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The Status of Certain Recent Copyright Developments in the European Community[†]

Joachim Fleury*

I will today attempt only to briefly touch upon those Directives or proposals for Directives currently being considered by the Commission for the European Communities (“Commission”) which I consider will be of particular interest to United States lawyers and rightsholders. In particular, I will briefly discuss the current status of each of the following Directives:

- (1) Amended Proposal for a Council Directive on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission (“Proposed Satellite Directive”);¹
- (2) Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright (“Rental Right Directive”);²
- (3) Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related

[†] A speech based on this paper was presented at the Fordham Conference on International Intellectual Property Law and Policy held at Fordham University School of Law on April 15-16, 1993.

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1. Amended Proposal for a Council Directive on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(92)526 final—SYN 358 [hereinafter Proposed Satellite Directive]. [Eds. note: The Proposed Satellite Directive was adopted by the Council of Ministers in final form on September 27, 1993 as Council Directive No. 93/83, O.J. L 248/15 (1993).]

2. Council Directive of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 92/100/EEC, O.J. L 346/61 (1992) [hereinafter Rental Right Directive].

Rights ("Proposed Term Directive");³

- (4) moral rights; and
- (5) *Marleasing SA v. Commercial Internacional de Alimentation SA*⁴ and the direct effect of EC Directives on national legislation.

I. PROPOSED SATELLITE DIRECTIVE

The Proposed Satellite Directive was submitted by the Commission on December 2, 1992. National implementation is required by January 1, 1995. The Proposed Directive seeks to coordinate copyright and neighboring rights applicable to satellite broadcasting and cable retransmission. The Proposed Directive seeks to eliminate obstructions on the free movement of television and radio broadcast services across the borders of European Community ("EC") States with minimal interference with national copyright and neighboring rights. The Proposed Directive also seeks to harmonize protection of authors and others in respect of the broadcast of their works by satellite and proposes the introduction of measures to harmonize the law covering broadcasts received in more than one Member State of the EC.

The Proposed Directive makes "communication to the public by satellite" a restricted act.⁵ "Communication to the public by satellite" means the "act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards

3. Amended Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights, COM(92)602 final—SYN 395 [hereinafter Proposed Term Directive]. [Eds. note: The Proposed Term Directive was adopted by the Council of Ministers in final form on October 29, 1993 (unpublished text on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*)].

4. Case 106/89, [1990] E.C.R. 4135.

5. The Proposed Satellite Directive, *supra* note 1, eliminates the distinction between direct broadcast satellites and communication satellites (where the transmissions are intended for home reception). It applies to encrypted services where decoders have been made available to the public by or with the authority of the broadcaster.

the earth.”⁶ Member States are required to provide a right for authors, performers, and broadcasters to authorize or prohibit such communication to the public by satellite. A new provision was added to the amended proposal which requires that, for purposes of this Directive, the principal director of a cinematographic or audio visual work shall be considered its author or one of its authors. Member States may provide for others to be considered as its co-authors. Similar rights are provided to performers, phonogram producers, and broadcasting organizations in the Rental Right Directive.⁷

Probably the most controversial element of the Proposed Satellite Directive is its adoption of the “country of origin solution” for satellite broadcasting. This means that the law of the Member State in which communication to the public occurs shall control the exploitation of that work.⁸ Communication to the public is deemed to occur in that Member State in which the signals are introduced under the care and responsibility of the broadcasting organization. The European Parliament has indicated that the act of communication is characterized by both conceptual and technical elements. It deems there is communication to the public by satellite when the content and support are linked in a “disassociable manner.” Essentially this means where the signal passes through operational control. Thus, a broadcaster who broadcasts a copyrighted work from the territory of one Member State, for example Luxembourg, by

6. Proposed Satellite Directive, *supra* note 1, art. 1, ¶ 2.

7. Rental Right Directive, *supra* note 2, art. 2(1).

8. The Proposed Satellite Directive, *supra* note 1, also provided further clarification regarding satellite broadcasts originating outside the Common Market. The fear was that broadcasters would relocate to countries outside the Common Market. The amended Directive proposal provides that if signals are transmitted to the satellite from an uplink station in a Member State, the act of communication shall be deemed to have occurred in that Member State. If there is no uplink station within the Community but a broadcasting organization within the Community has commissioned the act of communication to the public, that act shall be deemed to have occurred in that Member State. *Id.* art. 1, ¶ 2(c). “Commissioned” is intended to mean situations where the programs are assembled within the Community and then sent in recorded form to broadcasting facilities outside the Community. Where the broadcaster has no link with an EC country other than the fact his broadcasts are incidentally received in that country, the national law of that country will apply.

