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Trends and Developments in the European Community Affecting the Motion Picture Industry

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What Dr. Verstrynge and the other speakers have said led me—inspired by something I heard a few weeks ago—to think I should call my remarks "Copyright and Authors' Rights: Civilization in the Balance." But we are not yet at Armageddon—although, at least from the perspective of the motion picture industry, we are facing some very serious problems. I have outlined my perspective on those problems in the paper submitted for the conference, so I won't even try to go through it now.[1] I hope you will have a chance to look at it. What I will do is confine my remarks to a few things that came to mind as I was listening to the other speakers.

As you know from Dr. Verstrynge, what underlies the thrust of the activities of the Commission of the European Communities ("Commission") is the desire to achieve a free internal market—free movement of goods and services throughout the market. That is one of the goals of the Treaty of Rome ("Treaty"),[2] and it's enshrined in Articles 30 and 59 of that Treaty.

It implies—and requires, I suggest—something that some of the

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1. Unpublished manuscript, on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal.*

2. 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.

Commission activities will tend to hinder: that is to say, the ability to produce the goods and services and the ability to maximize public demand for them, as well as the ability to distribute them in a way that would make them accessible to the largest number of people.

We have heard references to the Satellite Directive[3] and to the *Coditel* cases.[4]

The Satellite Directive, in one of its very important elements that Dr. Verstrynge pointed to and outlined, requires that the law of the uplink countries be made applicable to a satellite broadcast—which is to say not the law of the respective footprint countries where the arrow shot into the air will come down, but only the law where the uplink originates. That's put a little generally and not totally accurately, but for purposes of this picture I think it's okay.

What happens, therefore, is that the owner of a program—and let's limit ourselves for this purpose to encrypted programs where Mr. Fleury drew the distinction—the owner of an encrypted program who would like to have that program transmitted only to people who pay to receive it in one country—to take an extreme example, only in Belgium. And why would that limitation be imposed? Because rights have been sold for theatrical exhibition or home video distribution in the other countries of the European Community ("Community"). Why would that difference exist? That difference is a natural outcome of cultural differences in the countries of the Community, of differences in movie-going habits, of differences in the number of viewers in the various countries.

The Satellite Directive's requirement of having only the uplink country's law apply would impose a straitjacket on the distribution of the motion picture. It would require that in order for the distrib-

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3. 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.

4. S.A. Compagnie Général pour la Diffusion de la Télévision v. Ciné Vog Films, Case 62/79, [1980] E.C.R. 881, [1981] 2 C.M.L.R. 362; Coditel S.A. v. Ciné-Vog Films S.A., Case 262/81, [1982] E.C.R. 3381, [1983] 1 C.M.L.R. 49.

utor to be able to maximize its revenues, the distributor would have to make the motion picture available in every country at the same time, and perhaps cut short its use in other media in other countries. That would be disadvantageous to the public because members of the consuming public or the movie-going public who would like to see the movie in theaters may have that ability cut short. Members of the movie-going public who would like to get a video cassette and take it home with some pizza would also have that ability cut short.

The *Coditel* cases stand for the principle that the public performance right under copyright is in a different class from the right to distribute hard goods. Whereas the Community requirements of free distribution of goods with respect to videocassettes or phonograph records would not allow the use of a copyright or trademark to erect barriers to their distribution throughout the Community, the public performance right in a motion picture was of a different category. It could not be fully exercised by the holder of that right unless it were exercised over and over again, so long in fact as the public was willing to see it. That means that in order to exercise that right, the owner of it would have to be able to establish exclusivity. This has developed in our law, as well as in the laws and businesses of civil law countries, with respect to motion picture distribution. It is a necessary element—a critical element—to motion picture distribution. And, as I said, it was accepted by the European Court of Justice in *Coditel.*

What the Satellite Directive attempts to do is to destroy that principle by requiring only the law of the uplink country to be applied, the implication being that the copyright owner could not rely on the copyright law of a country into which a program was sent without the copyright owner's permission.

One of the goals to which Dr. Verstrynge's paper spoke as an underpinning for some of the provisions of some of the Directives is to protect authors—that is to say, creative individuals—as well as investors in producing works. There is no question that that's a laudable goal. Authors are, after all, what make the whole machinery go and they should be protected.

In my view, however, it is arguable that authors—in the conti-

nental sense, at least with respect to an enterprise like a motion picture—and an individual author's creative work can seldom, if ever, be called an "enterprise"—that these authors are best protected, and even caused to prosper, when the investing entity is protected and allowed to prosper.

The regime in the United States has been one that has depended on freedom of the market and collective bargaining and individual bargaining, and it is one that has been eminently successful. Our motion picture industry is known, sometimes unhappily, for its success. But it is very, very successful, and it is probably one of the two, perhaps three, industries that has consistently provided a positive balance of trade for the United States.

I am not going to suggest that it's our free market regime that lies at the success of our motion picture industry, but it certainly hasn't hurt it. I do suggest that countries that have the creation of a successful motion picture industry as a serious goal should take a close look at it.

In that same context—and I think of a remark from Dr. Verstrynge's paper—in my view, it's neither necessary nor desirable to have what Dr. Verstrynge called a "balance" among authors, artists, and producers. It is necessary that authors and artists—and, indeed, all who are in any way involved in the making of a motion picture—be fairly compensated. This is achieved, as I suggested, through collective bargaining and individual contracts. But the kind of balance resulting from some of the recent Community initiatives would inhibit the producers' ability to maximize the revenues from their motion pictures. This inevitably would reduce the compensation as well as the employability of the very people the Commission is seeking to protect.

