), I, II & III.

[3] References will be made to the FEDERAL RULES OF APPELLATE PROCEDURE [hereinafter cited as FED. R. APP. P.]. For purposes of comparison, analogous rules will be considered under the OHIO RULES OF APPELLATE PROCEDURE [hereinafter cited as OHIO R. APP. P.].

[4] FED. R. APP. P. 10, 11. *See also*, OHIO R. APP. P. 9, 10.

[5] FED. R. APP. P. 10(a). *See also*, OHIO R. APP. P. 9(A).

of the district court to the court of appeals within forty days after the filing of the notice of appeal.[6] We do not have the institutions of either an "Appeal Book" or of an "Appellant's Statement." Rather, "statements" of an appellant come much later. Upon transmitting the record, the appellant pays the docket fee to the clerk of the court of appeals,[7] and only within forty days after the day of filing, when the briefing period begins, will the appellant make "statements."[8]

The Rules specify in detail the makeup of the briefs.[9] For example, there is a prescribed manner in which the record is to be referred to,[10] as well as a limitation on the length of briefs (not more than fifty pages except when permitted by the court),[11] but the most important subdivision may here be quoted in full:[12]

> BRIEF OF THE APPELLANT. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
> (1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.
> (2) A statement of the issues presented for reiew.[13]
> (3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented fom review, with appropriate references to the record (see subdivision (e)).
> (4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.
> (5) A short conclusion stating the precise relief sought.

The appellee's brief shall be similar, except that he need not submit a statement of the issues or of the case unless he is dissatisfied with appellant's statement.[14] A reply brief may be filed in reply to appellee's brief.[15]

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[6] FED. R. APP. P. 11(a), 11(b). *See also*, OHIO R. APP. P. 10(A), 10(B).

[7] FED. R. APP. P. 12(a). If the appellant fails to cause a timely transmission of the record or to pay a required docket fee, the appellee may move to dismiss the appeal. *Id.* at 12(c). *See also*, OHIO R. APP. P. 11(C).

[8] FED. R. APP. P. 31 provides:

> The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

OHIO R. APP. P. 18 sets forth a similar, but shorter briefing period.

[9] FED. R. APP. P. 28, 30, 32. *See also*, OHIO R. APP. P. 16, 19.

[10] FED. R. APP. P. 28(a).

[11] *Id.* at 28(g). OHIO R. APP. P. put no limitation on the length of a brief.

[12] FED. R. APP. P. 28(a).

[13] Rather than calling for a statement of the issues, OHIO R. APP. P. 16(A)(4) requires the appellant to set forth a statement of the assignments of errors presented for review.

[14] FED. R. APP. P. 28(b). *See also*, OHIO R. APP. P. 16(B).

In the same way, the writing of briefs is emphasized in the United States Supreme Court practice[16] (which is mostly by certiorari).[17] Rule 23 of the Supreme Court Rules spells out in detail what is to be included in the written Petition for a Writ of Certiorari. Among other things, it is to contain "the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail,"[18] and "a direct and concise argument amplifying the reasons relied on for the allowance of the writ."[19] The respondent has thirty days within which to file an opposing brief.[20] The decision whether or not to grant certiorari is made without oral argument.[21] If certiorari is granted,[22] the parties submit their briefs which are in detail described in the Rules.[23] Included in the brief is "a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief."[24] Thereafter oral argument, of one half hour on each side (unless otherwise directed), is allowed.[25] The Rules explicitly state that "the court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."[26]

Views have been expressed questioning the desirability of adopting for the Ontario appellate practice some form of written briefs modelled after the United States practice. In a recently published report by the Attorney General of Ontario, opposition was voiced against the "substitution" of writ-

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[15] FED. R. APP. P. 28(c). *See also*, OHIO R. APP. P. 16(C).

[16] For purposes of comparison, references will be made to both the United States Supreme Court Rules [hereinafter cited as U.S. SUP. CT. R.] and the Ohio Supreme Court Rules [hereinafter cited as OHIO SUP. CT. R.].