satellite for reception by viewers in that Member State which is also received in another Member State, say the Netherlands, need obtain a license to broadcast only from the copyright owner in Luxembourg. That is, the making of such a broadcast would constitute a restricted act under the copyright subsisting under the laws of Luxembourg but not under the copyright subsisting under the laws of the Netherlands. Similar rules are proposed in respect of neighboring rights.

Although there is a fear that this restricts or eliminates rightsholders' rights in other Member States, it must be emphasized that this relates to the broadcast right only. If the broadcast film is copied or another infringing act occurs without license in another Member State, such unauthorized copy would infringe both the right of the broadcaster in his broadcast and the copyright in the initial work which the copyright owner or its licensees in that territory could enforce. Accordingly, in our example, the Dutch licensee would retain its rights intact, including the right to authorize the broadcast of the work by a broadcaster established in the Netherlands. There might, however, be a reduction of the financial return that the Dutch licensee could expect to receive from its exploitation since the Dutch licensee could not prevent the sending down of the signal, as its reception would not constitute an infringing act. However, retransmission of the broadcast work, copying of the broadcast work, or any other unauthorized use would still constitute an infringing act within the Netherlands requiring the authorization of the rightsholder. Under national legislation, the receiving of programs fraudulently often is (and will continue to be) a criminal offense and the production, importation, sale, or hire of apparatus used for the unauthorized reception of transmissions are civil torts.

There is a fear that the Proposed Satellite Directive will create a preferred country for satellite uplink transmission, a sort of "forum shopping" for the country with the most favorable laws. It should be stressed that all Member States will become members to the Berne Convention⁹ and the Rome Convention¹⁰ on neighboring

9. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised*, Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Con-

rights while harmonization Directives on rental rights and the minimum term of copyright protection will also ensure that minimum standards apply throughout the EC. Finally, an owner may choose not to license a broadcaster in any territory.¹¹

Similar issues may arise in connection with the licensing of rights to transmit by cable. The Proposed Directive applies to cable retransmissions which are simultaneous, unaltered, and un-abridged retransmissions of programs transmitted by wire or over the air (by satellite or otherwise) from another Member State. Therefore, the editing of a program to include local advertisements would take the cable retransmission outside the scope of the Directive.

Under the Proposed Satellite Directive, the right to authorize cable retransmission of a broadcast may be exercised only through a collecting society representing the professional categories concerned.¹² If the rightsholder has not officially transferred management of his rights to such a collecting society, the collecting society shall be deemed to have the right to manage those rights in any event. However, this shall not apply to the right of a broadcasting organization in respect of its own transmissions, although it may choose to allow the collecting society to exercise the rights on its behalf.

II. RENTAL RIGHT DIRECTIVE

The Common Position on the Rental Right Directive¹³ was approved by the European Parliament in its final form and was

vention].

10. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, Rome, 496 U.N.T.S. 43.

11. There is concern among film producers and distributors that the country of origin solution is particularly inequitable in the case of "pay TV." They consider it necessary to develop a specific definition of "communication to the public" for purposes of pay TV to provide that where signals are scrambled, communication to the public occurs where the decoders are located by or with the consent of the broadcasting organization.

12. Proposed Satellite Directive, *supra* note 1, art. 9, ¶ 1.

13. Rental Right Directive, *supra* note 2.

adopted by the Council of Ministers on November 19, 1992. With one exception the provisions of the Directive are to be implemented by each of the Member States by July 1, 1994. The one exception relates to rental rights of directors of films. The Directive provides a great deal of flexibility for the Member States in the implementation of the Directive. Therefore, it is important to keep the manner in which each of the Member States implements the Directive under review and to be prepared to lobby where necessary.

The Rental Right Directive has been the subject of a great deal of controversy and is one with which I am sure you are all familiar. Briefly, the Directive has the following effects:

A. Creation of Rental and Lending Right

The Rental Right Directive creates an exclusive right to authorize or prohibit rental and public lending of copyright works in: (i) the author in respect of original and copies of his work; (ii) the performing artist in respect of fixations of his performance; (iii) the producer of a phonogram in respect of those phonograms; and (iv) the producer of the first fixation of the film in respect of the original copies of the film.¹⁴ These provisions must be implemented by July 1, 1994.

