Levies in the United States – Myths and Reality

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Thank you very much. I would like to thank the organizers of the Conference and particularly Mihály Ficsor for inviting me. It is a pleasure to be here and to see so many old friends and people I have come to know over the years.

When considering what to say about levies or "royalties" as some of you refer to them, I thought of a speech I gave about ten years ago when CISAC was kind enough to invite me to its congress held in Maastricht. At that time, I tried to suggest, very delicately, or so I thought, that many EU countries were not honoring their national treatment obligations under the Berne Convention with regard to payment of those levies to US authors. Well, the reaction was so dramatic that I can tell you for certain that I am not going to make the same remarks again today. That is not what I am about to do. In fact, as a sort of footnote to that speech ten years ago and looking at the 12 European Community countries that have private copy levies, we can report now that American authors, writers and directors, are compensated in eight of these countries and that as regards the remaining four, in two of those countries, negotiations are taking place. Further, with respect to the Eastern European countries that will become members of the Community next year, we can also report that US authors are currently receiving levy payments in three of them.

Thus, the situation has changed dramatically. I have another footnote here: I would like to remind those who can remember as far back as I do that in the famous Uruguay Round negotiations in 1993, there was a proposal on the table by the United States to the effect that, with regard to some of these levies – and the proposal was made to the European Community – that the US was prepared to leave the share attributable to US producers in the particular country provided it could be used by American producers who would come and make audiovisual productions with the use of that money – and additional money of course – in those countries. Unfortunately, however, that proposal was rejected by the European Community.

What can I say to you about the status of levies today in the United States? I thought that the best I could do would be to expose what I would regard as three significant misconceptions, or I would call them "myths" about the situation regarding levies in the United States.

Myth No. 1 is that – and I am talking about the audiovisual sector – there are no collecting societies; that in the US there is no one who performs the functions of such societies as in the EU. The second myth is that we have no levies in the US. As I will show, that is not exactly correct. There is a very important but largely unexamined provision in our Copyright Act that I would like to highlight in this regard. And the third myth is that the money all goes one way; that all the levy money just comes from Europe to the United States and none of the US collections ever go back to European countries from the United States. So let us talk about these three things.

First, the societies I represent – the Directors Guild of America and the Writers Guild of America – are very active in the negotiation and collection of not only initial compensation for their members, but also re-use payments and health and pension contributions. I want to say something about health and pension, because we are here in a meeting about creators and there are probably not too many more important things in the world today for all kinds of workers, and thus also for those who work in the creative industries, than to have some security about the future and a system that helps them in the face of the increasing medical costs. It is very significant that these guilds in the United States, sometimes to the surprise to their members – who, mind you, are not only Americans but may be and in fact are foreign nationals – offer them entitlement to pension and to health care.

Let us speak about the re-use payments for a moment, because levies are – no matter what you want to call them – a species of re-use payments. They are payments for the re-use of a work. There are all kinds of re-use payments that are negotiated between the creative guilds and the producers in the United States. When a motion picture is shown on television, when it is shown on cable, when it is shown by satellite, when it is shown on pay-tv, when it is shown on video, the re-use payments are often a percentage of the money which the distributor receives as a license fee. And those sums, in addition to sums which are earned in television, from the reuse of television serial programs, which are often a percentage of the initial minimum compensation, total over 400 million dollars per year for writers and directors in the United States. When you add that sum to the amount that performers and composers receive from residuals in the States, the total figure is over a billion dollars per year. That is clearly a substantial amount of money. Thus, the notion that we do not have audio visual collecting societies in the United States that perform similar functions to their European counterparts and collect payments for re-use of authors' works is incorrect.

In Europe, collecting societies, on the one hand, and the trade-unions, on the other, are different. They are separate organizations, they do different things. In the United States, it is all wrapped up in one organization. That is an important point. And the second main difference is that, of course, in the United States,

these re-use payments are negotiated with the producers, whereas here, in Europe, the collecting societies have to negotiate the re-use payments with the end-users, namely the broadcasting stations, the video distributors, etc. I would like to suggest that, in fact, the American system is more efficient in that way, but that is the matter of another debate.

Myth No. 2. There are no levies in the United States. You have heard already about the Audio Home Recording Act in the United States at this congress and the levies collected thereunder. I would recommend to everyone here Margo Crespin's excellent analysis. It makes clear the scope and content of the audio levy system in the US. Let me then turn to the levy in the US for the payment due on the basis of our cable compulsory licensing system which is a form of re-use payment.

The cable compulsory license in the United States has been there for 25 years and there is also a satellite license that is now part of the law as well. In that 25-year period, re-use payments totalling over 5 billion dollars have been collected under the cable compulsory license. That is a huge amount of money. And it is important to note that the United States gives full national treatment. Any copyright owner from any country who has a work which is licensed to a broadcasting station and is retransmitted by a cable-system carrying that broadcast signal in the United States is entitled to file a claim with the Copyright Office and apply to receive a share of the money collected..