[17] For example, among the cases docketed in the Supreme Court of the United States for the 1971-1972 term, 91.5% were brought on jurisdictional grounds of certiorari. REPORT OF THE STUDY GROUP OF THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573, 620 (1972).

[18] U.S. SUP. CT. R. 23.1(c). *See also*, OHIO SUP. CT. R. II, § 4 A(1).

[19] U.S. SUP. CT. R. 23.1(h). *See also*, OHIO SUP. CT. R. II, § 4 A(2).

[20] U.S. SUP. CT. R. 24. *See also*, OHIO SUP. CT. R. II, § 6.

[21] Upon expiration of the period for filing the reply brief, or upon an express waiver of the right to file, or upon a timely filing of the brief, the petition and brief (if any) are distributed by the clerk to the court for its consideration. U.S. SUP. CT. R. 24.3. In Ohio, discretionary appeals may be taken to the Ohio Supreme Court only if leave is first obtained. OHIO CONST. art. IV, § 2. When leave is required, memoranda must be filed in support of the motion for leave, OHIO SUP. CT. R. II, § 4, and the Court has the choice of either foregoing oral argument on the motion, *id.* at VII, § 1, or permitting fifteen minutes of oral argument for each side, *id.* at VII, § 3.

[22] The percentage of cases in which certiorari is granted is quite low. For instance, for the 1971-1972 term, only 9.6% of all certiorari petitions filed were granted. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, *supra* note 17, at 615.

[23] U.S. SUP. CT. R. 40.

[24] *Id.* at 40.1(f).

[25] U.S. SUP. CT. R. 44. *See also*, OHIO SUP. CT. R. VII, § 3, which allows the same time for arguments on the merits for each side.

[26] U.S. SUP. CT. R. 45.1. OHIO SUP. CT. R. VII, § 2, expressly allows a party to waive oral argument if proper notification is given to the Court.

ten argument for unlimited oral argument,[27] principally on the ground that the American appellate system is essentially a written one and that the "appearance of the 'Brandeis Brief' is not uncommon."[28] This statement may be misleading. True, the so-called "Brandeis Brief" exists in the United States, and its function is to present to the court a wealth of legislative or economic material usually taken from the practice of foreign jurisdictions or foreign countries, *i.e.*, material which could not properly be presented in oral argument. But the "Brandeis Brief" exists only in a minimal number of cases, *i.e.*, only where it is attempted to show by foreign examples that a certain American statute does not violate "due process" or "equal protection," and is therefore not constitutionally invalid.[29] The system of written briefs in the American appellate practice, however, applies to *every* case.

Moreover, the problem may not have been properly stated in the Attorney General's Report. The issue is not, as the Report seems to suggest, a choice between unlimited oral argument and a "substitution" therefor of written briefs. Rather, it is a matter of *supporting* the oral argument by written briefs and, consequently, of making it possible and desirable to institute a time limitation on the extent of oral argument. Generally, it seems desirable from the viewpoint of judicial administration to institute some time limitation but in the present Ontario practice such limitation may be unfair. However, with the addition in Ontario of a limited briefing practice, such as will now here be suggested, a time limitation seems fair.

Disregarding all minor discrepancies, the basic difference between the two practices is the fact that in the United States the appellant submits a written argument of his case only forty days after the transmission of the record.[30] The fact that the appellant's brief will contain other matters, such as a statement of the issues presented, a statement of the case, and a conclusion,[31] can here be disregarded because the Ontario practice of having an early "Appellant's Statement" and a "Respondent's Statement"[32] would seem to satisfy the same purposes.

## PROPOSAL FOR A MODIFICATION OF THE ONTARIO PRACTICE

In the United States practice, a written argument is to be submitted by the appellant at a later stage than in Ontario. This longer period of prepara-

[27] MINISTRY OF THE ATTORNEY GENERAL (ONT.CAN.), REPORT ON THE ATTORNEY GENERAL'S COMMITTEE ON THE APPELLATE JURISDICTION OF THE SUPREME COURT OF ONTARIO 40 (1977).