The Directive goes on to specify that the principal director of the film must be considered as its author or one of its authors for the purposes of the Directive.¹⁵ This provision may be implemented at Member States' option no later than July 1, 1997, and it need not apply to films created before July 1, 1994. Member States may provide for others to be considered as co-authors.

This has been a controversial provision. For instance, under United Kingdom law, as in the United States, the film production company is regarded as the author of a film. Therefore, the United Kingdom could take the position that the production company is an author of a film for purposes of the Directive and has an

14. *Id.* art. 2(1).

15. *Id.* art. 2(2).

unwaivable right to equitable remuneration.¹⁶ The U.K. government has not taken a position on this matter. However, preliminary indications are that it will take the view that the Directive does not oblige it to regard the production company as an author for the purposes of the Directive. These are issues which must be watched.

The exclusive right to authorize or permit rental and lending is fully transferable, assignable, and licensable. Therefore, producers must ensure that their contracts provide for assignment of this right from all categories of persons who might under the law of any Member State be considered to be an author.

B. *Non-waivable Right to Remuneration*

Article 4 of the Rental Right Directive provides that every owner of the rental and lending right is entitled to equitable remuneration for any rental of his work. This right is non-waivable and continues to apply even where the author has transferred or assigned his rental rights.¹⁷

Article 4(1) provides that where an author or performer has *transferred or assigned* his rental right, that author or performer retains the right to equitable remuneration for the rental. Does this mean that if the author licenses his right, he may waive the right to equitable remuneration? Probably not, although it is possible producers will attempt to argue this.

The Directive does not define "equitable remuneration." The recitals indicate that remuneration must be proportionate to the author's contribution. They also provide that equitable remuneration may be paid on the basis of one or several payments at any time on or after conclusion of the contract.¹⁸ Thus it would seem that remuneration may be pre-paid. There should be an adjustment to contracts to provide for pre-purchase at an equitable price or to allocate an element of consideration to the rental payment. Another possibility is to reduce up-front payments and provide for per-

16. See *infra* notes 17-18 and accompanying text.

17. Rental Right Directive, *supra* note 2, art. 4(1).

18. *Id.* art. 4(4).

formers and directors to share in the rental income.

C. Neighboring Rights

The Rental Right Directive also requires Member States to provide for certain neighboring rights.¹⁹ This will require a change of practice in a number of Member States who have not ratified the Rome Convention. The Directive requires that performers and broadcasters have the right to control fixation of their performances or broadcasts and for performers, phonogram producers, film producers, and broadcasters to have the right to control the reproduction of their performances or works.

These rights are freely assignable and transferable. Contracts should be amended accordingly.

D. Duration of the Rights

The Rental Right Directive specifies that the rights will not expire before the end of the term provided by the Berne Convention.²⁰ This is currently life plus fifty years. However, this term will be increased under the Proposed Term Directive to seventy years.²¹ Neighboring rights, on the other hand, will have a shorter duration of fifty years.

E. Application of Directive

The transitional provisions regarding when the Rental Right Directive must come into effect are very complicated. In general, the Directive must be implemented by July 1, 1994. However, the transitional provisions provide that no remuneration has to be paid in respect of rental exploitation before July 1, 1994. Moreover, if owners of rental rights had already consented to the exploitation of a film before July 1, 1994, the authors are presumed to have transferred the rental right. The unwaivable right to remuneration shall be deemed to apply only if they submit a request for payment before January 1, 1997. Member States may fix the level of remuneration if rightsholders cannot agree. There is also a general exclusion in relation to exploitation of works which were in the pub-

19. *Id.* art. 7(1).

20. *Id.* art. 11.

21. See *infra* notes 22-24 and accompanying text.

lic domain on July 1, 1994.

There is a great deal of uncertainty over the implementation of the Rental Right Directive, and the situation must continue to be monitored to ensure that the producer's position remains protected and the talent's rights are protected. For example, what remuneration is "equitable" is an open ended question. The issue should be carefully dealt with in contractual negotiations or any successful film may give rise to any number of claims that payment should be increased.

