Motion Pictures in American and International Copyright Law

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MOTION PICTURES IN AMERICAN AND INTERNATIONAL COPYRIGHT LAW

by

CHRISTOF SIEFARTH

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MOTION PICTURES IN AMERICAN AND INTERNATIONAL COPYRIGHT LAW

by

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This thesis intends to examine some problems of motion pictures in American and international copyright law.

Motion pictures are one of the most fascinating forms of communication and entertainment. They are of enormous commercial significance and probably the most complex works in the field of copyright law. The American motion picture industry is heavily influential throughout the world. Therefore the subject of this work will be mainly the American copyright law, solutions of other legal systems are treated when they provide interesting alternatives or similarities.

After looking at the subject matter of motion pictures in copyright law - especially whether a creative effort is required - it will be examined whether videotapes, which do not embody the picture in a visible manner, are protected under the American copyright law prior to the revision in 1976.

Most works dealing with motion pictures in copyright law fail to refer to the historical and economic background. A short survey on the history of cinema will be followed by an examination of the development and current structure of the motion picture industry. The movie business can be distinguished into four main functions: financing, production, distribution and exhibition. This
background is essential for legal problems treated in the following chapters, e.g. authorship and duration of copyright protection.

Unlike some European legal systems American copyright law does not recognize creative contributions to be determinative for authorship, rather the production company is generally author of a motion picture. Copyright ownership does usually correspond with authorship unless the copyright is transferred. This is possible under American copyright law, although most other legal systems impose restrictions upon assignments of the whole copyright.

The general rule provides that copyright expires 50 years after the author's death. As works made for hire motion pictures are protected for 75 years from publication or 100 years from creation.

Unlike other legal systems the American copyright law requires the fulfillment of certain formalities. The usefulness of these requirements will be discussed.

Even after the Betamax decision it is still unclear in how far private owners of videocassette recorders are allowed to copy motion pictures. A reasonable tax on blank videotapes might provide legal security for consumers.

In the international field two conventions are significant: the Revised Berne Convention and the Universal Copyright Convention. A possible adherence of the United States to the first will be discussed, as well as the assignability of copyrights and conflict of copyright laws.
(A) COPYRIGHTABILITY OF MOTION PICTURES

(I) SUBJECT MATTER

(1) AMERICAN COPYRIGHT LAW

In 1788 — at a time when motion pictures and even photographs were unknown — the Constitution mentioned only the protection of writings:

"The Congress shall have power •..•to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries."  

The framers of the Constitution had obviously only books as copyrightable works in mind.

In the subsequent copyright acts and its amendments Congress had to regard technical development, which produced new means of communication. The scope of protected works had to be enlarged.

Being developed at the end of the nineteenth century, motion pictures were first presented to the public in 1894. In 1903 Edison v. Lubin was one of the first court decisions dealing with the question whether motion pictures
are copyrightable. A short film was registered as a photograph under the title "Christening and Launching Kaiser Wilhelm's Yacht Meteor". The United States Court of Appeals for the Third Circuit concluded that not only the negative of a photograph, but even the projection of a positive filmsheet was a photograph. Because sec. 86 of the Copyright Act of 1870 protected "...any...photograph or negative thereof" motion pictures were held to be included in the scope of copyrightable works.

Obviously this was held to be sufficient. The Revision of the Copyright Act in 1909 did not mention motion pictures in the enumeration of classes of works, but protected only photographs, sec. 5 (j) Copyright Act of 1909.

Only a few years later the 1909 Act was amended. Now motion pictures were mentioned and distinguished in motion-picture photoplays, sec. 5 (1) Copyright Act of 1909, and motion pictures other than photoplays, sec. 5 (m) Copyright Act of 1909. A further definition of what constitutes a motion picture was not given.

The most recent Copyright Act of 1976 makes no distinction between different kinds of motion pictures. 17 U.S.C. sec.102 mentions motion pictures as copyrightable works as well as audiovisual works, a class of works unknown to the Copyright Act of 1909. 17 U.S.C. sec. 101 contains definitions of both:
According to the House Report on the revision of the Copyright Act in 1976, a work has to meet three special requirements (in addition to the general requirements of 17 U.S.C. sec. 102 (a), originality and fixation in a tangible medium of expression) in order to be characterized as a motion picture:

1. a series of images,
2. capability of showing the images in a successive order,
3. impression of motion when showing the images.

