

From pax americana to lex americana: American legal and cultural hegemony

In its 2000 *World Report*, the organization Human Rights Watch bluntly wrote:

As [the UN Security Council] functions today, with the five permanent members free to exercise their vetoes for the most parochial reasons, it cannot be counted on to authorize intervention even in dire circumstances. China and Russia seem preoccupied by perceived analogies to Tibet and Chechnya. The United States is sometimes paralysed by an isolationist Congress and a risk-averse Pentagon. Britain and France have let commercial or cultural ties stand in the way.

(Steiner & Alston 2000, pp. 652-3)

This was four years ago. If we add to this the more recent inability of the Security Council to determine the outcome of the Iraq crisis, then we have what looks like a decisive defeat for international law and its implementation through international institutions, chiefly the United Nations.

In this perspective, the question naturally arises whether, in the absence of a Security Council mandate, 'humanitarian intervention' by one state or a regional grouping of states is an

acceptable option in order to put an end to gross and systematic violations of human rights? The current Bush administration would answer ‘yes, definitely’ to this question. In March 2003 Pentagon adviser Richard Perle said, for example, that ‘as we sift through the debris of the war to liberate Iraq, it will be important to preserve, the better to understand, the intellectual wreckage of the liberal conceit of safety through international law administered by international institutions’.¹ For Perle and others close to President George W. Bush an international law which cannot effectively implement its own decisions, and which is based on the sovereignty of both democratic and ‘rogue’ states is indefensible. It is only a strong national state – like e.g. the US – that can guarantee security. To many Europeans, this is an unacceptable view on the part of the world’s remaining superpower. By acting without the blessing of the Security Council in Iraq, we Europeans would argue, the US-led coalition was in breach not only of international law but also of the UN Charter, an order which – somewhat ironically – was built at the incentive of the US and its allies themselves after WW II. Are we entering, we Europeans ask ourselves, a period of hegemony in which the law simply translates the will of the hegemon into prescriptions that subsequently become binding for everyone?

Harvard Law professor Detlev Vagts has talked about ‘hegemonic international law’. Tracing this concept to three German international law scholars in the early part of the twentieth century – Heinrich Triepel, Carl Schmitt, and Wilhelm Grewe – Vagts points out that a shift to ‘hegemonic international law’ means first of all ‘setting aside the norm of nonintervention into the internal affairs of states’; second, avoiding ‘agreements creating international regimes or organizations that might enable lesser powers to form coalitions that might frustrate the hegemon’; third, putting ‘internal law above international law’ as a matter of constitutional doctrine; and fourth, abstaining from customary international law in order to prevent the emerging rule in question from becoming part of custom (Vagts 2001, pp. 845-47). Detlev Vagts is careful to say

that he does not ‘take a position as to whether the United States is or should be a hegemon but merely addresses the lawyer’s question of what the legal implications would be if it is’ (Vagts 2001, p. 843). He clearly suggests, however, that we are presently watching the US moving toward hegemony by adapting international law to its own purposes.

In addition to the four ways mentioned by Professor Vagts I think that the American move toward hegemony is happening at another level too. It is happening at the ‘soft power’ level too, to use Joseph S. Nye’s famous phrase. ‘Soft power,’ says Nye,

is the ability to get what you want by attracting and persuading others to adopt your goals. It differs from hard power, the ability to use the carrots and sticks of economic and military might to make others follow your will....Soft power grows out of both US culture and US policies. From Hollywood to higher education, civil society does far more to present the United States to other peoples than the government does.

(Nye 2003, p. 1)

The particular soft power that I have in mind is the spread within the past fifty years or so of constitutionalism – that is, a constitutional system that falls within the liberal tradition. Constitutionalism implies that the constitution of a particular country is a ‘real’ as opposed to a merely aspirational instrument – truly a fundamental law that possesses a distinctive force in its own right. Constitutionalism generally involves a declaration of the individual rights that we associate with the liberal tradition. These rights set limits to governmental action, especially when they are coupled with judicial review of the constitutionality of legislation.

