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EUROPEAN COMMISSION'S REPORT ON AUTHORSHIP OF CINEMATOGRAPHIC FILMS: A CRITICAL ANALYSIS

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1. INTRODUCTION: A PROLOGUE TO THE DISCOURSE

The report by European Commission concerning authorship of cinematographic films which declared that no harmonisation is required in the concerned area – stands to be merely a silent administrative move across the globe. Probably, both the makers and users of law have grown weary of the flood of Community legislation in the media sector.

This also comes as a surprise due to the very fact that the European law governing cinematographic films stands at the notch of conflict between the Common Law regime and the *droit d'auteur* system of Civil law nations. As is known, on one hand, there are a host of people, which are regarded as creators and having copyright over a cinematographic film, while the latter fails to envisage a view other than producer being the single owner of the film. Although there were steps taken to avoid any disparage to the economics of the domestic market by designating the principal director as the usual author of the cinematographic work in the Directive on Renting and Lending right, the measure explicated its inadequacy within a short span of time. Over this, the question whether such recognition would entail hardships for exploitation of cinematographic films in the member states, was taken up by the European Commission in the report on authorship of Cinematographic films, which has been critically analysed throughout the length of the current paper.

2. PROMOTING CULTURAL DIVERSITY AND CREATIVE CONTENT: CINEMATOGRAPHIC FILMS AND THE COMMISSION'S REPORT

In tune with the theme of our discourse, it is crucial for us the 2005 UNESCO Convention on Cultural Diversity which has been ratified at EU level in 2006, seeks to promote and protect global cultural diversity through digital environment. Thus, in the

backdrop of an emerging digital society, it is believed that the advanced digital media can allow for a wider dissemination of cultural and creative content, as the reproduction is cheaper and quicker. Moreover, it also creates ample opportunities for authors and content providers to reach new and larger band of audience. While formerly, the individuals might have been excluded from sharing their opinion on issues, this new pluralism enables them to actively take part in the deliberations which could ensue therein. Thus, much emphasis is now being laid on promoting online cultural diversity and creative content through digital cinema. Here, it must be acknowledged that this promising technology has been taken up slower than expected, due to technical standards and economic issues, it was expected that the Commission is needed to enable the digitisation process of the cinema to ensure and safeguard cultural diversity. Even this goal has not been addressed under the Report.

3. ENABLING A GLOBAL REGIME: THE FILM INDUSTRY IN EUROPE

As far as other primary contents of the report are concerned, the suggestions made by the Commission reflect on the law of the land as prevalent in the member states concerning the partial harmonisation of the notion of authorship of cinematographic works. It is with such a pretext that terms such as 'authorship' and 'cinematographic or audiovisual work' have been construed in a broader sense to include issues concerning original and derivative ownership of rights as well as all types of film works and moving images. However, at this juncture, the Commission has refrained from entering into the conceptual differences between the nature of copyright law as it stands in both – the Common Law nations and the Civil Law Countries.

In addition to this, the report highlighted the Commission's opinion of considering the partial harmonisation along with the Directive together with its domestic implementation as having been successful. In these regards, no urgent need has been expressed to be felt, for further work on the issue of film copyright in the Community. Supplementing to this, the report concludes with the conclusion that:

"There is no evidence that vesting original authorship in the principal director of a film would have caused difficulties in the exploitation or distribution of films, or in the effective tackling of piracy and other unauthorised use of such works."

Although it must be seen, that on one hand, where the report maintains that hurdles which may steam up to the surface due to the varying rules governing different member states, can be cured either by contractual arrangements concerning the transfer of exploitation rights or by respective legislations, providing for vesting of these rights in the producer of the film. Albeit this, sufficient scope is left in the same regards, by announcing that national contract law in the area of film copyright would be subject to future examination. Moreover, the scepticism imbued in the conclusion extends to the fact that all such disparities between the legal regimes of the member nations would be overcome in reality through contractual arrangements; which are to serve as the most appropriate instruments for exploitation in the domestic market in the present age of information boom.

4.1 The competing interests in film production and exploitation of the entailing rights

It must be duly recognised in the backdrop of the discourse stated above that it is the producer of a cinematographic film, who dugs out the maximum benefit by unrestricted

exploitation of the bundle of economic rights vested in him in the capacity of the owner of copyrights subsisting in the cinematographic work. This has been seen as his reward for his ability to undertake the risk of providing financial sufficiency in making the film a success. In addition to this, such economic returns along with the moral rights which come complementary to the copyright – also, stand in the interest of other players and copyright owners who have contributed in the development of the cinematographic film as the latter's interest to share in the proceeds of the film's exploitation is closely integrated with the fate of the interests of producers in a successful production and exploitation. Contrary to this, all such economic prospects from exploitation of the copyrighted work would cease if a legal bar hinders the production of the cinematographic film. But, the situation gets caught in a cobweb in cases of the special contributions of a nature which are intended to be a part of a particular cinematographic film only temporarily and thus exist as independent copyrighted work of different authors. In such a context, the balance of interests is clear – it must be the film producer who is required to have absolute autonomy over the licences which are necessary for making of the film as well as for the subsequent exploitation of the copyright subsisting in the work. However, laws of many member states including Germany, fails to address this situation.
The Commission's report clearly brings forth this concern by stating –

