COMMERCIALIZATION OF CINEMA FILMS AND TV FILMS: SOME LEGAL ISSUES[i]

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"Heut gehn wir ins MAXIM, dort bin ich so intim"
Franz Lehar, *Die Lustige Wittwe*

Introduction

Operetta is not like opera. Operetta is light, is a comedy, an opera is a dramatic performance. Light performances are not serious and more adapted to financing which serves external goals. Lehar's 'Lustige Wittwe' probably has not been sponsored by the famous Paris Maxim's Restaurant. But nobody would wonder if it were. And nobody would care. Many commercially sponsored audio-visual productions belong to a category of light amusement; this category should be treated like it is: light. More serious problems appear when serious productions are financed by third parties. Like cinema and TV films?

Scope of the subject

'Derivative and related means of financing of films and of television programmes', is a broad subject. It deserves at least some narrow casting. Presented at the 50th Festival International du Film, the subject dealt with should be at any rate directed to cinema films. Since the financing of films in a lot of cases is dependant of their being also broadcast on public or commercial TV and of their being reproduced on video, these two audio-visual media should be included. It seems, however, not appropriate to deal with the whole scope of TV programmes. The coverage of sport events and the related problems concerning the triangle of advertisers, organisers and television networks seems to deserve a festival of its own, organised in the Amsterdam Arena football stadium; particular TV programmes like games, teleshopping, news and current affairs, children's programmes, talk shows and the like could not be compared with films so as to draw meaningful conclusions. So it seems sensible to restrict our subject to films on cinema, TV and video.

Derivative financing

Derivative financing is opposed to original financing. For argument's sake: as original means of financing films could be taken into account every contribution which is not made in exchange for commercial publicity of a third party. A third party is a party who is not engaged in television broadcasting activities or in the production of audio-visual works. Third parties could be commercial advertisers but also governmental bodies, social institutions, etc... By this definition we are able to concentrate on the main problem which is connected with derivative means of financing: the influence of third parties on the production and marketing process of films.

Commercialisation

This influence of course originates in third parties' interests in having control on the time, place and manner in which their messages could reach the public, more or less in the same way as they have where advertising is concerned. For the sake of the revenues connected to these interests, films must be commercialised. This may take place by sponsoring, product placement, bartering (financing of rights of publication in exchange for promotional communications) and in some cases by merchandising the final product or parts thereof (indirect merchandising) in a way which meets the

interests of third parties. The influence of third parties should, however, be at least recognisable, like it is with advertising.

Legal restrictions

These methods of commercialisation are for the most part subject to legal restrictions. The less restricted areas are video and internet, the most heavily restricted area is public broadcasting. The main and most elaborated reason for these restrictions regards the editorial independence of TV broadcasters, in particular when these broadcasters are financed by governmental funding. As a rule, state funded institutions should not be used as a vehicle for private, third party profit.

Understanding legal restrictions: distinctions and principles

In order to understand the ratio of these restrictions and the main legal issues in this field, some distinctions must be made and some legal principles discussed. Relevant distinctions concern the way in which audio-visual media are primarily financed (state or private funding), differences between programme sponsoring and the sponsoring of events, differences in the way in which audio-visual productions are made available to the public, differences in the ways of commercial communication, differences in the ways of production and in the ways of cooperation between producers and third parties, differences in the evidence required for infringements, and, last but not least, differences in the ways of maintaining the rules and in the answers to the question who is responsible for maintaining the rules. The legal principles which apply to the commercialisation of films cover a broad range: from unfair competition to transparency and protection against misleading information, from moral rights to the freedom of art and of expression, from editorial independence to the prohibition of commercialising state financed institutions. These principles could be discussed by looking at some national cases, like the German 'Dynamite' and 'Boro' cases and the Dutch 'Hoffmann' and 'Wokkels' cases.

Distinctions and corresponding Legal Issues

To understand the main legal issues in the field, we first have to make some distinctions. Legal regulations differ as to the following items.