According to Henry Steiner and Philip Alston one can approach this spread of constitutionalism from two different perspectives. ‘First, the adoption of liberal-style constitutions

(or at least constitutions with a significant liberal component) can be seen as a horizontal trend among states, a consequence of the influence and pressures exerted by powerful countries in the liberal constitutional tradition like the United States.’ The second perspective is vertical rather than horizontal in character, in that it ‘stresses the links between the spread of such types of constitutions and the achievements of the human rights movement in constructing an international system of norms, institutions and processes.’ Here, we are talking about influences from international law and institutions that are ‘above’ the state rather than influences between states (Steiner & Alston 2000, p. 988).

In what follows, I will concentrate on the former of the two approaches just mentioned – the horizontal one. As I see it, many European scholars tend to underestimate the American influence – perhaps in an act of wishful thinking, wanting international law and international institutions to count for more than the pull of American culture and American dreams. My argument is that the spread of constitutionalism has a lot to do with US legal and cultural hegemony. In constitutionalizing our political systems in the West (including my own native Denmark), we are becoming Americanized – we are falling victims to the soft power of the US.

I furthermore want to argue that one of the tools employed by the US in the process is copyright. American films account for no less than 70 percent of the European television market. A fair number of the American movies that we consume in Europe are produced by just a few film studios. Over the past twenty years or so, as a result of mergers and acquisitions within the media and entertainment sector, corporations like Time Warner and Walt Disney have become the owners of a substantial number of the world’s copyright interests in cultural output. Throughout this whole drive toward global domination of the market for cultural output, these multinational corporations have been very adept at using copyright to further their own interests.

American Constitutionalism

In the American context, law should be thought of not as a technical means to settle conflicts only, but also as meaning. ‘As Americans find and construct meaning in their culture,’ argues law professor David Ray Papke, ‘they are more likely than others to use law, legal premises and legal images to guide them’ (Papke 1992, p. 3). It is not just that the legal dimension of affairs is particularly prominent in the United States, nor just that people turn to the courts more often, on more matters, than elsewhere. Americans turn to the courts with a particular kind of faith, and hope, which survives at a deep level despite all the disappointments and frustrations of the legal process. The law is everywhere; American culture is a law-saturated culture. All the most important political, social, and cultural discussions are carried out in a legalistic vernacular that has aptly been termed rights talk. Deep down, Americans are not just stuck with law, they want to be – in spite of all their complaints about litigiousness, greedy lawyers, and the adversary system run wild!ⁱⁱ

It is not that Americans love their lawyers. The current favourite pastime of ‘lawyer-bashing’ testifies to the ambivalence most Americans feel towards lawyers. Most lawyer jokes are directed at practising attorneys, however – not at judges for whom there is much more respect. The American respect for judges may in good part be explained by the fact that the Americans took over from the British the common law. Common law is law made by courts on a case-by-case basis. From the very beginning, therefore, there has been in the American system a close relationship between law and politics. To this day, about 60 percent of the members of Congress are lawyers. Every major discussion either begins or ends in a court of law. Where else would you see the Supreme Court effectively selecting the new president, for example? This is what happened in the 2000 presidential election. If you want to get rid of a president, throw a sexual harassment suit at him, and if that does not work – and it did not in the case of Bill Clinton – then impeach him!

In a culture that venerates rights and the rule of law one might expect to find an ultimate law. That law is the Constitution. In other countries, people change their constitutions. Not so in the US; Americans create amendments to their Constitution. It is such a sacred document – a secular Bible of sorts – that changing the original wording amounts to sacrilege! As many Americans see it, when international law and human rights treaties clash with the Constitution, it is the international instruments that are wrong. They are simply unconstitutional – that is to say, no good.

On 17 March 2004 Congressman Tom Feeney, a Republican representing Florida's 24th Congressional District, submitted House Resolution 568 to his colleagues in the US Congress. Co-sponsored by US Representative Bob Goodlatte, a fellow Republican from Virginia, the Feeney/Goodlatte resolution or the 'Reaffirmation of American Independence Resolution' is a response to the tendency by certain Supreme Court justices to rely upon the decisions of foreign judicial tribunals when deciding American constitutional and statutory cases. 'Should Americans be governed by the laws of Jamaica, India, Zimbabwe, or the European Union?', asks Congressman Feeney on his official website. The Feeney/Goodlatte resolution is Congress's way of saying 'NO!' to this 'disturbing trend,' and it reminds the federal courts that their role is interpreting US law, not importing foreign laws. Feeney continues:

America's sovereignty and the integrity of our legal process are threatened by a jurisprudence predicated upon laws and judicial decisions alien to our Constitution and our system of self-government. The American people have not consented to being ruled by foreign powers or tribunals, and their elected representatives have an obligation to ensure that America's courts do not impose this rule upon them.... This resolution affirms the sense of Congress that judicial decisions should not be based on

any foreign laws, court decisions, or pronouncements of foreign governments unless they are expressly approved by Congress.