The intention of this broad definition was to protect "a wide range of cinematographic works".

Motion pictures are now part of the larger concept of audiovisual works. The basic difference is that motion pictures need to give an impression of motion. A series of slides is an audiovisual work other than motion picture, because it cannot give an impression of motion. In fact, it is difficult to find exceptions to audiovisual works: even television broadcasts are included, as long as they are fixed in a tangible medium. Only unfixed live broadcasts are not protected by copyright law.

The distinction is, however, without significance for copyright protection. 17 U.S.C. sec. 102 (a) (6) makes no difference between "motion pictures and other audiovisual works"; they are both recognized as works of authorship.
Similar to the situation in the United States motion pictures were not mentioned in the original German Copyright Act of 1907. Only three years after the enactment the Copyright Act was amended and sec.15 (a), protecting motion pictures, was introduced.

The recent Copyright Act of 1965 speaks of "film works" in sec.2 para.1 cl.6 and treats them extensively in sec.88 - 94. Generally the German Copyright Act uses, as a generic term, the expression films [Filme] and distinguishes them in film works [Filmwerke] and running pictures [Laufbilder]. Films are defined as picture-sound-sequences in succession, made by a photographic method. But unlike running pictures, film works require an artistic and creative effort. They are copyrightable, while running pictures are only protected by neighboring rights:neighboring rights protect works which are produced without a sufficient creative effort, but which are similar to copyrightable works. Subject of copyright protection are literary and artistic works, neighboring rights can be achieved for performances, phonograms or broadcasts.

Works considered to be running pictures are e.g. films of animals in open nature, news broadcasts and films of theater performances. Although Art.95 German Copyright Law provides the analogous application of some provisions
concerning film works to running pictures, basic differences remain, especially the shorter period of protection.

The French Copyright Act of 1957 originally provided a solution similar to the German system: copyrightable were only cinematographic works [œuvre cinématographique] i.e. imaginative works composed especially for the projection. Excluded were documentaries and news.

A recent revision of the French Copyright Act seems to adopt a system similar to American Copyright Law. Art. 3 French Copyright Law now mentions not only cinematographic works, but also "other works consisting of a sequence of related pictures, with or without sound, which constitute together audiovisual works". The similarity to the language of the House Report on the American Copyright Law of 1976 is obvious, although the French concept of audiovisual works does not correspond with audiovisual works in 17 U.S.C. sec.101, rather with motion pictures in the American Copyright Act of 1976. Artistic and imaginative effort is therefore no longer determinative for the protection of motion pictures under French copyright law.

(3) COMMENT

The distinction provided by the American Copyright Act of 1976 is convincing. The German solution and the former French distinction fail to provide legal security, i.e. it might be unclear whether the creative effort in the making
of a motion picture is sufficient to grant complete copyright protection to the work. Finally lawyers are forced to determine artistic creativity.

Already in 1903 the United States Supreme Court refused to measure creativity and artistic effort: in Bleistein v. Donaldson Lithographing Co. the Court had to decide whether a chromolithograph showing groups of persons and things and used as advertisement for a circus is a subject of copyright. The question was affirmed, because the judges found themselves unable to determine the artistic value of the lithograph. The fact that the French Copyright Act was recently revised and that the scope of copyright protection was enlarged to nonimaginative works might be seen as evidence for the advantages of the American solution.

(II) PHYSICAL FORM

(1) AMERICAN COPYRIGHT LAW: THE VIDEOTAPE PROBLEM

A more difficult - and to some extent still unsolved - problem is whether copyright protection depends on the physical form of the motion picture. The main question is whether videotapes, videodiscs and similar materials - as contrasted with filmstrips are within the scope of copyright protection.
Fortunately there is no doubt that motion pictures on videotapes are copyrightable after January 1, 1978. 17 U.S.C. sec. 102 (a) protects generally all works "fixed in a tangible medium of expression, now known or later developed". The definition of audiovisual works stresses additionally that a certain physical form is not required. This view is supported by the House Report: "...it makes no difference what the form, manner or medium of fixation may be.".