III. PROPOSED TERM DIRECTIVE

In February 1993, the European Commission submitted the Proposed Term Directive.²² The aim is for implementation by July 1, 1994.

The Commission considered harmonization necessary because the duration of copyright protection varies within the Community, in some cases according to the nature of the work. The disparities create obstacles to the free movement of cultural goods and services and lead to distortion of competition, since the same work may at the same time be protected in one Member State and have fallen into the public domain in another.

The Proposed Term Directive lays down fixed periods of protection beginning and ending at the same time in all Member States of the Community, for each type of work and for each neighboring right covered. The term proposed for literary, dramatic, musical, and artistic works is the author's life plus seventy years for copyright, irrespective of when the work is made available to the public, and fifty years for neighboring rights (e.g., sound recordings). Works created by legal persons will be protected for seventy years after the work is legally made available to the public, or if none, is created. The term of the protection for broadcasts is fifty years from the first transmission of a broadcast.

The Proposed Term Directive contains a major and significant

22. Proposed Term Directive, *supra* note 3.

modification as amended. It now provides at Article 1(1), that "the authors of a cinematographic or audiovisual work shall be the natural persons who made the intellectual creation of the work." Article 1(2) specifies that the principal director shall be considered as one of its authors.²³ Article 1(3), however, allows Member States to introduce rebuttable presumptions of transfer of rights from the authors to the producers. Such presumptions are indeed essential for better exploitation of works.

This new provision is extremely controversial in the film and broadcasting industry, having implications on ownership of copyright and also moral rights. If implemented, this provision would alter the current position under U.K. law, although this is already the position in some continental countries. In the case of films, the rights are held by the directors, creators, or producers depending on the laws of each Member State. The question of who holds the rights has a direct bearing on the length of copyright protection.

In the case of cinematographic works, the Berne Convention leaves it to the member countries to determine who is the author of a film.²⁴ The producer of a film may be a legal or natural person. Article 1(1) would apply where the law of a Member State considers the producer to be one of the authors of a film. If the producer is not a natural person, Article 1(3) will apply. The term of protection will run for seventy years after the work is lawfully made available to the public (provided they are lawfully made available to the public within seventy years from their creation). This provision is intended to prevent works from benefitting from perpetual protection.

The Proposed Term Directive will apply to all rights which have not expired on or before December 31, 1994. The Directive will not shorten any existing terms. Additionally, retroactive protection which may be available to certain works currently in the public domain may be lost. For example, there is an argument that works in the public domain in the United States are still entitled to copyright protection in EC countries, notwithstanding the fact they

23. This goes beyond the Rental Right Directive.

24. Berne Convention, *supra* note 9, art. 1.

have passed into the public domain in the United States. Article 4(2) and (3) of the Proposed Directive provide that where the country of origin is outside the Community or the author is not a Community national, protection may be extended by the Community but it shall expire no later than the date of expiry of the protection granted in the country of origin or the country in which the rightsholder is a national. However, Article 4(4) of the Proposed Directive reserves the rights of the Member States to vary or waive these rules. Moral rights must be maintained at least until the expiry of the economic rights.

Article 8 of the Proposed Term Directive makes clear that the Commission continues to remain active in the field of intellectual property. It provides that if a Member State proposes to grant any new related rights, it must notify the Commission which may direct deferral of the adoption of such plans for three to twelve months if the Commission intends to propose a Directive on that subject.

IV. MORAL RIGHTS

Moral rights have long been recognized in continental legal systems, and indeed they are a requirement of the Berne Convention. However, unlike economic rights (protected by copyright) they have traditionally not formed part of common law systems such as in the United Kingdom and the United States.

At present, there are considerable differences in the scope of moral rights protection available in EC countries. The most important issues which the Commission is considering include:

- (1) The type of work to which protection is offered.

Moral rights protection, as it developed in Europe, was intended to protect genuinely creative artistic works. For this reason in most Member States there is a creativity threshold for protection. However, in other Member States, notably the United Kingdom, there is only a minimal creativity threshold for copyright and moral rights protection.

- (2) The duration of moral rights protection.

In France, moral rights exist in perpetuity, whereas in several

countries, they only subsist for the duration of copyright. It is important that the duration of protection is harmonized in order to simplify commercial transactions.

(3) The right to waive moral rights.