Thirdly, in the Digital Millennium Copyright Act, there is a provision, Section 1201(k). There is not much talk about this provision, but I think that it has some special significance to the discussion that is currently taking place about DRMs and levies. Section 1201(k) provides that, after a certain date that has now passed, every entity manufacturing or importing an analogue VHS-recorder into the US has to equip the recorder in a certain way so that the copyright owner can have the option of preventing people from making copies in their homes, in the following situations: a) from back-to-back copying, so that, if you buy or rent an analogue tape in a video shop and you take it home, the copyright owner has the option of encoding the video tape in a way that you cannot make a copy; and b) from certain kinds of broadcast transmissions.

What is the significance of Section 1201(k)? First, the significance is that we always talk about the Sony-Betamax case as providing no protection in the United States from private copying. From my perspective, in the analogue area, there has been a dramatic modification of the decision by the Congress to the extent that people believe it applies across the board to all forms of private copying. In my view, the Sony-Betamax case is limited to free-over-the-air advertisers-supported transmissions and Section 1201(k) now clarifies the scope and extent of the decision with respect to other kinds of analogue transmissions.

Further, Section 1201(k) reflects a business-oriented compromise to the problem of private copying. The basis for the compromise is the recognition that a substantial portion of the revenue from the distribution of theatrical motion pictures today is derived very heavily from video. Last year, of 134 films released by the major film studios in the United States, 7,5 billion dollars was returned by those 134 films from cinemas. Do you know how much was returned from video? 13 billion! And the total from the other markets was about another 6 billion. Thus, video represents about 50% of the remuneration of the major motion picture releases today. Cinemas represent maybe 30%! And the significance of Section 1201(k) in the Copyright Act is that it is designed to protect the revenue from the video market because it is saying: "you cannot make a copy from a pay-per-view transmission and you cannot make a copy from a video-on-demand transmission." And then, after the video release (rental or sale), from which copies are precluded by the back-to-back copying limitation, it says "OK, in the case of pay-tv and HBO," the next transmission window, one copy is allowed. Thereafter, with regard to regular, over-the-air transmissions, the Betamax case situation, "you can make as many copies as you want."

Now, what is the relevance of this background to the present discussion? Section 1201(k) in the US Copyright Act, as I previously explained applied to analogue copying. But, there was a similar deal on the table for digital copying in the US some six or seven years ago. The hardware companies were prepared to accept a similar proposal. The computer companies were not. Why did the computer companies oppose it? The main objection that they made was a concern about the precedent of government interference in the configuration of their machines. To make the system work, you have to put a chip or some other device in the digital machine, just as Section 1201(k), for analogue, requires manufacturers and importers of analogue machines to put a device in their machines, or configure them in a certain manner to satisfy the legislative conditions.

And where are we now? We find that the very same computer companies who did not want to configure their machines in a certain way are saying, "oh, we have to get rid of the levies because levies are too costly.". Well, I would summit to you that I do not think that they can have it both ways. They are either going to have to configure their machines in a way to be responsive to DRMs or they are going to have costly levies. And they are finding that the very same governments who they did not want to interfere with their machines, are now interfering with their income stream by imposing these heavy levies. And I suggest to you that the business-based compromise, which is reflected in Section 1201(k) of the Copyright Act is the kind of compromise that will come some day, when all the parties realize that you have to protect owners of rights and give them the right to control exclusively the use of their works, and at the same time have some compromise on the consumer-side giving people the right to make copies.

Finally, let me speak about Myth No. 3 concerning the royalties and which way they go across the Atlantic. With regard to private copy levies, I heard the comment yesterday that well, the French collect 95 million dollars a year and the Americans only collect 2 million dollars. The bottom line on the French story is – as you all know – that 25% of the money is deducted for French cultural purposes, and then two thirds of the remaining amount goes for producers and performers and that the share for producers and performers is not available for any US claimants. Thus, in fact, the French scheme starts with 25% off the top and then deducts another 66%; of the remaining amount, about 25% of the original total. The US owners of rights receive about 30% or less then 10% of the total money collected in France. At the same time, I can represent to you that more money goes back to French directors and writers from the residuals collected by the US guilds for their participation in US films. Thus, the money flows are not only one-way.

In conclusion, let me suggest that the good news is that we are far ahead of where we were ten years ago, and the bad news is really not so bad. The "somewhat" bad news is that we need to work harder to develop solutions to the digital copying problem. Whether they take the form of Section 12 01(k) of the US Copyright Act or some other form, I do not know. However, I am confident that, in the end, owners of rights will prevail and they will continue to control their own destiny and the destiny of their works.

Thank you very much.