(www.house.gov/feeney/reaffirmation.htm - last visited on 25 May 2004)

The Feeney/Goodlatte resolution is a good illustration of a festering dispute that has to do with when (if at all) it is appropriate for the Supreme Court to discuss foreign legal materials. And while some judges – chiefly Justice Scalia - are of the opinion that it is hardly ever appropriate, other members of the Court see comparative constitutionalism in a much more positive light. To a court already divided along many different ideological positions, we can now add judicial foreign policy as a fault line!

The Constitution is ‘the supreme law of the land,’ as it says in Article VI, and it is the Supreme Court, not Congress, that gets to interpret it. More than anything else it is judicial review that makes the US Supreme Court so extremely powerful. It does not say anywhere in the Constitution that the Supreme Court has a right to declare Congressional legislation unconstitutional. The Court simply declared in 1803 in the famous case of Marbury v. Madison that it had this right.

American politics has always been notably Constitution centered. Another way of putting it is to say that American democracy is a constitutional democracy. Modern constitutionalism is generally considered to have its practical beginnings in the making of the American and the French constitutions during the late 18th century. The ideology of constitutionalism can be traced back to the theories of John Locke (1632-1704), Charles Montesquieu (1689-1755) and Jean Jacques Rousseau (1712-1778). Its three key elements are the rule of law, the separation of powers and human rights (in the liberal tradition).

From the beginning, constitutionalism has developed into two quite different main directions. In the US, where there was no need to overthrow a domestic power elite, importance was mainly placed upon ensuring a separation of powers – that is, on preventing any one person, group or faction from gaining too much power at everyone else’s expense. The French bourgeoisie, on the other hand, was (at an early stage of the revolutionary process) endeavouring to increase its own influence upon the state by limiting the power of the king through the use of constitutional provisions. In that way, the king’s ministers were not supposed to be able to remain in power without the support of the majority of duly elected representatives in a legislative assembly. This was the beginning of the struggle for democratic parliamentarism in Europe during the 19th century. ‘The Americans chose a way which stabilised constitutionalism based on judicial review and checks and balances, whereas the citizens of Western European countries chose a way which brought them towards modern democracy and close to unlimited parliamentarism’ (Árnason 2001, p. 46).ⁱⁱⁱ

If any nation is the peculiar home of the expansion of judicial power, therefore, it is the United States. Today – in the year 2004 – to cut a long, but absolutely fascinating story short, American-style constitutionalism has won. As an overarching political ideology, or theory of the state, the new constitutionalism faces no serious rival today. According to political scientist Alec Stone Sweet, ‘Parliamentary supremacy, understood by most students of European politics to be a constitutive principle of European politics, has lost its vitality. After a polite, nostalgic nod across the Channel to Westminster, we can declare it dead.’ (Sweet 2000, p. 1) In his latest book, Governing with Judges: Constitutional Politics in Europe, Stone Sweet argues that what has been called the ‘judicialization of politics’ (in this case European politics) - that is the way in which judicial processes have become sites of policy-making that supplement, and at times rival, the legislature - should come as no surprise to us. European legal philosophers like the Austrian Hans Kelsen warned against this already back in the 1920s and ‘30s. Once we start ‘taking rights

seriously' (to use the title of Ronald Dworkin's famous book from 1978), especially the rights of minorities, we further the move toward law; we give to our courts and judges a political role (a judicial activism). We may or may not like this, but with the strong wish to prevent anything like the Holocaust from ever happening again we have seen a transfer of power from politics to courts – a development in our democracy from 'democracy without' to 'democracy with constitutionalism.'