The Copyright Act of 1909 contained no similar provision. Therefore the definition of copy is significant. The starting point of all the trouble is the Supreme Court's understanding of copy in the often criticized but never overruled decision White-Smith Music Pub. Co. v. Apollo Co. (so called Apollo case). There the Supreme Court held that a music roll, which produced sound in connection with a piano by the means of a certain order of perforation in the roll is no "copy". The Court ruled that a copy of a musical composition has to be "...a written or printed record in intelligible notation." The music rolls were no pieces of sheet music; looking at the perforation does not (in the usual way) show how to play the piece of music. As part of a machine the perforated rolls were not itself printed in intelligible notation and therefore not copyrightable. In order to avoid the results of the Apollo decision sec.1 (e) of the Copyright Act of 1909 protected copyright owners of pieces
of music by introducing a compulsory license for these mechanical reproductions, but failed to change the Supreme Court's interpretation of copy. Therefore the Apollo doctrine was still applicable under the Copyright Act of 1909.

Applying the Apollo doctrine to motion pictures would lead to the conclusion that only those materials are within the scope of federal copyright protection which embody the picture in a visible manner. Ordinary filmstrips, supposed to be shown by the means of a projector, are visible with the naked eye and therefore protected under the Apollo doctrine. Videotapes, videodiscs and similar materials are not in intelligible notation, inasmuch as the picture contained can only be seen by the means of a machine.

Videotapes can be compared to sound recordings, which do not present the sound contained in intelligible notation either. In fact, 17 U.S.C. sec. 301 (c) states explicitly, that sound recordings fixed before February 15, 1972, are not subject of copyright.

Once again in the history of copyright law the technical development was not foreseeable for lawmakers and courts. Even today a court might feel to be bound by the Apollo decision in cases concerning videotapes and similar materials created prior to 1978.

Before turning to some arguments against the application of the Apollo doctrine to videotapes it has to be asked if the result would be of practical significance:
In 1972 the Supreme Court had to decide in how far unprotected or subject to state law and their common law copyright.

Under the Copyright Act of 1909 federal copyright protection began with the publication of the work. Common law copyright was certainly applicable to works prior to their publication. Therefore an unpublished motion picture on videotape might be protected by common law copyright.

More significant is whether published motion pictures on videotape can be - theoretically - subject to state law. It might be argued that these works - being published but not within the scope of federal copyright law - are in the public domain.

In 1972 the Supreme Court had to decide in how far states are bound by the fact that certain (unpublished) works are excluded from federal copyright protection. In Goldstein v. California the Court had to deal with the criminal offense of copying sound recordings without permission, California Penal Code sec.653 (h). At the time
In regard to motion pictures there was no intention of Congress to exclude motion pictures on videotape from the scope of protected works under the Copyright Act of 1909. But – contrary to sound recordings – there was also no express protection of videotapes and similar materials by state law. Only one state court held videotapes to be copyrightable as a motion picture, but by applying the (federal) Copyright Act of 1909, not under state law.

Although states had the opportunity to grant (common law) copyright protection to videotapes and similar materials they did not take advantage of that fact, probably because they failed to foresee the future significance especially of videotapes on the motion picture market.
Holding the Apollo doctrine applicable and under consideration of the ruling in Goldstein v. California videotapes and similar materials were not protected under state law and would therefore fall in the public domain.

There are several arguments in favor of protecting motion pictures on videotape in the same way as on ordinary filmstrips. In the beginning of the twentieth century, i.e. at the time when the Apollo case was decided and the Copyright Act of 1909 became effective, it was not foreseeable that motion pictures can be shown with the help of a technique different from photography.

Even Justice Holmes was not able to foresee this specific technical development. But in Kalem Co. v. Harper Bros. a case holding that the production of the motion picture "Ben Hur" was an infringement of the copyrighted book, he pointed out obiter that the medium of fixation should not be determinative for copyright protection: "The essence of the matter...is not the mechanism employed but that we see the event or story lived."

Even before the revision of the Copyright Act in 1976 the Copyright Office Regulations hold that a videotape is a form of motion picture under the Copyright Act of 1909. This view was explicitly supported by Congress and Senate in the legislative history of the Sound Recording Amendment in 1971. But these statements are not binding for courts: the 1971 Amendment excluded explicitly motion pictures.
Only the Supreme Court of New York held in Trophy Prods., Inc., v. Telebrity, Inc. that Congress intended to grant copyright for motion pictures under the Copyright Act of 1909 regardless of the "...instrumentality which produced the moving images."