Ex ante vs. ex post financing

There is a difference in the set of rules governing the *ex ante* stage of production of audio-visual programmes by sponsoring, product placement, bartering (financing of rights of publication in exchange for promotional communications) on the one hand and the *ex post* stage on the other hand by merchandising the final product or parts thereof. The first set of rules is mainly directed to guarantees for a non-biassed and independent information service, the second set deals primarily with the non-commercial status of public television and is therefore not important for commercial broadcasting and for the production and merchandising of motion pictures; more sophisticated forms incorporate both ex post and ex ante cooperation between commercial advertisers or governmental bodies on the one hand and producers of films and broadcast programmes on the other.

News vs. amusement

The character of information provided makes a difference: amusement and sport on the one hand and news, documentaries and other forms of more or less independent and objective information on the other hand; the last category could in most countries not be subject to commercialisation because of

the interest of a free press and broadcast; see f.i. art. 18 (2) of the Council of Europe's Convention on Transfrontier Television: "Sponsorship of news and current affair programmes shall not be allowed." Recent proposals make clear what is meant with 'news and current affairs programmes': these programmes must involve a critical and investigative journalistic approach likely to engage the political responsibility of the broadcaster.[ii]

Coverage of events vs. other programmes

Television coverage of events on the one hand and programmes which are specially produced for broadcasting on the other hand are regulated by different rules. Of special interest for TV programmes is the commercialisation of reality: football games and other sports events are to be considered popular advertising media just because of their being broadcast on TV. In this field there is no ex ante or ex post cooperation between organisers of sports events and sponsors of events on the one hand and broadcasting companies on the other: most TV rules on surreptitious advertising restrict the broadcaster in his editorial activities when sports events or other sponsored events have to be reported. A distinction has to be made therefore between the sponsoring of TV programmes and the sponsoring of events which are broadcast on television: normally the film producer or the broadcast company does not profit by the commercialisation of reality, but is only hindered by it. We will therefore not deal with this kind of programmes.

There are, however, some grey areas where the broadcaster cooperates more closely with the sponsors of events. A recent development is 'virtual advertising', because that kind of advertising could not be broadcast without techniques used by the broadcaster himself.[iii] Another area between programme sponsoring and event sponsoring concerns cases in which the coverage of an event on television has been made possible by the sponsors of the event.

Original financing: state vs. private

The original financing of audio-visual media could be state financed (license fee), commercially financed or combinations thereof. When state financed, commercialisation is to be restricted: public institutions should not be used as a vehicle for private, third party profit.

Ways of making available to the public

This item concerns the way in which audio-visual productions are made available to the public: in movie theatres, on video, by closed circuits (video on demand, pay TV, near video on demand) or by broadcasting. The last category is more severely restricted than the first categories. There are no legal restrictions I know of where motion pictures are concerned; the same holds, of course, for video.

Sponsoring vs. advertising

The legal treatment differs as different ways of commercial communication are involved: by sponsoring or by (non-spot) advertising. Sponsoring is not the same as advertising. In many countries the rule is that sponsoring shall not advertise a specific product or service.[iv]

Ways of production

In house productions, commissioned productions or productions which are purchased and broadcast (acquisition of TV licenses) are treated differently. In the last case the problems concerning the reporting of sports events reappear in the broadcasting of films which are not specially made for TV. There also, a broadcaster could be confronted with commercialisation which he himself is sometimes

not allowed to. Most rules permit the broadcast of this kind of films, even when they contain product placement and the like which would not be permitted if the film was produced by the broadcasting company for broadcasting on television. When commissioned, the broadcasting company could exonerate possible sanctions for infringing the rules on commercialisation to its producer.

Cooperation between producers and third parties

Differences in the way of cooperation between producers and commercial advertisers or governmental bodies: from the simple supply of facilities to the partaking of advertisers in the editorial board of a TV programme; it will be clear that the last option is a dangerous one, seen from the viewpoint of the broadcaster's editorial independence and his own responsibility for the content of his programmes.

Evidence: screen rules vs. financial rules

The evidence required for infringements differs: only the showing of trade names on the screen could in some countries be sufficient to construct an infringement of the rules on sponsorship and surreptitious advertising, whereas in other countries evidence of commercial intentions is required in the form of contracts, payments, and the like.

Enforcement and jurisdiction

Enforcement systems vary from self-regulation, to unfair competition law, criminal law or administrative law. In the EU a home country control system is accepted with regard to the compliance with the rules on sponsoring and surreptitious advertising on transborder TV, whereas for other media rules of private international law apply. In most cases the rules of private international law tend to conformity with the legal system of the country of destination.