[28] *Id.* at 78.

[29] The term refers to the form of brief filed by Louis Brandeis in Muller v. Oregon, 208 U.S. 412 (1908). The case concerned the constitutionality of an Oregon statute which restricted the number of hours a woman could work to ten per day. Rather than offering a pure legal argument, the brief presented a mass of economic and social data which demonstrated that the issue was one that affected the health of women in the state, which in turn served as a constitutional basis for state regulation. The material included expert opinions, statistics, and an analysis of similar domestic and foreign legislation which was aimed at limiting the working day for women. *See* S. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 84-92 (1957).

[30] FED. R. APP. P. 31. Under OHIO R. APP. P. 18(A), the appellant has 20 days to serve and file his brief from the date on which the record is filed.

[31] See note 12 *supra* and accompanying text.

[32] ONT. SUP. CT. R. 501.

tion is desirable and merits adoption in Ontario. The following policy considerations and suggestions show how a modification of the Ontario practice would assist both parties and the appellate court:

(a) The appellant, being required to put his appellate arguments in writing at a later stage and not being forced to submit a "Statement" quite so soon after notice, would have the chance of better analyzing, researching, and formulating his own case for appeal purposes.

(b) The appellee, obtaining a copy of the appellant's argument, would have the opportunity to better prepare his case in light of the appellant's argument and, therefore, would be protected against the danger of unexpected arguments of the appellant.[33]

(c) By means of his written reply brief, the appellant can formulate his own thoughts, and will properly advise the appellee of his line of reasoning with resepect to the appellee's written argument.

(d) The submission of written arguments by the appellant and the appellee in this form will assist the appellate court in handling appeals because (1) the court will be better prepared for the oral argument; and (2) the court is more likely to be spared unsatisfactory surprises. For purposes of administrative ease, a limitation could be placed on the maximum number of pages contained in a brief.[34]

(e) The contention that in preparation of the oral argument the judges would have to spend considerable time in reading the written arguments of counsel could be easily overcome in Ontario by making the submission of a "Summary of Argument" not discretionary but mandatory.[35] By reading only the "Summary" the Ontario judges would be saving considerable time and still would be adequately preparing themselves for the oral argument, which under this procedure could be limited in time. In addition, proper utilization of law clerks by the judges might result in cutting down the time required for preparation.

In the Appendix there are set forth in Exhibits A and B excerpts of a "Summary of Argument" and of an "Argument" in two different Supreme Court cases. The two cases were selected because the excerpts show the value an appellate judge can derive from summarization in different types of cases.

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[33] While some surprises may still take place, their likelihood is much reduced if written arguments were required. The oral argument could be limited by Rule to the points advanced in the written arguments.

[34] Maximum limitations on the number of pages of a brief are not uncommon in the United States. For example, FED. R. APP. P. 28(g) provides: "Except by permission of the court principal briefs shall not exceed 50 pages of standard typographic printing . . . exclusive of . . . table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc." Reply briefs are similarly limited, but to 25 pages. *Id.* Similarly, one appellate district in Ohio has instituted a 40 page maximum limit on both initial and answer briefs. LOCAL R. OHIO EIGHTH APP. JUD. DIST. 6(7).

[35] For instance, U.S. SUP. CT. R. 40.1(f) states that only briefs in excess of 20 printed pages require a summary of argument. The summary takes the form of "a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief." Under FED. R. APP. P. 28(a)(4), a party has the option of including a summary of argument in the brief.