My claim that American-style constitutionalism has won is admittedly a controversial one. Most of my fellow-Danes (and probably other Europeans as well) would argue that the European Union has won – that this whole development of constitutionalism comes to us from or because of the EU. Or, in other words, that the vertical perspective outlined above – the one that 'stresses the links between the spread of such types of constitutions and the achievements of the human rights movement in constructing an international system of norms, institutions and processes' - is the better approach to the spread of constitutionalism. There is a lot of truth to this, of course. Both the European Court of Justice and the European Court of Human Rights have systematically over the past few years expanded the relevance of constitutional law within the policy-making processes, thereby altering the nature of the polity. But, I would argue, underneath that European Union development is a strong American influence. One of the things that the Americans made sure of before they left Germany and Italy after the Second World War, was that the constitutional frameworks of these two countries – especially Germany – reflected American ideas of separation of powers, rule of law, and the importance of rights. The German Grundgesetz (drafted in part by Carl Joachim Friedrich, a German academic who had emigrated to the US and become a professor at Harvard University) is much more detailed about the fundamental rights of German citizens than is the American Constitution itself, and the German Bundesverfassungsgericht (Constitutional Court) has become as fierce a guardian of these rights as the US Supreme Court has

been of the Bill of Rights and has been a strong influence on the evolution of human rights law in Europe as a whole.

The American Dream: The Right to Have Rights

From the very beginning of their national life, Americans professed a strong belief in what they considered to be their destiny – to spread, by example, freedom and social justice and to lead people away from their wicked ways to the new Jerusalem on earth. Early settlers declared America to be ‘a city on the hill’ and considered it their mission to inspire other societies to follow their lead. This view is normally referred to as ‘American exceptionalism’ – the belief that Americans and their country are different from others and implicitly also better. A critical phrase here is ‘by example’. Despite Americans’ belief in their destiny and a somewhat overblown sense of their own moral superiority, Americans have generally been reluctant to be drawn into the conflicts and politics of Europe. This is apparent even in the colonial statesmanship of George Washington, who in his farewell address to his nation in 1796 warned against the dangers of foreign entanglements. His warnings resonated well with his countrymen and set the stage for the isolationism that would characterize American foreign policy for over a century.

From its earliest beginnings, that is, we see in American society a strong sense of idealism and high moral purpose coupled with a pronounced reluctance to play a significant role on the world stage. There is clearly a tension here within the notion of American exceptionalism. Should the US be a shining example for the whole world to watch at home – or should it be a shining example by actively going abroad and giving to the rest of the world a version of American democracy? Nonetheless, at the foundation of America’s idealism and high moral purpose has always been a deep commitment to universal concepts of human rights. In its political version, the American Dream – that is, the personalized or individualized version of American exceptionalism –

is very much about having rights, the rights and freedoms outlined in the Constitution. It is important to note here that the American dream is a global dream. ‘If and when fundamental human rights (even in the limited sense of equal opportunity),’ writes historian Andrew Delbanco, ‘are someday secured for all Americans, the American dream will not have been fulfilled. It has always been a global dream... To be really American has always meant to see something beyond America’ (Delbanco 1999, p. 117) It was Woodrow Wilson, of course, who formulated for the 20th century – or reargued – the case for the globalization of the American dream. ‘The world must,’ said Wilson in 1917, ‘be made safe for democracy.... We are but one of the champions of the rights of mankind’ (Wilson, quoted in Tindall and Shi [1984] 1999, pp. 1134,1146).

The political part of the American dream has to do with rights, then – perhaps we can call it, the right to have rights! It is this originally European idea that we are getting back today in the shape of constitutionalism. As we too are becoming multicultural and rights-oriented, we are beginning to listen to the view that the solution to the gravest flaws of democracy may be found in constitutionalism in the form of a judicial review. ‘In order to reconcile democracy and human rights,’ argues Canadian historian Michael Ignatieff, ‘Western policy will have to put more emphasis not on democracy alone but on constitutionalism, the entrenchment of a balance of powers, judicial review of executive decisions, and enforceable minority rights guarantees. Democracy without constitutionalism is simply ethnic majority tyranny’ (Ignatieff 2001, p. 30).