In several EC countries, there is an absolute bar on waiver; elsewhere only certain rights can be waived. It may be appropriate for the Commission to exclude the general waiver of moral rights while at the same time providing for a partial waiver in relation to certain specified moral rights and/or certain specified acts.

(4) The rights of employees, artists, and authors.

In the United Kingdom, employees can only assert moral rights where these rights are infringed by a third party acting without the authority of the employer. In France, by contrast, although there is no definite court decision on this point, it seems that employees are able to assert their moral rights.

It will be extremely difficult for the Commission to develop an approach which satisfies the divergent views of the Member States. The Commission will also have to mediate between the conflicting interests of industry and authors, artists, and directors.

Last year, interested parties were asked to submit answers to a Commission questionnaire, and on November 30 and December 1, 1992, the Commission held a hearing on moral rights. No proposal for a Directive has yet been decided, and as yet no timetable for action has been set.

V. THE DOCTRINE OF DIRECT EFFECT

The issue of the direct effect of European Community law on national law of Member States is of paramount concern. If a provision of EC law is directly effective, domestic courts must not only apply it, but, following the principle of supremacy of EC law, must do so in priority to conflicting provisions of national law.

This means that individuals and companies may be able to take advantage of the terms of a directive, as opposed to the national law, where a Member State has failed to implement a directive within the time limit laid down in the directive for implementation

or has wrongly implemented it.

Community law on the effect of the failure to implement a directive by the due date or in an incomplete form or an inconsistent manner is still developing. Article 5 of the Treaty of Rome²⁵ ("Treaty") expressly provides that Member States shall take all appropriate measures to fulfill obligations arising out of the Treaty.

It is now well settled EC law that mandatory provisions of directives which are sufficiently clear and precise on their face shall have direct effect even if not formally enacted. Such mandatory provisions of a directive have "direct effect" (i.e., have the force of law in a Member State without the need for national implementing legislation) against a State or emanations of the State including nationalized industries and bodies providing public service under governmental control with special powers for that purpose ("vertical direct effect").²⁶

It is not clear whether such direct effect can arise as between individuals ("horizontal direct effect"). However, horizontal direct effect provisions which give rights against third parties may in practice be directly effective following the *Marleasing* case²⁷ where the European Court of Justice held that pre-existing national legislation should be construed so far as possible to be compatible with a directive.

Further, aggrieved individuals who suffer loss from failure to implement or from inadequate implementation of a directive may seek damages from the defaulting Member State.²⁸

It is likely that certain other Member States will not implement the directives and proposals discussed above by the deadlines imposed. Certain Member States have not complied with deadlines

25. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958), amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

26. *Vanduyt v. Home Office*, Case 41/74, [1992] E.C.R. 1337.

27. *Marleasing SA v. Commercial Internacional Alimentation SA*, Case 106/89, [1990] E.C.R. 4135.

28. *Francovich & Bonifaci v. Italian Republic*, Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 11, 1991) (not reported).

imposed for implementation of the "Television Without Frontiers" Directive.²⁹ For example, the U.K. government has not enacted legislation to comply with the Harmonization Directive on Trade Marks ("Harmonization Directive") by the December 31, 1992 deadline.³⁰ As a consequence, the United Kingdom is in breach of the Directive (as are Belgium, Germany, Italy, Luxembourg, the Netherlands, and Spain). The Harmonization Directive imposes some fairly fundamental changes to U.K. trademark law and it does so by way of "mandatory provisions" (which the United Kingdom must implement) and "optional provisions" (which the United Kingdom may implement). It is unlikely that a new law will be enacted in the United Kingdom before the end of 1993.

Under the new law, many marks not previously registrable under U.K. law will now be registrable. A number of applications have been filed seeking to register such marks. We understand that the U.K. Trade Marks Registry is unlikely to change its current practices without a Court decision. Therefore, it is likely the Registry will refuse these applications and it will then be for the Court to decide whether these applications should be allowed under the doctrine of direct effect.

The developments in the doctrine of direct effect and related matters have clearly strengthened the position of private citizens and companies in the European Community. The possibilities provided by direct effect have frequently been overlooked by individuals and companies. Such persons could, however, benefit substantially from the provisions of Directives which should have but have not been implemented by national law.

29. Council Directive of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 89/552/EEC, O.J. L 298/23 (1989).

30. First Council Directive of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, 89/104/EEC, O.J. L 40/1 (1989).