Some Legal Principles, Cases and Problems for Discussion

The legal principles connected to the distinctions made above, could be summarised as follows. These principles are partly derived from cases and from the possible damages which could follow by not attending to the rules concerning 'non-spot advertising' and sponsoring. Of course this is a *petitio principii*, but it has the advantage of making things clear. The principles mentioned below are sometimes contradictory: that is inherent to legal principles. Therefore, I mention also some of the problems which follow from contradictory principles. One of the most ideal solutions would be a clarification of the legal issues concerned with the commercialization of films in which only one or two principles had to be applied. We will see that this is not possible.

Transparency of commercial intentions as a necessary and sufficient principle?

A necessary and prima facie sufficient principle is that of transparency, based on the protection against misleading information concerning the character of the information: viewers should be able to know what kind of information they are looking at. Thus the EC-Directive on television broadcasting activities prescribes that sponsored programmes must be clearly identified as such by the name or the logo of the sponsor. And likewise, the prohibition of surreptitious advertising in the EC-Directive is applicable only if this kind of advertising "might mislead the public as to its nature" (art. 10 (4) jo. art. 1(c) EC-Directive).

The question, of course, is whether sufficient transparency should not be enough. In the

Dynamite case of July 1996 the Federal German Court ruled that product placement in cinema films is permissible, provided that the audience is made aware of it beforehand, and at the latest in the opening credits.[v] A decision like this is based on the general rule that advertising must be clearly recognisable as such when, and in so far as, the audience concerned did not expect it and from which it cannot simply withdraw (captive audience). This decision has, in the opinion of the Court, nothing to do with prohibiting the sale of a work of art, but merely with prohibiting a certain mode of sale which affects neither the nature of the work nor the artist's creative freedom. Note that in distinguishing the prohibition of the sale of a work from a certain mode of sale, the Court recognises the rule of the Court of Justice EC in the Keck-case: prohibitions concerning the mode of sale ('certain selling arrangements') are not to be considered as a quantitative restriction or as a measure with equivalent affect in the sense of Article 30 EC-Treaty.[vi] This could be of wider importance: national restrictions on commercialisation which fall outside of the fields coordinated by the EC-Directive on television broadcasting activities, need not be tested against the provisions of the Articles 30-36 EC-Treaty.

One can not but agree with the Court's decision, but at the same time the question arises whether the principle or transparency could not be the main principle which overrides all other principles. One of the answers to the contrary could be found in the specific character of public broadcasting which should not serve as a means for private profit. So if a public broadcaster is involved as a (co-)producer of a film which is intended for broadcasting, transparency of commercial intentions would not be a sufficient condition for the permissibility of product placement. This answer, however, is not applicable to film producers and to commercial broadcasters, because they are not involved in any public service obligation.

Another answer which is also applicable to cinema films and commercial TV programmes could be found in the moral rights of the creative authors of a motion picture. Product placement could constitute an infringement of their 'droit moral', unless it was included with the authors' prior consent. And one last answer which is, however, dependant on the manner in which product placement is accounted for, is to be found in possible unfair competition. The Dynamite case, mentioned before, is a perfect example. The cinema film 'Feuer, Eis und Dynamite' contained a lot of advertising. Owners of the cinemas participate in revenues arising from pre-feature advertising. They did not participate in profits from product placements in the feature film. The cinema owners recorded therefore exactly the portion of the complete film that was dedicated to advertising. Accordingly, they withheld the portion of the box office receipts that matched the extent of advertising in the film and were therefore sued by the distributor of the film. At the moment I do not have the exact text of the decision of the Federal German Court at my disposal, but even without it the case is illustrative of the problem of product placement: this kind of commercialisation damages the regular revenues from normal advertising.