As already mentioned, the American influence of constitutional democracy and rights talk may come to us through the EU and its institutions (and via Germany). For the average Dane/European, though, the influence may well come more directly from the US. I am thinking here of American popular culture. This takes us back to Joseph Nye’s notion of ‘soft power’. The political part of the American dream in the shape of the right to have rights is repeated to us daily in

American movies and television series – especially in the countless films and series in which the main characters are lawyers, or the climax comes in the shape of a trial scene.

Legal Storytelling and the American Courtroom Drama

As scholars of popular legal culture have been trying to tell us for some time, there is a complex relationship between popular culture, the day-to-day operation of the legal system, and the ideas that books, films and television shows attempt to convey. The realities of law and justice are changed, not merely because of legal scholarship, these scholars argue, but also because consumers take the attitudes and ideas of the legal stories to which they have been exposed with them wherever they go.

Few Americans have any real experience with law and lawyers; they learn about their legal system only indirectly.

Few people ever read the text of appellate opinions or statutes. Few of us ride in a squad car, play any role in litigation or participate in administrative decision making. Newspapers and television news, however, take us to some parts of the legal system in operation. Nevertheless, news is not social science, and journalists do not offer a representative sample of the work of the legal system. Sometimes they even misreport what happens.

Moreover, most Americans read mystery novels or watch films or television that deal with dramatic aspects of the legal system.

(Macauley 1989, pp. 1551-52)

Mystery novels and perhaps most of all films and television – these are the media that tell those legal stories that may ‘bring us into contact with a cultural repository of common knowledge and popular belief concerning law, truth, and social justice in our time’ (Sherwin 1996, p. 897). Richard K. Sherwin may be exaggerating when he claims that to an increasing degree popular stories of truth and justice are non-linear, non-print-based, reflecting the influence of ‘post-literate storytelling.’ Yet, the interest and emotional intensity with which the public followed such legal dramas played out on television as the Rodney King assault case and the O.J. Simpson case testifies to the importance of the visual media in the shaping of legal storytelling. What the public fervour in relation to these cases furthermore testifies to, Sherwin argues, is a ‘growing, media-generated difficulty of clearly demarcating fiction and reality, of drawing the line between historic events and their visual representations’ (Sherwin 1996, pp. 896, 897). Most recently, we have seen in the obsessive and very emotional discussions following the release of Mel Gibson’s The Passions of the Christ in the spring of 2004 how difficult it is for many to distinguish between the real, historical events and the events they see acted out on the screen.

As the worlds of law, film, and television increasingly overlap, we need a careful examination of the images and stories furnished by popular culture. Legal storytelling merits our attention, first of all because what people consider necessary, acceptable or just may form the basis for their support of the legal system. If we concentrate our efforts at understanding the place of law in society around the reading of specific legal rules and the operation of the legal system, we miss out on one very important source of law: the popular imagination.

We study the popular imagination because it is an important source of law: from the voters who put lawmakers and judges in power, to jurors who determine truth and justice in jury rooms across the nation. And just as it is the lay public from whom

law's legitimacy ultimately derives, so too it is the public's continued belief and acceptance upon which law's legitimacy depends. It is the people who in anger may repudiate the law of the state, who may even make their own law from the streets.

(Sherwin 1996, p. 898)

Secondly, and not unrelatedly, the popular myths, images and storytelling conventions that help shape the popular imagination serve to remind us that we are surrounded by a plurality of legal meanings. For legal officials and law professors, whose professional lives are intimately related to law, legal ideas and symbols are bound to have a different meaning than the one they carry for the lay person. Similarly, various groups within a nation or culture may experience and therefore think very differently about the law and its practitioners. We should not, therefore, 'expect to find a single coherent legal culture at a place or in a nation. We should not be surprised to discover that legal ideas differ as we consider class, gender, race, region, religion and the amount of direct experience people have with police officers, administrative agencies or courts' (Macauley 1989, p. 1547). Of this, the O.J. Simpson case was a living illustration. Much of what went on during and after the criminal trial may be explained by the very different encounters African Americans and whites have had with the legal authorities.