"The practical need to place the rights concerned in the hands of the producer and yet to respect the basic principles of author's rights protection ... In this regard, a balance has to be struck between rights and interests of the natural persons who contributed to the intellectual creation of the film on the one side and the need to ensure the optimal exploitation of cinematographic or audiovisual works on the other".

To this, it must be stated that however easy it may seem in the statement, it becomes cumbersome to reconcile between the interests of both – the individual authors and the producers – which, may be treated to be largely overlapping; if not at odds with each other.

4.2 International Film Industry and the Conflict of Laws

The scenario in the field of authorship and control of copyrights vesting in the cinematographic films as sketched above appears even more uncertain once the producer becomes active at the international level and cross the national borders of his production location. This results primarily due to the inconsistencies across the legal systems of the member nations who have resorted to diverse propositions within the law of copyright protection. Here, it becomes crucial to record the distinction between 'applicable copyright law' and the 'applicable copyright contract law'. This bears a reference to the fact that in case of a copyright infringement, the law of the country offering protection to the cinematographic films would be treated as the 'applicable copyright law'. However, for the instances involving breach of contract, the 'applicable contract law' is to be identified – which for the member countries of EU, is the provision embedded in Art 3 of the Rome Convention. Thus, the major determinant in this field stands to be, how the respective law of the country of protection addresses the issue of authorship in cinematographic films. In the same regards, it is to be taken care of that there is no agreement whatsoever, in relation to the quintessential question of transfer of rights i.e., the law applicable to the disposal of copyright.

Thus, as was perceived in the German literature, the application of proper law of contract would also come into play. However, at this juncture, it must be taken care of that a

restricted approach of the member nations in their efforts to systemise and ascertain the constants in the field of copyright protection, are not potent enough given the legal uncertainty. To this, the German experiment to enact Sec. 32 (b) UrhG, stands as the best possible illustration. More evidently, if a Spanish screenwriter is considered as the author of the film natively, the same implication does not rest in the legal systems where English Law is applicable. Despite such contradictions, it appears almost as a matter of surprise and callousness that the Commission continues to make the discourse flow through settled positions and make no endeavour to provide an impetus to the process of harmonisation across the regimes prevalent amongst the member nations.

5. AUTHORSHIP OF CINEMATOGRAPHIC FILMS AND ACQUISITION OF FILM RIGHTS

5.1 The differences in the prevalent legal practices with respect to authorship of Cinematographic films

As we move down to the band of people who are entitled to copyright under the Continental Law concept of *droit d'auteur,* there exists only a thin line of distinction. A musing upon the idea also leads us to ponder upon the fact as to how the licence is passed off from the authors of the independent works to the producers of cinematographic films. However, at this juncture, a delineation of the approach adopted in *droit d'aut eur* with that of the Common law system, must be distinguished as the latter regards the producer to be the sole author of the film.

However, the nuances for the former system may be understood by allowing a classification into two broad groups:

a. The first group comprises of precisely the individual film authors. Such enumerations are found in the legislations from Spain and Italy as well as Greece. However, French and Belgian law do not provide exhaustive lists, having presumptions as to typical film authors.
b. The second group, which includes Germany, Austria, the Netherlands and Denmark, does not specifically identify in their copyright provisions as to who is the creator of a cinematographic work nor do they offer a presumption that certain individuals could be considered authors. Instead, they examine the creative quality of each individual contribution.

It must be duly noted that the director of a cinematographic film counts as undisputed in the circle of direct film authors under all of these copyright regimes, even before the partial harmonisation of film copyright in Europe to which an allusion has already been made. Not regarding this, there are some quintessential disparities which emerge with reference to the question whether the screenwriters entitled to co-authorship in the cinematographic film over and above their role as a creator of the screenplay. This issue as it apparently seems to be, has created much clamour and controversy across member nations as a screenwriter is presumed to be the author of his contribution which has been subjected to exploitation for the purposes of making the cinematographic film. Thus, some scholars do not accord him the status of direct authors of the film. However, the former opinion may get due support by the 'doctrine of dual character', which considers works created for film, such as screenplay, treatment or synopses, as well as film music as a component of the cinematographic work and thus their creators are co-authors of the film.