The first brief,[36] set forth in Exhibit A, was concerned with the question whether suspension of the mails for the distribution of obscene magazines was constitutional. The reproduced excerpts of the "Summary" and of the "Argument" show how a "Summary" can properly be used by a judge where the issue is strictly legal in nature. The second brief,[37] set forth in Exhibit B, involved, among other issues, the question whether a broad discovery order of the court requiring production of the documents of a bank over which the plaintiff was alleged to have full control was proper. The reproduced excerpts of the "Summary," as compared with at least a portion of the corresponding part of the "Argument," show the values of a "Summary" in the instance where a legal conclusion based on facts of record is being considered. The important point for purposes of this discussion is that in both cases the "Summaries" were prepared at a later stage, after the briefs were completed, and not, as in Ontario, at the early point when the "Appellant's Statement" and the "Respondent's Statement" are filed. This longer period of gestation allows for written argumentation which is better analyzed and researched by the parties.

(f) In Exhibit C of the Appendix, there is set forth the full text of a "Question Presented." The brief from which it is excerpted,[38] was filed before the United States Court of Appeals for the District of Columbia. That court's former rules required that the entire "Question Presented" text be placed at the very first page of the brief, *i.e.*, clearly set off from the commencement of the brief.[39] Arguably, a requirement such as this can assist the judge in streamlining his thoughts regarding the case.

(g) Finally, adoption of written arguments and summaries should be accompanied by the requirement in a proper case to submit appendices, preferably in the form of joint appendices.[40] The value of an appendix is self-evident, especially in cases where examination of testimony is needed to support the persuasiveness of allegations made in a brief. In exhibit D of the Appendix, there is set forth a sentence from an appellate brief in a complicated labor law case which the Secretary of Labor, plaintiff in the action, had lost in the lower court.[41] Under a specific statute, the Secretary, upon complaint

[36] Brief for Appellants, at 11-12, 16-20, Blount v. Rizzi, United States v. Book Bin, 400 U.S. 410 (1971).

[37] Brief for Respondents, at 23-24, 29-32, Societe Internationale v. Rogers, 357 U.S. 197 (1958).

[38] Brief for Appellees McGrath and Clark, at I, Kaufman v. Societe Internationale, 188 F.2d 1017 (App. D.C. 1951).

[39] RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA 4(b)(2) [abrogated July 31, 1973].

[40] In federal appellate practice, the appellant prepares an appendix which includes "parts of the record to which the parties wish to direct the particular attention of the court." FED. R. APP. P. 30(a). The Rules set out a procedure whereby the appellant and appellee may come to an agreement as to all of the parts of the record which will be included in the appendix. *Id.* at 30(b). In any event, the appendix functions only to assist the parties and the court, since "the entire record is always available to the court for reference and examination." *Id.*

[41] Brief for the Secretary of Labor, at 4, Wirtz v. Local 66, Glass Blowers Ass'n., No. 16944 (3d Cir. Aug. 8, 1969) (*remanded for further proceedings*).

of a union member, had sued the union defendant to set aside an election which it had conducted. The allegation was that the union had improperly disqualified the individual from election to a union office, and the question as to the frequency of the individual's attendance at union meetings, among other issues, took on a crucial role. That portion of the record in the Appendix, to which the statement in the appellate brief refers, is also set forth in Exhibit D.[42]

## CONCLUSION

In conclusion, it would seem that adoption in the Ontario practice of a qualified briefing appellate procedure may be desirable. The preparation by both parties of an argument, and a summary of argument, accompanied, if necessary, by an appendix, would serve the purposes of (a) better preparing the parties for the oral argument; (b) better acquainting the appellate judges with the contents of the parties' positions; and (c) strongly reducing the danger of unexpected surprises. In this manner, it would seem to be fair to introduce a limitation on the length of oral argument on appeal. The submission of "statements" by the parties, not so soon after an appeal is noticed (as it is now in Ontario), but in a more detailed form by way of argument after the parties have studied and researched their positions, should facilitate these desirable results.

[42] Appendix to Brief for Appellant, at 138a-140a, Wirtz v. Local 66, Glass Bottle Blowers Ass'n., No. 16944 (3d Cir. Aug. 8, 1969) (*remanded for further proceedings*).