Beyond teaching us practical lessons about a plurality of legal sources and legal meanings, the pursuit of legal storytelling may also be beneficial in a more theoretical way. Legal storytelling may expand the traditional range of legal studies:

[The study of law and popular culture] seeks to include what has often been omitted, such as the feelings, desires, conflicting impulses and wishes that circulate within the law, from its narrative construction to its (at times violent) social effects. To recognize

this part of legal reality is to recognize as well the evisceration of the legal fictions that in the past succeeded in keeping this domain in the shadows. This includes the fiction that law derives from dispassionate reason, that it is the product of objective analysis disengaged from feeling or desire, and the fiction that legitimate legal decision making cannot occur in the absence of deductive or inductive logic, strict causal analysis, and well-reasoned explanation.

(Sherwin 1996, p. 898)

All in all, representations in popular culture of law and lawyers are a kind of cultural barometer which may provide useful information about current norms and values, as well as about alternative normative possibilities and ways of thinking about law and lawyers. Are lawyers seen as heroes or villains? Is the legal system portrayed as a well-functioning part of the American democracy or as a part that may no longer be trusted to work fairly and impartially? What role do gender, race, religion or class play in the day-to-day operation of the American justice system, and how is this reflected in the media? These are but some of the questions that may be raised in relation to cultural configurations and conventions such as courtroom trials, lawyer novels, and films.

Over the past few years, I have been especially interested in American lawyer films and television series. In most of these courtroom dramas, the main character is either the defending attorney or the presiding judge.^{iv} The attorney typically defends the little guy; it is when the rights of the man/woman in the street are being abused by some group, company or public authority that the (young), aggressive attorney steps on to the scene. One of the most classical movies that portrays the attorney in a very positive light as a creative champion of the weak, a fighter for justice in a pluralistic world, is To Kill a Mockingbird from the early 1960s. In this movie Gregory Peck

plays Atticus Finch, an attorney who is brave enough to defend an African American accused of rape in the American South. In many ways, the attorney in American popular culture may be seen as the personification of the liberal tradition in American history. He or she believes in the rule of law and the rights and freedoms of each individual.

The attorney is not always portrayed as positively as Gregory Peck in To Kill a Mockingbird. As a matter of fact, American popular legal culture is full of greedy attorneys of the ambulance-chasing sort who are only interested in making money. This may have something to do with the fact that the US has more attorneys than any other country. The American Bar Association today has about 400,000 members which makes it one of the largest academic unions in the world, and the number keeps going up. As the number of attorneys increases, so does the ambivalence on the part of the Americans towards their attorneys. I have already mentioned the many ‘lawyer-bashing’ jokes that currently circulate.

The second major player in American popular legal culture is the judge. Unlike the attorney, who must think only of his client’s best interest, the judge has to think about the common good. He (or she) is a Solomonic Father (or Mother) figure who listens patiently to what is being presented in court in order then to make a decision as to who makes the best and most believable argument. Often it is up to the judge to re-establish order, and he or she may be seen as a personification of the Republican tradition in US history, encouraging a public-spirited devotion to law. As previously mentioned, judges – especially federal judges and Supreme Court justices – enjoy much more respect than do attorneys. This is reflected in the courtroom drama. ‘The stage set, at least for most film and television trials,’ writes David Ray Papke,

is classic, well upholstered and a far cry from the tunnel-like rooms and hard plastic furniture of many urban courtrooms...The set includes flags and portraits, and the

costuming features not only the dark judicial robes but also, in the background, police uniforms. Noteworthy as ceremony is the cry of ‘All rise’ or the even more mysterious and awe-inspiring ‘Oyez’ when the judge enters. The judge’s bench stands like an altar at exact center-front and rises above the other tables and chairs, suggesting something higher and truer.

(Papke 1992, p. 9)

Over and over again in these American movies the rule of law premise sets the stage for specific courtroom portrayals. The attorney may or may not be portrayed in an altogether positive light, but the trials in American popular culture resonate with respect for the rights protected by the Constitution and for the judges that are potentially miniatures of Supreme Court justices. This is the US spreading the message of the blessings of constitutional democracy – and doing so by means of soft power. This soft power has typically been copyrighted, and it is to the issue of (cultural) copyright that we must now turn.

