Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 4 *Volume IV*
Number 1 *Volume IV Book 1*

Article 7

1993

Panel Discussion

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PANEL DISCUSSION

AUDIENCE MEMBER: When you talk about the enforcement mechanisms under the Berne Convention—or the Paris Convention—going to the International Court of Justice, which nobody has done yet, comprising a retaliation; I agree with that. But I see that as a non-issue in approaching the neighboring rights problem. It may be that one of the reasons we're in the GATT is we don't have enforcement mechanisms under the Berne Convention. Is it an issue?

MR. METALITZ: I would certainly agree with that as far as Berne as it stands now is concerned. Of course, this is a lively topic for the Berne Protocol discussion, the idea of incorporating some enforcement mechanisms. Secondly, there is the negotiating record on GATT TRIPS. And third, I think there are simply some subtle expectations about what kind of enforcement would be expected for copyrights.

What concerns us in the sui generis unfair extraction right is simply that the Database Directive says that Member States shall adopt an enforcement procedure. As a practical matter, the entire project of harmonizing by a new form of protection, this unfair extraction right, could be completely undermined if a Member State were to provide extremely weak or onerous or formality-laden enforcement mechanisms. If that were to happen, it would not achieve harmonization as a practical matter, and it would certainly create a great deal of uncertainty as these enforcement mechanisms were being developed.

The point that was mentioned about equitable remuneration in the motion picture area is a good example. If each Member State decides on a standardless, or relatively standardless, basis on how to enforce one of these rights or how to limit the exceptions to these rights—that's again another issue with the Database Directive, the compulsory licensing provisions—then the issuance of the Directive is really just going to kick off a long period of uncertainty, and one that may end up with a system that is less harmonious than what we have now.

AUDIENCE MEMBER: Part of the negotiations in the Data-

base Directive was on the enforcement mechanisms, the same way as we are doing in the GATT. One of the problems with GATT is that it hasn't addressed this problem. But we have to address it. So I see this as being as important to address as any of the other problems that GATT has successfully addressed.

AUDIENCE MEMBER: I think everyone here shares the goal of harmonization. If we are moving toward harmonization, we would not want to introduce a concept that is basically foreign or not contained in the copyright laws of any country. Equitable remuneration is really, it strikes me, a sort of bizarre concept. But basically it seems like a very non-copyright idea, and one that seems to lead away from harmonization since it's contrary to all the copyright experience of the various countries.

DR. VERSTRYNGE: I want to answer certain of the remarks which were made here.

It is clear that if you could achieve through the mere operation of a system the result where all the rightsholders would be properly remunerated, you could dispense with the provision on equitable remuneration. The problem is, experience shows that that is not exactly so.

We tried in the Council negotiations some other alternative—like making collective harmonizations compulsory—or having a Scandinavian regime, or extending collective bargaining. There were certain ideas. But we couldn't reach agreement on those; we could only reach agreement on equitable remuneration.

We wanted to have in a situation where we increased the protection, the guarantee that one category of rightsholders would not run off with all the benefits. It is to the extent that we are pushing the increased protection for others, and we think it is legitimate to do so when increasing the revenues. You may agree or disagree with that, but that's what the Council decided.

On the points which were made by Professor Hansen, you have to watch out what is guaranteed because the subsidiarity in the Maastricht text does not apply to areas of exclusive jurisdiction of the Community. The internal market is an area of exclusive jurisdiction of the Community. So that, whenever the market is

blocked, there is an obligation to harmonize and there is no possibility to say, "Well, we'll leave that on the side because it is not important." That obligation does not exist. It exists only outside of the internal market blockage.

So far, we have harmonized most things where the European Court of Justice, through its case law and the use of Article 36, did show that the market was blocked. *Coditel*, which was properly explained, shows that you didn't have an internal market. *Patricia* explained that on duration you didn't have an internal market. *Warner* explained that on rental rights you didn't have an internal market.

The argument comes with private copying: Does private copying block the internal market? Well, it doesn't exactly block the internal market, but it distorts the internal market. If some countries are going to have levies on machines and tapes and others are not going to have it, and you open up the borders and you make every control at the borders illegal, obviously, people will import the machines and the tapes in the countries where they don't have to pay the levy and re-export them to the other countries, and that is going to destroy the French and the German and the other regimes on private copying.

How long is this distortion going to be permitted to go on? I believe you have a valid internal market argument on which to base private copying legislation. What is not clear is how to deal with this problem. I don't know what the result will be because the Commission hasn't decided, so I cannot tell you any more than what has happened so far.

Another point which I want to make is that I disagree with Mr. Sorkin on the contract problem. I disagree for the very simple reason that the Berne Convention itself says that it's the law of the country where you exploit the work that governs the protection; that's what the Berne Convention says. That's what the French Supreme Court used to give priority to the territoriality of copyright law or for contract law. His ideal of making a free choice of contract flies in the face of that provision of the Berne Convention.

I must warn you against this approach because my understand-

ing of how Community law works—not in the copyright area, but in general—is that it is territorial. So when you come with your products or your services into this territory, it is the law of the Community which applies. So you can make any contract in the world or any country in the Community which you like, but you cannot go away from the fact that copyright law is governed by the law of the Community in combination, as Mr. Fleury has correctly pointed out, with the transposition of the Member State law in accordance with the Directive. But you cannot maintain that you can go away from that and then apply some freedom of contract.

We had that problem to begin with in the Software Directive, where of course the temptation was that once we have begun the reverse engineering derogation, it would be then free for the contract, that the parties could decide in a contract whether or not they could have another regime than the one we have laid down in the reverse engineering provision. But the Directive clearly says that any contract contrary to Article 6 on reverse engineering is null and void. So that is a clear example where we legislated to have the opposite effect.

I think that you have to watch out when music, or movies, or whatever are exploited in the Community. It is the Community law which applies to it. I do not think that the Court of Luxembourg will move away from that position. That was tested in front of the Court by the antitrust rules. They didn't budge; they said it's the law of the Community which applies even to agreements which are made outside of the Community.