Unfair competition

The previous remarks may clarify that transparency is a necessary but not a sufficient principle. Could we then perhaps tackle the whole problem with a combination of the principle of transparency and that of the suppression of unfair competition? One has after all to follow Ockham's Razor: 'essentialia non sunt multiplicandum praeter necessitatem'. Most of the leading German cases in this respect have been unfair competition cases. This holds for the Dynamite case and also for the Boro case. The problem with this principle could perfectly be illustrated with both cases. What exactly would in the Dynamite case be the unfairness of product placement in a cinema film against the cinema owners if the conditions of transparency had been fulfilled? Unfair competition rules do not protect against economic losses as such, but do only protect against economic losses which are caused by unfair competition methods. Is product placement an unfair method if the conditions of transparency are fulfilled? The answer must be negative, unless other rules exist the infringement of

which would be unfair because these rules are applicable to all producers of cinema films, and breaking the rules by one of them could be considered unfair against the others who are complying with these rules. But even then, there would be no case for the cinema owner but only for a competitor of the film producer. This last case is represented in the Boro case.[vii] In this case the German public broadcasting company ZDF broadcasts a 'krimi' series entitled 'Wer erschosz Boro'. The solution of each part is broadcast one week later. Viewers can win an amount of 10.000 DM if they guess the right solution. To this end a book is published, entitled 'Wer erschosz Boro. Handakte des Kommissars' with pictures and pre-printed return cards. The publisher of the book pays 100.000 DM to ZDF for the use of the title and sells over 300.000 copies at 15 DM each, a turnover of four and a half million DM. ZDF announces this handy book in its TV programmes. Altenburger, a manufacturer of detective board games sues ZDF on account of unfair competition.

The Boro construction is ingenious and could be considered a fine piece of media innovation which should not be hampered with by competition rules, because the foundation of the rules on unfair competition is precisely the advancement of innovation. This is what the lower Court said. Nevertheless, ZDF, behaving itself like a competitor on the market of games, competes unfairly by breaking specific media rules: a public broadcasting company should in the making of its programmes be guided only by editorial and not by commercial motives.

Applicability of the principle of the suppression of unfair competition will therefore in most cases depend on the breaking of other specific media rules. These rules pertain for most parts to the field of broadcasting.

Non-commercial nature of public broadcasting

Public broadcasting in most countries is state financed. When this is the case, commercialisation is to be restricted because public institutions should not be used as a vehicle for private, third party profit. This rule is for instance laid down in Article 55 of the Dutch Mediawet which says that public broadcasting companies should not serve (excessive) profit making of third parties. In other countries, like Germany, this rule is incorporated in restrictions concerning the main task of a public broadcasting organisation: it should be guided only by editorial motives and not by commercial motives. The Dutch local broadcasting company SALTO infringed this rule by another ingenious variety of media innovation. It made air time available during the nightly hours to a programme supplier who in his turn cooperated with the owner of a sex telephone line. The programme supplied to SALTO consisted in a soft porn film which was repeated every twenty minutes and in which figured an actress who had a telephone conversation with somebody while slowly undressing. Anybody who wished to hear what the actress said, had to call the telephone number of the owner of the telephone line at a rate of fifty cents a minute. This number was not broadcast, but everybody could have knowledge of it because a lot of free publicity in the papers (not advertising) was given to this ingenious construction. SALTO was paid an amount of DFL 1500 for one hour, the owner of the telephone line could have made an excessive profit by this way of using public broadcasting time. So both parties profited by this construction. Nevertheless, it was prohibited by a decision of the Dutch Commissariaat voor de Media, who considered these activities an infringement of Article 55 of the Dutch Media Act.[viii]

Freedom of art and freedom of expression

Freedom of expression and the German constitutional Freedom of Art may conflict with restrictions concerning product placement and the like. Generally accepted exceptions in this field concern reviews of books, records, films, etc.., on television: the presentation of works of literature during literary programmes should not be regarded as surreptitious advertising and the same holds for films and for music.