Cultural Commodification Through Copyright

American films account for no less than 70 percent of the European television market. As regards the European cinema market, the situation is much the same; the figure may vary somewhat according to the latest box office hits, but the US again seems to account for around 70 percent of the European market. By comparison, the market share accounted for by European films in the US is as low as four percent. In the year 2000, Europe’s balance of trade deficit with the US for audiovisual products was estimated at no less than 8.2 billion dollars (Hilty 2003, p. 52)!

How did the situation get to be like this? One important part of the answer has to do with copyright and the realities of cultural creativity. According to the US Constitution, the purpose of copyright is to provide an economic incentive for creative activity. The basic principle here, as the Americans see it, is that copyright should be linked to ‘work made for hire’ – that all rights of use should belong to the party who bears the economic risk, and not to the creators of the work in question. ‘American legislators have never displayed serious concern for the creators of works. As a result the latter have long since banded together in “guilds” to assert their interests in contractual dealings with those who would exploit their work’ (Ibid.).

Many Europeans see this differently. The European focus has traditionally been on the rights of the author or creator (moral rights or performers’ rights). This may well be changing, however. According to Reto M. Hilty, with the EU Directive of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, European member states have been committed to implementing regulations that are not unlike those implemented in the US as a result of the 1998 Digital Millennium Copyright Act, which forms part of the amended US Copyright Act of 1976. The issue here is the legal status given to technical means of protection.

First of all, the possibilities offered by technical protections go far beyond the powers previously accorded to copyright holders within the meaning of the necessary balance of interests. It is not just the fact that technical blocking places both protected and unprotected material under the sole control of the supplier – the ability of the individual to enjoy a given work can also be massively impaired.

(Hilty 2003, p. 51)

The problem, as Hilty sees it, is that decisions on granting access and enjoyment to third parties are being passed on to the investors in the cultural industry. Public coordination of the conflicting interests involved in copyright is losing ground to the more or less private order of the exploitation industry. The ‘winners’ in this whole process are the American entertainment industry and the American economy – and the ‘loser’ is the European consumer:

The reality in the USA is equally real in Europe. The establishment of additional rights of exploitation is of little help to the creators of the works exploited, for whose benefit they are not really intended. The latest rights to be introduced – above all the legal enshrinement of technical measures – scarcely improve the creator’s position, despite the innocence with which the object of the EU Directive [of 22 May 2001] is formulated... Rather, it is the case that these new rights are tools in the hands of the entertainment industry. And it is the – above all American – entertainment industry that primarily stands to profit in real terms.

(Hilty 2003, p. 52)

What we are witnessing, in other words, is a build-up of private power over cultural output. In an excellent article from 2002, Fiona MacMillan describes what she calls ‘copyright’s commodification of culture’ (MacMillan 2002, p. 483). ‘The way in which the distribution rights attaching to copyright might be used by a multinational corporation to carve up the international market,’ she writes, ‘is a small part of a much bigger story about the way in which commodification can lead to global domination of a market for cultural output’ (MacMillan 2002, p. 485). It is precisely this ‘bigger story’ about ‘global domination of a market for cultural output’ that interests

me as a cultural historian. As MacMillan, Hilty and others have shown, copyright has been one of the most essential tools in the orchestration of this global – and essentially American – domination.

It was in the 1970s, says MacMillan, that we saw the first horizontal and vertical mergers and acquisitions in the media and entertainment sector. One driving force behind these mergers was ‘the desire to increase the level of corporate ownership over copyright interests’ (Ibid.). By reorganizing in such a way that their activities would now involve the integration of diversified lines of business such as the production and distribution of film and television, the ownership of cinema chains and cable networks (both at home in the US and abroad) and the publication of books and music, media and entertainment corporations like Time Warner and Walt Disney became the owners of a substantial number of the world’s copyright interests in cultural output – most importantly in the context of this paper, films. The development continued throughout the 1980s and ‘90s. At this later stage, corporations developed an interest in the production of the very content of this cultural output as well; owning the rights to the technology involved in the distribution of films and other cultural output was no longer enough.