Thus, as is much apparent, deliberations of such a sort would not find much acceptance in states that acknowledge the screenwriter as a film's author directly. To this, certain illustrations are crucial to be taken into account –

i. Under French and Belgian copyright law, the screenwriter belongs like the composer of music specifically created for film to the group of individuals who bear an entitlement to the rights of authorship in a cinematographic work.
ii. Similarly, the Spanish and Italian copyright regimes assign authorship rights in a cinematographic work to an exhaustive list of individuals which include the authors of literary materials (i.e. the scripts, their revision, the screenplay and dialogue) and music made especially for the film as well as the director. The same holds true for Portuguese law.
iii. With Denmark, Finland and Sweden, some Member States whose copyright laws do not explicitly enumerate the individuals who are entitled to authorship rights in film also routinely recognise the screenwriter as a direct author of the cinematographic work.

However, when it comes to ground-level implementation of such principles, the screen-writers are found parting away with their rights most of the times and find it a better option to quit from the race to the authorship of Cinematographic films.

5.2 The Distinction in the rules relating to the Acquisition of Film Rights

Taking the above discourse into account and gauging the fathoms of prevalent law, it seems that the few possible modes of consolidating the rights needed for making cinematographic films in the hands of film producers are as follows.

(a) Firstly, the authorship rights in a cinematographic film under the Common law can vest primarily, with the producer of the film.
(b) Alternatively, such rights can also be assigned to the producers by statutes or,
(c) Thirdly, by contractual arrangements based on presumptions.

It is apparent that the second most is the most widely adopted one s far as the countries of Italy and Austria are concerned. In Italy, an individual who organised the production of the cinematographic work is entitled to the right entailed within the film. In addition to this, the law governing the scenario in Italy states that the enjoyment of commercial exploitation rights to which the producer is entitled is the purpose for the exploitation of the produced work.

Much congruent to this, is the Austrian copyright law, which states that the owner of the enterprise (the film producer) is entitled to exploitation rights for commercially produced cinematographic works. The hurdles which come in the path of acquisition of rights by the film producers are catered to by the statutory assignment of legal rights. On the other hand, the issue of contractual grant of rights required for film production and exploitation implicates back to adequate uncertainty for each one who gets involved in making of a cinematographic film.

6. IMPACT OF PARTIAL HARMONISATION OF COPYRIGHT LAWS & THE DISTINCTION BETWEEN THE LEGAL SYSTEMS

As noted at the outset of the discourse, the systems prevailing amongst the member nations for protection of copyright vesting in cinematographic works can be crudely sketched

into nations following the *droit d'auteur* concept and those oriented around the copyright tradition. At this stage, it also becomes crucial to fathom that neither of the two concepts have been posited upon by framing boundaries at the international plane. It is, Art. 14 of the Berne Convention prescribes for the determination of authorship in a film entirely in accordance with the national legislation of the country of the Union where protection is claimed. However, the proposition amongst the continental countries emphasise that the author of an original work enjoys an exclusive and absolute immaterial property right with respect to this work on the mere basis of his creation. In other words, they are bent towards a position where they believe that the original right in intellectual property accrues by virtue of the creation of the work as a special expression of intellectual effort.
The laws also use formulations such as –

"The author means the natural person who creates an artistic, literary or scientific work."

Such a conception is premised on the condition that any work capable of being copyrighted, can only come about as the result of creative, human intellectual activity. However, a notion converse to this prevails in common law where the copyright doesn't point towards the right to exploit an original work to its creator, rather it aims at the person who is either the employer or superior to the creator. Also, it is the latter which forms the basis for British and Irish copyright law, as well as that of Luxembourg. Notwithstanding this, there are instances where the two systems may intersect due to the partial harmonisation of law. One such arena stands authorship where, by means of the Directive, which acknowledges the principal director's authorship of a film.

Moreover, in addition to the directive on rental and lending rights, it is also the directive on satellite broadcasting and cable retransmission; which provides for the recognition of authorship of the principal director. Instead, the legislators went to an extent whereby they did not restrict the director of the film to be recognised as author for the purposes of the directive.

Complementing to this, it has to be taken into due consideration that calculation of the period of protection of the cinematographic work is not only made centred to the principal director, but also to the screenwriter, dialogue writer, and composer of music specifically created for use in the cinematographic work. Thus the nations where such a principle has been adapted in the national law (as in, Britain, Ireland & Luxembourg), the principal director enjoy a personalised bundle of rights. Alternatively, since partial harmonisation of authorship of films is also visible in the field of Lending and rental rights (Art. 2(2)) EC Lending and Rental Rights Directive and Art. 2(1) of the EC Term of Protection Directive); where it has brought about recognition of film directors as co-authors of a film. This was much desired by British and Irish film directors as the directors had been denied any protection beforehand. Indeed, the European Commission in its proposal for the EC rental directive, did renounce harmonising film authorship in the framework of this directive which is limited to the lending and rental rights only. However, it was only, harmonising a horizontal issue in respect of selected rights which was not considered appropriate. Therefore consequentially, the film producers and film directors are now recognised as co-authors under British Law – a concept which seems contradictory in its own self.

