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Professor Hansen mentioned when he was speaking earlier that it's desirable to get back to basics when we look at European Economic Community ("EEC") intellectual property law. That is the core of what I am going to talk about: the interplay between intellectual property rights and free movement of goods.

Free movement of goods is, as you are undoubtedly aware, one of the fundamental principles of the European Community ("Community").

This is in contrast—in vivid contrast, I might say—with our Constitution's Commerce Clause, which is not a goal but merely a power clause. Hence, not surprisingly, Community law has gone further in the removal of barriers to trade than we have in the United States. The United States Supreme Court, on several occasions, has recognized that the Congress may limit trade and permit states to have obstacles to trade, which would not be permitted in the European Community. States may even discriminate against out-of-state products and out-of-state suppliers of services if the Congress permits. That would not be possible in the Community because it hinders the achievement of a positive goal.

In recent years, this positive goal of free movement of goods has been reinforced by the program of Completing the Internal Market by 1992, first outlined in the Commission of the European

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Communities ("Commission") White Paper of June 1985,[1] and by the Single European Act's introduction of Article 8a, which set a deadline of December 31, 1992, for the removal of barriers to trade.[2]

In order to achieve that, however, one must attempt to remove the barriers to trade permitted in Article 36 of the Treaty Establishing the European Economic Community[3] ("EEC Treaty"), supplemented to some extent by the doctrine of the European Court of Justice in *Cassis de Dijon*,[4] which allows other areas of important state concern to limit the movement of goods—such areas include environmental concerns, consumer rights protection and the like. Hence, the Commission and the Council of Ministers ("Council") have undertaken an extremely aggressive program of harmonization of Member State rules which protect these State interests in order to set Community-wide rules.

How does this interrelate to intellectual property?

The first point is that the harmonization of intellectual property—or the creation of intellectual property rights—is not a specific goal of the EEC Treaty. It was not included in the initial Articles 2 or 3; it was not added by the Single European Act, which added environmental concerns as an area of Treaty activity; and it was not added by the Maastricht Treaty,[5] which added education, health, and culture as areas of concern for legislative action. It has become, however, a part of the harmonization program because intellectual property rights are a limit to the movement of goods under Article 36, which specifically allows industrial and commercial property rights to limit the free movement of goods. So it has

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1. Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final.

2. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741. The Single European Act ("SEA") constitutes a series of important amendments to the European Economic Community Treaty, *infra* note 3. The SEA entered into effect on July 1, 1987.

3. 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.

4. Rewe-Zentral AG v. Bundesmonopolverualtung für Branntwein, Case 120/78, [1979] E.C.R. 649.

5. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719.

come in, if you will, through the back door.

That has always been recognized in the Community. In the White Paper of June 1985, the Commission stated that, "Differences in intellectual property laws have a direct and negative impact on inter-Community trade and on the ability of enterprises to treat the Common Market as a single environment for their economic activities." That, therefore, is the justification for a program to try to eliminate the diversities of intellectual property law.

The necessity for this harmonization program—or the creation of Community-wide rights, which is the alternative approach used in the Community Patent Convention[6] and the draft Community Trademark Regulation[7]—has been reinforced by the European Court of Justice's doctrines.

The Court of Justice is an extremely active player in the integration of the Community's market. The Court of Justice has, generally speaking, interpreted Article 36's limitations on the free movement of goods rather strictly. In the area of health and safety, for example, it has developed doctrines which require Member States to justify their interference with the free movement of goods, and it has introduced doctrines of proportionality which state that the Member States' measures must be strictly limited to what is necessary to protect the State interest involved.

Somewhat surprisingly, in the field of intellectual property rights, the Court has not been active to any great extent, with the exception of the exhaustion doctrine that I'll turn to in a moment. Instead, its record has been one of great deference to national rights. Indeed, the term in the Treaty is "industrial and commercial property rights," and one could argue that copyright should not be deemed an industrial and commercial property right. It is more properly termed an intellectual property right or an artistic and literary right.

The Court of Justice fairly early on did not accept that interpre-

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6. Convention for the European Patent for the Common Market, Dec. 15, 1975, Luxembourg, 15 I.L.M. 5.

7. Amended Proposal for a Council Regulation on the Community Trade Mark, EUR. PARL. DOC. EEC(91)4595 draft (PI 10).

tation. In the *Deutsche Grammophon*[8] case, and later in *Coditel*[9] and *GEMA*,[10] the Court followed the Advocate-General's suggestion that the term "industrial and commercial property rights" should be read broadly and should include artistic and literary rights under copyright. I don't think that's particularly surprising because I believe, even in 1957, that the term "industrial and commercial property rights" in France—French was presumably the initial drafting language—could be read broadly enough to include copyrights.