The House Report on the 1976 revision of the Copyright Act does not say whether videotapes were eligible for federal copyright protection under the Copyright Act of 1909, rather it is stressed that the medium of fixation is without significance under the Copyright Act of 1976.

Therefore courts are still free to hold motion pictures on videotape or similar material uncopyrightable and in the public domain under the Copyright Act of 1909. They can only rely on the Apollo doctrine; today there is no convincing argument for this holding. Fortunately the situation is clear after January 1, 1978: the current Copyright Act protects works regardless of the material used.

(2) CONCEPTS OF OTHER LEGAL SYSTEMS

Other legal systems usually protect works regardless of the medium employed; there is no distinction like that used in the Apollo case.

The German Copyright Act of 1965 speaks of "...filmworks including those works made similar to filmworks", Art. 2 para. 1 cl. 6 German Copyright Act. But
even before 1965 courts did not limit copyright protection to filmstrips. In a 1962 decision the Federal Supreme Court had to decide whether the unlicensed projection of television pictures on a movie theater screen was an infringement of copyright. The plaintiff projected a live television broadcast of the soccer world championship in 1958 on a screen and charged an admission price. The court held for the plaintiff and - in determining whether the television picture is protected by copyright law concluded that the medium employed is not significant rather the fact that an optical system similar to photography was used should be sufficient.

Art.3 of the French Copyright Act of 1957 protected, already in the original version, "...cinematographic works and those made by procedures analogues to cinematography."

Art.1 of the Swiss Copyright Act of 1922 mentions "...acts of cinematography or those fixed by a similar procedure."

(3) COMMENT

There is no doubt that motion pictures should be protected by copyright law regardless of the physical form of the medium. Most legal systems and the American Copyright Act of 1976 make no distinction in this sense. However, the United States Supreme Court's understanding of
copy in White-Smith Music Pub. Co., v. Apollo Co. might exclude videotapes and similar materials made before January 1, 1978 from federal copyright protection — a result which is indefensible and would have an enormous impact on the video market, if it would concern the entertainment industry today. But fortunately the number of motion pictures on videotapes is presumably small, videotapes became much more important in the last few years.
(B) MOTION PICTURE INDUSTRY AND MOVIE BUSINESS

(I) FUNCTIONS

Examining the legal aspects of motion pictures is not only interesting because movies are one of the most complex works in copyright law but also because the movie business is of enormous commercial significance.

In 1984 box office receipts exceeded - for the first time in history - the amount of $4 billion.

Recently the video market may become more profitable than the traditional form of motion picture exhibition on theater screens. In 1984 consumers in the United States spent $2.4 billion for video software.

Finally the motion picture industry receives a significant income from television stations and networks: either by licensing the broadcast of theatrical motion pictures or by producing television movies and series. In the season 1982/83 the major television networks had to pay an average of $650,000 for a one-hour episode of a prime time series.

The creation and exploitation of motion pictures is related to the four major functions of the motion picture industry:
1. financing,
2. production,
3. distribution,
4. exhibition.

(II) HISTORICAL DEVELOPMENT

(1) PIONEERS

Before turning to the current situation of the motion picture industry a short survey of the historical development of the movie business will be given. This background is essential for the following chapters.

The history of motion pictures began in the late nineteenth century. Twenty-five cents were charged by Andrew Holland for the admission to his movie theater in New York City, where the first public exhibition of a motion picture took place on April 14, 1894. But motion pictures were invented and shown to the public in different countries during the following years: by the brothers Lumiere in Paris/France in 1895 and by the brothers Skladanowsky in Berlin/Germany in 1895.

The artistic element of the creation of movies had to stand back at this time; technical problems required filmmakers to be primarily technicians. The brothers Lumiere, for example, owned a factory for photographic equipment, where they invented the Cinematographe, serving
as both, camera and projector. This example indicates that legal problems in the pioneer era were mostly those concerning patent law, not copyright law.

Copyright protection, however, was less important for other reasons: movies were produced in a very inexpensive way; they were often shot in one day, consisted usually of one scene on one film-reel, which contains thousand feet of film and runs about fifteen minutes.