The kind of thing I have in mind in that context is, for example, the equitable remuneration provisions of the Rental Directive.[5] Those provisions are non-transferable. It seems to be fairly clear—although, as Dr. Verstrynge pointed out, the Directive has

5. 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).

not answered the issue—it seems to be fairly clear that the equitability of remuneration will be determined on a Member State-by-Member State basis by some forum, some court, some arbitration tribunal, which, as I say, has not yet been addressed.

Such a determination may even be done on a picture-by-picture basis and, as Mr. Fleury suggested, the thrust of the inquiry may well change if the picture is more or less successful, or if the reason for success is publicly perceived to be a particular actor or a particular writer. Until the issue of whether remuneration is equitable is worked out, distribution of the picture may well come to a crashing halt. And there is little more perishable in this world than motion pictures. The public taste can change very, very rapidly in that regard.

The issue of national treatment has been addressed. I touched on it in my paper, but I do want to make an additional remark. National treatment is both necessary and desirable. There would have been little need for its development as a principle of protection if all countries were at the same level of protection. The development of international copyright protection would have been a much faster and less difficult process if all countries were at the same level of protection. But the fact of the matter is that they are not.

In my paper, I quoted some copyright experts—civil law copyright experts—who support the principle very strongly. As Mr. Fleury pointed out, the World Intellectual Property Organization, in its recent Memorandum on the Berne Protocol Proposals, has referred to the opposite of national treatment—namely, the principle of reciprocity—as "a cancer that is growing."[6]

What I would suggest is that to deny national treatment where levels of protection are different undermines a very important and long accepted principle of international copyright and, unfortunately, exacerbates international disagreements in that area, of which

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6. Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, 3d sess., *Questions Concerning a Possible Protocol to the Berne Convention*, Memorandum prepared by the International Bureau, WIPO Doc. BCP/CE/III/2(I-III) (Mar. 12, 1993).

we have enough.

Focusing more specifically on motion pictures once again for just a moment, the fundamental difference, as Dr. Verstrynge has indicated, between our system of copyright protection here and that in the civil law countries is that the focus in the latter is on the individual author, whereas here—I guess, one can put it relatively pejoratively—it's just on exploitation of the product—the distinction between copyright and author's rights.

Mr. Fleury quite rightly pointed out the huge extent of the population and geography and importance of the countries which accept the author's rights approach—the "continental approach." In terms of motion pictures, there are particular problems raised. I'm not saying that there aren't problems raised in other areas, but this just happens to be close to my heart.

I think it might be worth quoting Adolf Dietz, who is one of the more respected copyright authorities on the continent, who said that, "One of the most difficult questions in copyright is the question of authorship and copyright in motion pictures. The difficulties flow from the fact that the circle of persons whose work is included in one way or another in the completed film is very large."[7]

Now, what that means is that we are not dealing with the four artists in *La Bohème* in their garret, each individual author turning out his or her work. We are dealing, when we talk about motion pictures, with a particularly unique kind of item that can only be created by a conglomeration of resources, of talent, of people, all of which takes some kind of guiding enterprise, which generally is a legal entity and not just one single human being.

But Mr. Dietz expressed the view that, "A system which grants the original copyright in a film to the producer, insofar as he provides only organizational and no creative contribution to the making of the film, should be rejected as contrary to the system. It is contrary to copyright in the legal policy sense to grant original rights to someone other than the creator of the work."[8]

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7. ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 50 (1978).
8. *Id.*

Now, what I suggest to you, in the context of the success of the American motion picture industry, is that is putting theory well above pragmatism—or, as somebody said recently, "It may work, but the theory isn't theirs."

To conclude, I would offer this notion: In a free market system, where collective and individual bargaining are the order of the day, neither creators nor producers have total control over each other. I use the words "total control" because those are the words Dr. Verstrynge used in his paper and decried the possibility—quite rightly—of such a situation.

I leave aside as unworthy of extended comment the distinction drawn between creators and producers. I think that may be the subject of a whole other seminar. Where there is, and should be, total control is over the exploitation of a motion picture. It is the producer's job to produce the best picture possible and distribute it to maximum effect. That's not only for the reasons of his own pocketbook, but for the benefit of the public. If authors and artists and producers are given equal exclusive rights, the effect would best be described in terms of the hackneyed comment that "a camel is a horse designed by a committee." That goes back to the fear I expressed before, under the heading of equitable remuneration, where everybody has to get together to determine what that is and hold up the distribution of a motion picture until that happens.

The presumption of transfer of rights contracted against equitable remuneration would not help because of the potential stranglehold over distribution remaining in effect while the equitability of the remuneration is determined.

Now, just a final word. We have two systems in existence. There is nothing that has ever been suggested by any American motion picture representative in dealing with this problem—no suggestion has ever been made that we would want to impose our system on the users of continental approaches. What is happening, on the other hand, is that, by virtue of these directives, there is an attempt to impose the continental system on the U.S. industry.

The EC Member Countries have accepted for themselves what I believe to be an excellent choice of a law system. There is a

Treaty of Rome—it's not the Treaty of Rome which underlies the Community, but another one—which establishes a choice of law system with which people who have taken conflicts courses are familiar.[9] That is, the contract will be enforced according to the desires of the parties or where the significant contacts are. It's a wonderful system and a progressive one. Unfortunately, at least at this time, it is one open to only the members of the EC.

9. Convention on the Law Applicable to Contractual Obligations, *opened for signature* Rome, June 19, 1980, O.J. L 266/1.