In the same way the appearance of certain products is not to be considered as prohibited surreptitious advertising, if this is required for artistic and dramatic reasons.[ix] This indeed seems a necessary exception; one should, however, realise how difficult it could be to refute the argument that some product placement is required for dramatic and artistic reasons. If this is the case, ample possibilities exist for product placement in TV films. The Dutch approach therefore is quite severe. Artistic or dramatic reasons could not be an excuse for the showing of trademarks and the like in productions which are made by the broadcasting company itself. So VPRO, a Dutch public broadcasting company was fined (with a symbolic fine) on account of its showing the wrapping of a MARS candy bar in the TV film 'Hofmann's Honger' whilst clearly not being paid for this form of product placement. The same approach has been followed in the Wokkels case.[x] Wokkels dealt with a children's programme on junk food in which by way of explicit satire the trade marks of Coca Cola and of Wokkels (a Dutch trademark for potato chips) were shown. Even the European Commission decided that there was not a breach of Article 10 of the European Convention for the Protection of Human Rights in fining the broadcasting company for this form of product placement which certainly was not in the interest of the Coca Cola Company or the producer of Wokkels potato chips. The Commission accepted that the interference complained of was intended to protect the right of young children to be protected against indirect advertisement in television programmes primarily aimed at a young audience and the right of companies to be protected against unfair competition. It considered the interference not to be unreasonable or disproportionate in view of the target audience of the programme and the specific position of the applicant in the Dutch broadcasting system and the respective amounts of the fines imposed.

Unavoidability

General exceptions exist for the broadcast of acquired audio-visual material, due to the fact that the broadcaster has few or no influence on its content. So the broadcast of foreign programmes and the broadcast of motion pictures which have been released in the cinema are not subjected to the rules on product placement.

Editorial independence, co-production and sponsorship

Sponsorship is not the same as advertising. Sponsor publicity must not encourage the purchase or rental of the products and services of the sponsor or a third party, in particular by making promotional references to those products or services. Dutch regulations permit no logos or trade names, the philosophy being that sponsor publicity should be considered as a warning to viewers or listeners that a certain broadcast is sponsored, in stead of a means to the provision of publicity for the sponsor. Neutral product placement will not be allowed to sponsors who have made financial contributions. The experience in the United States has been that it is very difficult to stop sponsor publicity from being gradually metamorphosed into a disguised form of commercial advertising.[xi] This development will no doubt appear in Europe also. More serious problems could be expected by the blurring of borderlines between sponsor and co-production activities. As a general rule, content and scheduling of sponsored programmes may in no circumstance be influenced by the sponsor in such a way as to affect the responsibility and editorial influence of the broadcaster in respect of programmes. Therefore, co-production is only available for companies in the audio-visual sector, the press or the communications sector, whilst programme sponsorship for its part should be open exclusively to natural or legal persons who are not engaged in these sectors. Co-production agreements should not be open to sponsors. In practise, one sees commercial and government sponsors being part of editorial boards and co-productions between broadcasting companies and governmental institutions.

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NOTES

i. Slightly revised version of a presentation at the XIth Conference on International Audiovisual Law: "Financing Films and Television Programmes: Derivative and related means of financing of Films and of Television Programmes", Cannes, 9-10 May 1997. J.J.C. Kabel is Media Law Professor at the University of Utrecht and Senior Lecturer in Information Law at the Institute of Information Law at the University of Amsterdam.

ii. See Council of Europe, Discussions of the Standing Committee on Transfrontier television on advertising and sponsorship, Strassbourg, 14 November 1995, ARN (95) 3), pp. 22-23.

iii. Virtual advertising is an image processing and synthetic image insertion software system aimed at the sports sponsorship field. Mainly offered by EPSIS, it adapts advertising boards to each country where the event is broadcasted. See Commercial Communications, 1996, No. 4, p. 10.

iv. See f.i. Council of Europe, Programme Sponsorship and new forms of commercial promotion of television, Mass Media Files, No. 9, Strassbourg 1991, pp. 7-8.

v. GRUR 1995, 744; GRUR 1995, 750.

vi. CoJEC 24 November 1993, C-267/91 & C-268/91.

vii. BGH 22 February 1990, Zeitschrift für Urheber und Medienrecht 1990, p. 291 ('Wer erschosz Boro').

viii. ARRvS 2 September 1991, No. R01.89.3460, Jan J.C. Kabel and Margreet M. Reijntjes (eds.), Publieke Omroep en Commercie, Adviezen en uitspraken 1988-1992, pp. 155-157.

ix. See for example Article 6.5 of the German Inter State Agreement.

x. See for both cases Kabel c.s. (eds.), Publieke Omroep en Commercie 1994, pp. 41-47 (Hofmann's Honger) and Publieke Omroep en Commercie 1993, pp. 13-21 (Wokkels).

xi. Willard D. Rowland, Sponsorship in the US. No rose without a thorn, Diffusion, Quarterly Journal of the EBU, Winter 1993/1994, p. 54.