Until 1903 movie theater owners - because of the admission price of five cents these theaters were called Nickelodeons - had to purchase motion pictures from the producer, for the price of approximately one hundred dollars per reel (i.e. per film). Then the exchange system of distribution began: prints were bought from the producer and leased to theater owners for twenty-five percent of the purchase price - a profitable business.

Because of the unsatisfactory patent and copyright protection of their products some major producers of motion pictures established the Motion Picture Patents Company (MPPC) in 1909. Monopolizing the motion picture business they distributed licenses to exhibitors for a tax of two dollars per week. After a number of antitrust law suits the MPPC was disbanded in 1917.

The pioneer era was dominated by directors with technical knowledge, e.g. W.K.L.Dickson, A. & L.Lumiere, G.M-plies, E.S.Porter and D.W.Griffith. A good example of the making of a movie at this time was described by the
Court of Appeals for the Second Circuit in Epoch Producing Corporation v. Killiam Shows, Inc. The court had to determine the role of D.W. Griffith in the making of The Birth of a Nation in 1915, one of the early masterpieces of the early cinema. Griffith was held to be not only the director but also producer and co-author of the scenario. He controlled the entire production of the movie, and even the main actors did not know the complete story.

(2) STUDIO SYSTEM

The pioneer era ended completely in the 1920s, when film-making became more sophisticated. Pioneers were replaced by studios, i.e. influential companies which began to control the entire motion picture industry.

The coming of sound movies ("talkies") began in 1925 and replaced silent movies totally in only a few years. Unlike the early days of cinema, motion pictures were now accepted by the business world; they realized the potential commercial significance. The enormous need of money for the conversion to sound - some experts estimated a total figure of more than $300 million - made the motion picture industry financially dependent on Wall Street financiers.

Not only the studio facilities but also thousands of movie theaters had to be equipped with a sound system.

By 1930 eight studios - five "majors" and three "minors" - controlled 95 percent of all American film
production. They controlled not only the production of movies, but also their financing, distribution and exhibition — all four functions of the motion picture business. This golden age with enormous influence of the studios was coupled with financial success: between 1930 and 1945 more than 7500 feature films were produced by the studios, which is almost three times as much as today.

Significant for the studio system was furthermore that people involved in the creation of a motion picture — writers, directors, actors and technicians — were employed under term contracts and only those very successful were able to negotiate contracts which gave them more artistic freedom.

(3) MOVIE CRISIS

The importance of the studios began to decrease in 1948. The Federal Department of Justice brought an antitrust suit against five majors. In United States v. Paramount Pictures, Inc. the Supreme Court examined some common practices in the motion picture industry. The Court sustained the District Court's finding of two price-fixing conspiracies: between the majors as well as between each major and its licensees. After finding a violation of sec.1 and 2 of the Sherman Act the Supreme Court remanded the suit to the District Court, which was directed to
provide effective relief against the unlawful practices of the defendants. The result was that the majors agreed in the following years to divest themselves of the ownership of several thousand movie theaters (so called "Paramount decrees"). They lost control over one of the four major functions, the exhibition of motion pictures.

Another reason for the movie crisis was the challenge by the new competitor, television. Only 1 million television sets were in use in the United States in 1949, but in 1951 about 10 million and in 1959 about 50 million television sets caused this medium to become a serious rival.

Former moviegoers preferred to stay at home and the total gross income from admissions to movie theaters decreased from $1,6 billion in 1946 to $1,2 billion in 1953 and to $0,9 billion in 1962.

These financial problems had two consequences. The number of permanent employees with term contracts was reduced and artists were employed on a picture by picture basis. Secondly, independent production companies began to produce motion pictures and the studios restricted their contribution by providing their studio lot facilities and financing these movies.

The traditional studio system changed. The majors still exist, but they lost some of their influence and have mainly two functions today: financing and distribution of motion pictures.
(III) CURRENT STRUCTURE AND PRACTICES

(1) STRUCTURE OF THE MOTION PICTURE INDUSTRY

Artistic as well as legal aspects of motion pictures are highly influenced by the position of film production companies - mainly the "majors" - throughout the historical development of cinema. This reflects not only the changing functions of the motion picture industry, but also the situation of the American economy during the twentieth century.

