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Title: A Question of Right or of Expediency?

Abstract:

Globalisation

1. Globalisation is not a recent phenomenon; it dates back as far as the 17th Century. The various *pulses of globalisation* (McNeill/McNeill) invariably originate from a combination of paradigmatic and societal factors, which are present at certain, times and places.

2. Globalisation, in whatever form, has deep and far-reaching effects on the societies involved. Such effects concern cultural, economic, social and ecological aspect of the societies at stake, induced basically by movements of people, goods and services. As a consequence – to give some examples – standards of living will change, indigenous cultures may lose their characteristics, ecological arrangements can be disturbed.

3. In its broadest sense referring to an integratory process in which cultural, economic and social inputs are interrelated across borders to create global opportunities in the related spheres of societal activities, the following aspects of globalisation can be mentioned as characteristic

- the relativisation of the nation state
- the involvement of non-governmental organisations (NGOs)
- the rise of the multinational corporations (MNCs)

4. Obviously, the law in general and from the 19th Century onwards intellectual property law in particular, is involved in globalisation processes. This is evidenced already by the *international awakening* (Ploman/Hamilton) which led to the Paris Convention 1883 and the Berne Convention 1886, and is underlined by the establishment of the TRIPS Agreement 1995 as well as the WIPO Copyright Treaty 1996. But also the activities of UNESCO and other organisations in the cultural sector should be mentioned here. With regard to copyright law it may be said that copyright law, although *a historical invention* (Hobsbawm/Ranger) of the 19th Century for the Industrial Society, continues to be instrumental for the use of cultural information in the Information Society.

Convergence and Divergence

5. Convergence is a rather new concept that is used in different terms of reference. It was the geopolitical watchword of the 1960s, for example referring to the meeting of the capitalist free market approach and the communist central planning on the middle-ground of mixed industrial economy and generous social provisions. Convergence became also the keyword to indicate the combined and simultaneous operation of different technologies (telephone, television, computer) of the new telecommunication infrastructure, creating exponential growth in the amount of information that is being communicated over computer-based electronic networks. No less colloquial became convergence as an indicator of all sorts of combinations of content (multimediaworks

and the like). It is of note, however, that as a phenomenon convergence, like globalisation, dates back as far as the 17th Century.

6. From a copyright law perspective of the world it is worth noting that the first traces of (international) convergence are to be found in the already mentioned Conventions of Paris and Berne. There is good reason for the argument that these two treaties determined the course of copyright law development for the next hundred years in the industrialised part of the world. However, it should be remembered also that in the 1960s the world was still divided into three ideologically competing blocks: the developed Western World. The under developed Third World and the community of Socialist Countries. This divide was one of the reasons that the negotiations concerning a 20th Century update of the Berne Convention resulted in being a failure. So it may be said that from a political point of view divergence was the second guiding principle for the development of copyright law in the 20th Century. This divide even became a major concern for the Western World because of the enforcement problems with regard to copyright law in particular (and intellectual property law in general) it raised at the end of the 20th Century, not in the last place due to the globalisation process indicated before.

7. Divergence, however, was not only characteristic for the political side of copyright law. The same was true for the conceptual side of copyright law. For it became gradually apparent that the advent of computer technology put the conceptual framework of copyright law under strain by accepting legal hybrids such as software and databases as protectable subject matter. Besides, it required adjustment of copyright laws prerogatives as a consequence of new modes of exploitation. In addition it may be said that from the 1960s stems a second type of conceptual divergence, i.e. the divide between copyright law for the analogue world and copyright law for the digital world. At the same time and related to that conceptual divergence a societal divergence took off: that between traditional personal copyright law and entrepreneurial copyright law.

8. Apparently, the TRIPS Agreement, in harmony with the WIPO Copyright Treaty, is designed to bring to an end the (by the conventional community unwanted) outcomes of the indicated diverging trends. And indeed, convergence of different copyright law regimes seems to be one of the striking effects of both treaties. This raises the question whether such convergence with an eye on the actual globalisation process, in itself as well as in the manner in which it is executed, is a question of right or of expediency.