## APPENDIX

## EXHIBIT A

Brief for Appellants, at 11-12, 16-20, Blount v. Rizzi, United States v. Book Bin, 400 U.S. 410 (1971).

### SUMMARY OF ARGUMENT

I

The postal power conferred on Congress by the Constitution gives it full authority, short of restrictions imposed by the First Amendment, to deny the use of mails to commercial traffic in obscenity. See *United States v. Hiett,* 415 F.2d 664 (C.A. 5), certiorari denied, 397 U.S. 936. Indeed, this Court has upheld against sweeping First Amendment attack a statute parallel to that at issue here, regulating the use of the mails for transmission of fraudulent and lottery matter. 39 U.S.C. (Supp. V) 4005; *Donaldson v. Read Magazine,* 333 U.S. 178. It found not "the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes." 333 U.S. at 191. Similarly, the First Amendment does not confer complete freedom, uncontrollable by Congress, to use the mails for commerce in pornography.

*Stanley v. Georgia,* 394 U.S. 557, requires no different conclusion. *Stanley* does not protect commercial activity, even where it occurs in relative privacy, among adults, and without causing alarm to the community as a whole by involving unwilling persons. That opinion protects privacy, and in particular the privacy of ideas; it does not follow that an individual has any "right to receive" obscene materials, which by this Court's definition embody no redeeming advocacy of ideas. A commercial pornographer is not more entitled by *Stanley* to receive his mail unimpeded than he would be to protect himself from otherwise lawful searches and seizures of his place of business by using his home for that purpose.

### ARGUMENT

### I. CONGRESS HAS CONSTITUTIONAL AUTHORITY, BY AN APPROPRIATELY LIMITED STATUTE, TO DENY THE USE OF THE MAILS TO COMMERCIAL TRAFFICKERS IN PORNOGRAPHY FOR THE RECEIPT OF PAYMENTS AND ORDERS FOR OBSCENE MATERIALS

Congress' constitutional power to "Establish Post Offices and post roads" and to "regulate Commerce with foreign Nations, and among the several States," Art. I, Section 8, includes full power to deny the

use of the mails to commercial traffic in obscenity. Short of restrictions imposed by the First Amendment, its right to prohibit the carriage of unlawful or dangerous items, or the carrying on of an unlawful business through the mails is not open to doubt. *United States v. Hiett,* 415 F.2d 664, 666-669 (C.A. 5), certiorari denied, 397 U.S. 936. Some items are prohibited because of their inherent dangerousness, including danger to the carriage of the mails themselves, *e.g.,* 18 U.S.C. 1716; others, because of the unlawfulness of the transmission, and a desire to protect the postal service from involvement, however innocent, in such sendings. 18 U.S.C. 1302, 1341, 1717, 1718; 39 U.S.C. 4001. The Post Office Department is not only a common carrier, but also an instrumentality of government. As such, it is peculiarly affected with a public interest; within the limits imposed by the Bill of Rights, and especially the First Amendment, it is important and proper to protect that interest from involvement, even unknowing, with crime.

These propositions were reaffirmed in a case involving a statute parallel to the obscenity statute at issue here, but in that case regulating the use of the mails for transmission of fraudulent and lottery matter. Federal criminal statutes make it an offense to use the mails in connection with a lottery or a fraudulent scheme. 18 U.S.C. 1302, 1341. When the Postmaster General is persuaded that a person is using the mails for such a scheme, however, he may also invoke the civil remedy of 39 U.S.C. (Supp. V) 4005, permitting the return to their senders of letters addressed to that person or his representative, with the letters appropriately stamped to indicate the reason for their return. In 1945, he invoked that remedy against Facts Magazine and others on account of an allegedly fraudulent "puzzle contest" appearing in that magazine, and this Court upheld him. *Donaldson v. Read Magazine,* 333 U.S. 178.