Perhaps more surprising is that, in other areas, the Court generally has deferred to the national law in its recognition of types of intellectual property rights in their extent and in their modes of creation and protection.

In the outline that I prepared I have indicated some of the leading cases: *Nancy Kean Gifts*,[11] where the Court recognized national trade design rights for handbags; *E.M.I. Electrola v. Patricia*,[12] where the Court recognized that a longer period of copyright in Germany was an effective means to prohibit goods coming in from a state where the copyright had expired; *Thetford v. Fiamma*,[13] where the Court allowed the U.K. to have a rather peculiar relative novelty patent as a legitimate form of patent; *Warner Bros. v. Christiansen*,[14] where the Court allowed Denmark's creation of rental rights as a form of copyright to reinstate or resurrect the

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8. Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG, Case 78/70, [1971] E.C.R. 487, [1971] 10 C.M.L.R. 631.

9. 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.

10. Musik-Vertrieb Membran GmbH v. Gesellschaft Fur Musikalische Auffuhrungs und Mechanische Verviel-Faligungsrechte (GEMA), Case 55/180, [1981] E.C.R. 147, [1981] 2 C.M.L.R. 44.

11. Keurkoop BV v. Nancy Kean Gifts BV, Case 144/81, [1982] E.C.R. 2853, [1983] 2 C.M.L.R. 47.

12. E.M.I. Electrola GmbH v. Patricia Im-und Export, Case 341/87, [1989] E.C.R. 79, [1989] 2 C.M.L.R. 413.

13. Thetford Corp. v. Fiamma SpA, Case 35/87, [1988] E.C.R. 3585, [1988] 3 C.M.L.R. 549.

14. Warner Bros. v. Christiansen, Case 158/86, [1988] E.C.R. 2605, [1990] 3 C.M.L.R. 684.

right of an initial copyright owner who had sold the product in the U.K.; and *Terrapin v. Terranova*,[15] which allowed Germany to maintain and utilize its doctrine of trademark confusion to bar a British company from using a traditional British trademark in Germany.

The important point to note is that in all of those cases the counter-arguments were invariably either that the nature of the right is rather peculiar in the Member State, and therefore should not be considered to qualify under Article 36; or that the Court should construe Article 36 more narrowly.

Thus, for example, in the *Thetford* case, the case of the British relative novelty patent, the argument was made that, the Court should recognize the patent but require a compulsory license, so that the outsider, the importer into the U.K., could still compete. The Court would not adopt that approach.

In the *Warner Bros.* case, which was, to some degree, the catalyst for the Rental Rights Directive,[16] the argument made and accepted by Advocate-General Mancini was an exhaustion of rights approach; namely, that since the British product—the tape of the James Bond movie, *Never Say Never Again*—had been sold in the United Kingdom, it would be inappropriate to allow Denmark suddenly to grant new rights to the owner of the copyright when the economic exploitation right had been exhausted by the product's initial sale in the United Kingdom. Under the exhaustion doctrine, once a product has been sold with the owner's consent, the right of the owner, generally speaking, elapses.[17] But the Court denied such reasoning and recognized the Danish right as a form of copyright and, hence, appropriate as a limitation.

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15. Terrapin (Overseas) Ltd. v. Terranova Industrie C.A. Kapfere & Co., Case 119/75, [1976] E.C.R. 1039, [1976] 2 C.M.L.R. 482.

16. 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).

17. Centrafarm BV v. Winthrop BV, Case 16/74, [1974] E.C.R. 1183, [1974] 2 C.M.L.R. 480; Musik-Vertrieb Membran GmbH v. Gesellschaft Fur Musikalische Auffuhrungs und Mechanische Verviel-Faligungsrechte (GEMA), Case 55/180, [1981] E.C.R. 147, [1981] 2 C.M.L.R. 44.

The net effect of the Court's higher level of deference, of course, is that the Community is partitioned by intellectual property rights. Thus arises the necessity for the Commission to propose and the Council to adopt a number of the Directives about which we have been hearing today. If the Court had taken a different approach to those cases, that necessity would have been diminished because the goal of Community harmonization is the removal of barriers to trade.

Now, the final point I would like to make—and I think that I can't make it at any length—is that even though the Community program's goal is to remove the barriers to trade, particularly in the area of copyright as Dr. Verstrynge has noted, the Community has gone a bit beyond its goal by recognizing additional social and cultural features of interest that it wants to see promoted through the particular Directives.

That, particularly to common law lawyers, either may seem to violate the principle of subsidiarity or to go beyond the Community's brief, which merely is to remove the barriers to trade. I don't have time to go into this now, but we might be able to go into it in the question period.

I think that, as an outside observer, one can have some serious questions as to whether it is absolutely necessary to adopt some features of the Directives that have already been adopted or that are proposed—in particular, the directive on moral rights—simply to remove barriers to trade.