7. RECOGNISING THE NEED FOR HARMONISATION

As has already been pointed above, there is a vast chasm separating the legal regimes prevailing in various member nations which govern the arena of copyright protection in cinematographic films which also includes assignment of rights by a producer. Taking into account, such a backdrop, the need for harmonisation of laws is unmistakable in the field. To this, it must be noted that a principal director has been universally recognised as co-author based on partial harmonisation through directives aimed at the industry. But, beyond this, the parlance remains absolutely uncertain as to who all constitute the group holding copyrights.

Here, although the inclusion of a screenwriter in the group of direct film authors has been much welcomed in the German film Copyright Law, the ambiguity with respect to the authorship claims of other agencies involved in the film production – such as Cameraman, the sound engineer and the composer of film music; still breathes. This serves as an undesired element for the Copyright regulations as such uncertainties are potent enough to be detrimental for the functioning of the domestic market which aspires to deal with the exploitation of cinematographic works. As an illustration, it was the 'Home field advantage' under the English Law which, before the partial harmonisation, recognised producers as the only authors. On one hand this provides a simplified dimension to the entire process of exploitation of the rights associated with the copyright, but on the other, it blatantly flouts the mandatory co-authorship of the principal director. As opposed to the conclusions stated in the report, such repercussions wouldn't be eliminated by way of contractual arrangements in the *droit d'auteur* jurisdictions. Rather, it is the significant distinction between the member States whose copyright law offers a clear solution either through a statutory assignment (as is prevalent in, Austria) or at least an enumerative listing of film authors together with the presumption of assignment (as is prevalent in, Spain) and the member nations where the law is still not settled to the matter stated (as is prevalent in, Germany).

However, this would have a negligible impact on a nation where the exploitation of cinematographic work gets hampered due to regulatory mechanisms. In this regards, Germany may stand to be an illustration to this effect where, the granting of a license for an unknown method of exploitation is void. All of this contributes to substantial legal uncertainty, which should be ruled off in the context of EC law. Moreover, the effect on the Internal Market remains to be reviewed of the fact that in one Member State high costs must be laid out for legal research and compensation of the most varied film authors, whereas in another Member State a simpler and more secure transfer of rights is possible in a straightforward manner. As a result, it is not fathomable in this context why there should be a need for harmonisation just in the area of rental and lending rights, satellite broadcasting and cable retransmission and the period of protection, but no need for a general harmonisation of film copyright as a whole.

8. CONCLUSIONS

The discourse which unfolded above takes us to comprehend that although, the varied nature of the rules of various member nations governing the authorship of cinematographic films is appreciable, the Commission's report clearly failed to cash upon an opportunity to instigate harmonisation in a crucial domain of law of Copyright protection. Moreover, as has already been hinted above, the report makes an error in gauging the consequences of such a dissonance on the internal functioning of the audiovisual market in Europe. Even, the hopes

of the Commission in looking forward, at the contract practice in the member countries seem to shatter down as these are not potent enough *inter se,* to reconcile and compensate for the dissonance amongst the legal regimes across Europe. Therefore, the report seems to have exposited its inadequacy to provide security to the fear of some production houses which are unable to catch international attention due to their disadvantaged location. In these regards, the report seems to have adopted a docile diplomatic stand and has chosen to ignore the balancing of this parlance with a general presumption of authorship in favour of the principal director, the screenwriter, dialogue writer, as well as the composer of music exclusively noted for the film.

In light of these failures and to the context of transfer of film rights within the internal marketplace, it seems advisable to suggest complementing the idea of harmonisation of authorship of cinematographic films by introducing adequate legislative instruments in place. This step has already proven to be one of the most efficacious and feasible solutions in the past for many member countries across Europe and even serves to be in the best interest of the parties involved in making of the film. One of the prime benefits of such a resort is that they not only integrate the rights of exploitation of the copyrighted work with the producer but also aim at providing the much required legal certainty in the film market by unification of legal relationships for common exploitation. More so, such a course of action attends best to remedy out the nuances which arise due to conflict of laws and helps accentuate the process of harmonisation of the legal regimes across the member nations so that greater protection is available to the creators of content thereby facilitating wide-spread dissemination of copyrighted information; which is the primary goal of the concept of copyright protection.

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