Although the publishers of Facts Magazine mounted a broadscale constitutional attack on Section 4005 and its application to them—including, *inter alia,* First Amendment claims, 333 U.S. at 189, 191—the Court found the government's power to protect its citizens against use of the mails to perpetrate fraud to be firmly established, and sufficient to support the statute. The Court appears to have accepted the publishers' contention, as we do here, that Congress' power of regulation over postal matters, as over commerce and tax, is limited by the strictures of the Bill of Rights; but those limitations do not "provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes." 333 U.S. at 191; and see *Hiett, supra,* 415 F.2d at 667.

Similarly, we believe the First Amendment does not confer on individuals complete freedom, uncontrollable by Congress, to use the mails for commerce in pornography. As in the case of fraud, such

use may be prohibited by criminal statute. Compare 18 U.S.C. 1341 with 18 U.S.C. 1461; *Parr v. United States,* 363 U.S. 370 with *Roth v. United States,* 354 U.S. 476. And assuming—as in the case of fraud—that requisite constitutional limitations are honored, the use may also be regulated by civil means. Since civil interdiction of mail to a person engaged in fraud meets the constitutional tests, it would appear that civil interdiction of mail to a commercial salesman of obscenity would do so as well. See *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 441.

It may be argued, however, that this Court's recent decision in *Stanley v. Georgia,* 394 U.S. 557, requires an opposite conclusion. Although the opinion in that case limited itself in terms to a holding that the state has no power to make criminal the mere possession of obscene literature in a private home, and expressly disavowed any intent to limit the *Roth* doctrine, 394 U.S. at 565, 568, some lower courts have read it as protecting commercial activity, particularly where that activity occurs in relative privacy, among adults, and without causing alarm to the community as a whole by involving unwilling persons. See, e.g., *Byrne v. Karalexis,* set for reargument, No. 83, this Term; *United States v. Thirty-Seven Photographs,* pending on jurisdictional statement, No. 133, this Term. If *Stanley* does protect such activity, then it might appear that use of the mails—inherently private and, in the case of a mailed order blank, ordinarily consensual [footnote omitted]—is indeed protected from government regulation. On that reasoning, only the uninvited advertisement or mailing of obscene matter to a minor could be made an offense, and *Roth* would have been not only limited but overruled.

We believe *Stanley* has no such reach. As we explain at greater length in our brief *Amicus Curiae* in *Byrne v. Karalexis, supra,* pp. 6-17, *Stanley's* disclaimer of any purpose to modify *Roth* in its application to the commercial distribution of pornography can and should be honored. *Stanley* recognized that, for important and compelling reasons, the state has no right to intrude into a private home in search of obscenity. That the owner of those places has a constitutional right against intrusion into them does not mean, however, that he has a First Amendment right, as such, to have everything which might otherwise be found there. The First Amendment protects materials otherwise be found there. The First Amendment protects materials otherwise obscene in such circumstances because of the risks to privacy, to protected speech and thought, which would be presented by a governmental search. It does not follow that an individual has a "right to receive" obscene materials. It therefore cannot be argued, we submit, that there is any First Amendment right to disseminate such materials.

Nor do we think the use of the mails in this kind of case can fairly be analogized to the use of a home or office as a private sanctuary from state inquiry. It is true that, like the home, first class mail

is protected from unreasonable searches and seizures. 39 U.S.C. 4057; cf. *United States v. Van Leeuwen,* 397 U.S. 249. Accordingly, it is possible that consensual, non-commercial correspondence sent through the mails would be found to enjoy immunity under *Stanley* from seizure or use as the basis for prosecution; as this Court knows, the government's policy is not to prosecute such cases. *Redmond v. United States,* 384 U.S. 264; and see the Memorandum for the United States therein, No. 1056, O.T. 1965, pp. 3-4. But here, the mails are being used for a commercial purpose, and that degree of concern for the privacy of ideas is no longer appropriate. Just as a home used as a place of business by a dealer in pornography would not be immune from search under *Stanley,* use of the mails for commercial purposes in connection with dealings in obscenity is subject to regulation without any offense to the *Stanley* holding.