Throughout this whole drive toward global domination of the market for cultural output, multinational conglomerates – and again, in this context especially the major US film studios – have been very adept at using copyright to further their own interests. MacMillan especially points to the strong distribution rights attached to copyright and the long period of copyright protection as aspects of copyright law that have played a part in facilitating the commodification of copyright. As long as copyright is primarily an economic right, commodification is very hard to escape. As an economic right, copyright has helped ‘cultural homogenisation’ – ‘the more powerful the copyright owner the more dominant the cultural image, but the more likely that the copyright owner will seek to protect the cultural power of the image through copyright enforcement’ (Macmillan 2002, pp. 488-89). The sad result is that ‘cultural

development is frozen not stimulated' (Macmillan 2002, p. 491). Forget about diversity and alternative art, in other words – whether we are in Europe, the US, or Asia, we will be watching the same (American) blockbuster films and admiring the same (American) film stars.

Concluding Remarks

In real life, it is not always 'the good guy' who wins. As we are watching American courtroom dramas we are aware of the fact that real life is often different from the way in which it is portrayed in these dramas. But movies are not only the big lie or illusion that we have a tendency to say that they are. To a certain extent at least, claims Professor of Film Studies at the University of Copenhagen Torben Grodal, movies are close to reality in that they reflect fundamental aspects of our mental architecture. In fact, Grodal continues, we develop as human beings by watching movies.

Fiction is software with programmes that increase our understanding of the intentions and behaviour of our fellow human beings. Films do not portray reality. Films are a part of reality. And they make it possible for us to stay the same and to develop ourselves, and they are not merely entertainment but are a central part of the social process.

(Grodal, 2003 – my translation from Danish)

What happens to us when we consume these American movies that are so successful in attracting a mass audience throughout the world? As I have argued in this article, I do not think that the message of these movies is lost on us. In American courtroom dramas, the topic or theme is

presented as one of rights – one person’s rights are contrasted with someone else’s rights, and in the end it is up to the judge to figure out who has the better argument. What we are witnessing here is a dramatized version of the American belief in the rule of law and constitutional democracy. If somebody’s individual rights are not respected by his or her fellow human beings or by the public authorities, there is at least one place he or she can turn to for help: the courts. The underlying message is that one should always do as one’s own conscience bids one to do, regardless of what one’s surroundings might think - individual rights being just as, if indeed not in the end more important than the general common good.

In many countries throughout Europe, we are currently becoming more multicultural and international and we are (re)negotiating the premises of our welfare states as a result. From American courtroom dramas we receive visual images of right and justice that may well impact our view of the relationship between each individual and the public authorities of his or her country as well as civil society in general. If Torben Grodal is right we ‘increase our understanding of the intentions and behaviour of our fellow human beings’ – in this case, the Americans – as a result of watching American courtroom dramas. We get to understand – and take with us when we debate the future of our societies - that things can work in a different way from the one we are used to in Europe.

The rule of law premise that sets the stage for specific courtroom portrayals in American movies quickly make these movies very familiar to us. One does not have to see very many of them until one knows what comes next. The pattern is clear and for a while, they make us believe – if not that there is such a thing as law and order, then at least that there are people out there who care enough to be willing to fight for a better world. The political implication of the fact that such people are lawyers and that the fight for a better world necessarily has to take place in a court of law may escape us as we watch and allow ourselves to be drawn into a world in which the

right to have rights reigns supreme. That is why it is important to look more closely at these courtroom dramas – at their political message and its impact on us as well as at the instruments that allow the big film studios to produce and distribute them around the world, thereby effectively achieving cultural copyright!

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ⁱ Richard Perle, "United they fall," *The Spectator*, March 22, 2003 – available on the Benador Associates website, at <http://www.benadorassociates.com/article/287> (visited October 14, 2003).

ⁱⁱ For a longer discussion of the role of law in American history and culture, please see Porsdam, Helle (1999), Legally Speaking: Contemporary American Culture and the Law, Amherst, MA: University of Massachusetts Press.

ⁱⁱⁱ This and the preceding paragraph build on Árnason's excellent article.

^{iv} Only rarely do we see a prosecutor as the main character. The role of the prosecutor is obviously important as a part of the stage set of these courtroom dramas, but most often he or she plays but a small part. Why this is the case, is hard to say. One may speculate, though, that it may have something to do with the fact that the prosecutor personifies 'the system/authorities' and as such may suffer from the somewhat negative attitude of most Americans towards public authorities.