## EXHIBIT B

Brief for Respondents, at 23-24, 29-32, Societe Internationale v. Rogers, 357 U.S. 197 (1958).

### SUMMARY OF ARGUMENT

. . . .

I. The order for discovery was eminently proper. While the documents ordered produced were those of Sturzenegger & Cie. [a private bank], nominally an entity other than petitioner, petitioner had full control of the records. The lower courts' conclusion as to control was grounded on an abundance of evidence showing the common origin of the two companies in I.G. Farben; their common service for I.G. Farben; their common management, personnel, and activities; the administration by one of the assets of the other; and their cross-ties of ownership . . . .

### ARGUMENT

#### I

#### THE ORDERS BELOW WERE BASED ON EVIDENCE SHOWING A VIRTUAL IDENTITY BETWEEN PETITIONER AND STURZENEGGER & CIE., THE FIRM WHOSE RECORDS IT WAS ORDERED TO PRODUCE

The district court initially made *prima facie* findings that petitioner had control of the Sturzenegger records in 1949 . . . . In February 1953, after four years of proceedings, Chief Judge Laws extensively reexamined the matter and reaffirmed his conclusion . . . .

The district court's detailed findings and the conclusion of control were explicitly approved by the court of appeals in its opinion of June 30, 1955 . . . .

In the findings on control, the district court found an intimacy verging on identity between petitioner and the Sturzenegger firm, whose records petitioner was ordered to produce. This virtual identity, of course, supports the order of discovery . . . .

The findings of control and identity are supported by a wealth of evidence on the ties between petitioner and the Sturzenegger firm—evidence showing the creation of petitioner by the Sturzenegger firm, their joint personnel and activity, their physical proximity, the performance by the one of the other's functions, and the existence of cross-ownership. Separate findings on each of these factors were made by the district court (R. 611-3) [footnote omitted].

Petitioner was created in 1928 by Gruetert & Cie. (the name of the Sturzenegger firm until 1939) on behalf of I.G. Farben. The court so found (R. 611-3), and its finding is supported by the report of the Swiss Compensation Office that Greutert & Cie. founded peti-

tioner pursuant to the plan of Hermann Schmitz of Farben (R. 211-3, 248). Counsel for petitioner, who describes Schmitz, chairman of Farben's board, as "the most prominent individual at the head of I.G. Farben", concedes that petitioner was "sired very greatly by the Hermann Schmitz influence" (R. 63-5). He says further that "[t]here was no secret about the fact that the Germans of Farben had sponsored both" petitioner and the American I.G. Chemical Co., the predecessor of the General Aniline & Film Corporation, whose stock petitioner now claims (R. 89).

The Gruetert firm was itself a creature of Farben. It was owned, from 1931, by Visca A. G., a company whose stockholders, Mr. Hans Sturzenegger said, were "people closely connected with I.G. Farben" (R. 63-5, 88-9, 216, 268-71, 1717, 1279-85, 1847-63, 1882-94, 1712-22). According to Alfred Merton and Rudolf Euler, for a time co-owners with Visca of the Greutert firm, Visca was operated in Farben's interest and was just "one of the many names" under which Farben appeared (R. 216, 269-71, 1844-7, 1853-63, 1873-9, 1887-8). Counsel for petitioner admits the mounting influence on the Greutert firm, as time went on, of Hermann Schmitz and other "people affiliated with I.G. Farben" (R. 63-4, 88-9).

Both petitioner and the Greutert firm depended on Farben's money. The Swiss Compensation Office reports that Farben's "great balances", deposited with Greutert, maintained Greutert in business, and that "large assets" of Farben, kept with Greutert, were transferred to the petitioner after petitioner was created. Indeed, a Greutert account in which Farben assets were carried was "the precursor of the idea of establishing" petitioner (R. 211, 215, 270, 295-6, 776-83, 1212-3, 1277-9).

The early intimacy between petitioner and Greutert-Sturzenegger continued. The two were managed by the same persons, in both the prewar and wartime periods. Until 1940, Hermann Schmitz of Farben was chairman of the board of petitioner and, in the words of the Swiss Compensation Office, he "held the reins" in petitioner's affairs (R. 89, 214).

## EXHIBIT C

Brief for Appellees McGrath and Clark, at I, Kaufman v. Societe Internationale, 188 F.2d 1017 (App. D.C. 1951).

### QUESTIONS PRESENTED

In the opinion of defendants-appellees, the questions presented are as follows:

Where a Swiss corporation is maintaining a suit, under Section 9(a) of the Trading With the Enemy Act, for return of property of the corporation vested under the Act, may stockholders of the corporation, who own 86 of some 300,000 outstanding shares, intervene in the suit to assert:

1. A derivative cause of action, on behalf of the corporation, for the share of the vested assets proportionate to the corporation's non-enemy-tainted stockholders, the recovery to be for the benefit of such stockholders; and

2. A cause of action that the corporation and the defendant Alien Property Custodian be enjoined from settling the case between them unless the above-mentioned proportionate share be first paid or secured.

EXHIBIT D

Brief for the Secretary of Labor, at 4, Wirtz v. Local 66, Glass Blowers Ass'n., No. 16944 (3d Cir. Aug. 8, 1969) (*remanded for further proceedings*).

*Statement in Brief*

. . . Starting with the meeting of November, 1964, until September, 1964, his attendance record was perfect, with the exception of July, 1965, his vacation month.

Appendix to Brief for Appellant, at 138a-140a, Wirtz v. Local 66, Glass Bottle Blowers Ass'n., 16944 (3d Cir. Aug. 8, 1969) (*remanded for further proceedings*).

*Portion of the Appendix*

BY MR. SAVAGE [Attorney for Defendant]:

Q Miss Stoller [who was recording secretary of the union], you testified that September '63 until December of '63 Mr. Razvoza was not credited with attending any meetings, is that correct? September to December of 1963?

A Yes.

Q And, from January of '64 until October of 1964, how many meetings did Mr. Razvoza attend or was he given credit for attending?

A Two.

Q And, these two you are referring to, are those where he was physically present or are those what you refer to as write-ins?

A Write-ins.

Q And, it was after October of '64 that he was appointed to his office of financial secretary, is that right?

A Right.

Q Now, from October of 1964 until December of '64, how many meetings did Mr. Razvoza obtain credit for attending or physically attended?

A No, according to the information I have here, I only have it in '65 until September.

Q No, I said October of '64 until December of '64?

A Oh, I see.

THE COURT: It would be three, two, one or zero.

THE WITNESS: That would be October November and December. It would be two, November and December meetings he was present.

BY MR. SAVAGE:

Q And, from—

THE COURT: November and December he was present.

BY MR. SAVAGE:

Q Was he present at the October '64 meeting?

A No.
Q Did he have a write-in for that meeting?
A No.
Q November, he was present?
A Right.
Q December, he was present?
A Yes.
Q All right. And, from January of '65 to September of '65, would you please tell us how many meetings he was physically present at or obtained write-ins for attending?
A Eight. That was January; he was there February; he was there March; April he was there; May he was there; June he was there; July he wasn't; August he was there and September he was there.
Q So, subsequent to his appointment as financial secretary, he attended, or was given credit for, regularly?
A Yes.
THE COURT: No write-in for July?
THE WITNESS: No.
BY MR. SAVAGE:
Q And, to your knowledge, that was his vacation month?
A Yes, to my knowledge that was his vacation.
Q In accordance with the prior procedures that you have testified to, would absence from a regular monthly meeting because of vacation be reason to give an individual a write-in or credit attending that meeting?
A Yes.