Currently there are seven major studios involved in the creation and exploitation of motion pictures: Universal Pictures, Columbia Pictures, Twentieth Century-Fox Pictures, Paramount Pictures, Warner Brothers, Metro-Goldwyn-Mayer/United Artists [MGM/UA] Entertainment and Buena Vista/Disney Productions. Buena Vista/Disney Productions was not recognized as a major until recently but its commercial significance requires ranking it as a major in the motion picture industry of today.

Universal Pictures is currently Hollywood's leading Studio [with two of the most successful pictures in the last few years, "E.T." (1982) and "Back to the Future" (1985)] and is involved in the field of theatrical motion pictures as well as in the production of prime-time television series and movies. Founded by Carl Laemmle in 1912, who controlled the studio until 1936, it lost its
status as a major in the thirties, but only for some years. In 1962 Universal was absorbed by one of the huge entertainment conglomerates, Music Corporation of America [MCA].

Columbia Pictures is another important film studio. It was founded in 1924 by Harry Cohn, who was highly influential in the company's affairs until his death in 1958. Similar to Universal, Columbia was not recognized as a major from the beginning, but achieved this goal in the forties and fifties. Privately held until 1982, Columbia Pictures then became a subsidiary of the Coca-Cola Company.

Twentieth Century-Fox Pictures was established in 1935 after a merger of Fox Film Corporation with Twentieth Century Productions. Although being a division of Twentieth Century-Fox Film Corporation, this major is still privately held and not under control of an entertainment conglomerate. Today Twentieth Century-Fox Pictures is a major film studio and the leading television production company.

Paramount Pictures was formed between 1914 and 1917 after several mergers of smaller companies. Despite several name changes the company was commonly known as "Paramount". In 1966 Paramount Pictures lost its independence and became a wholly owned subsidiary of Gulf & Western Industries, Inc. Today Paramount is one of the
major studios involved in the creation and exploitation of motion pictures and television programs.

Warner Brothers was founded by Harry, Abe, Sam and Jack Warner and incorporated in 1923. Losing its independence in 1969 it was acquired by Kinney National Service, now named Warner Communications. As a subsidiary of this entertainment conglomerate, Warner Brothers is a major studio for motion picture and television productions.

MGM/UA Entertainment combines two important studios of film history:

Founded in 1919 by the film pioneers Charlie Chaplin, Mary Pickford, Douglas Fairbanks and D.W. Griffith, United Artists began as a distributor of independently produced motion pictures. Being different in its business practices compared to other major studios throughout its existence, this company was the first to encourage independent producers by limiting its involvement in the creation of movies to the function of financing in 1951. United Artists was a subsidiary of the conglomerate Transamerica Corp. from 1967 to 1981. Then Transamerica sold its interests to MGM Film Company.

Metro-Goldwyn-Mayer was formed in 1935 after several mergers. It became Hollywood's biggest studio in the thirties and produced two of the most influential and successful movies in film history, The Wizard of Oz and Gone with the Wind (both published in 1939). In 1973 MGM
ceased to exist as a distributor of motion pictures and domestic distribution of its pictures was licensed to United Artists. In 1981 MGM purchased United Artists and the name of the company was changed to MGM/UA Entertainment in 1983.

That the practice of mergers and acquisitions in the motion picture industry goes on, was proved in 1986 when the Atlanta based Turner Broadcasting System Inc. [TBS] acquired MGM/UA Entertainment for $1.5 billion.

Buena Vista Corporation, a subsidiary of Walt Disney Productions, is now recognized as a major studio. Like Twentieth Century-Fox Buena Vista/Disney is in private hands and not under control of an entertainment conglomerate. It is recently very active on the television market.

(2) FINANCING

The production and exploitation of motion pictures is a business with huge financial risks. In 1984 the average production costs of a feature motion picture distributed by the majors reached the $12 million mark. It is a rule of thumb in the motion picture industry that a film must return at least three times its production costs. Additionally, it is not sufficient to provide the money for one production, the chance of failure is enormous: it was estimated that only one out of ten movies is a
financial success, two will break even and seven motion pictures will be a commercial failure.

Another characteristic of the movie business is that the estimated production costs are often surpassed: Apocalypse Now's (1979) production costs reached $31.5 million compared to the estimated $12 million (director Francis Ford Coppola survived - once again - by risking to lose his entire property; fortunately the picture was very successful). Heaven's Gate (1980), on the other hand, was a commercial failure: the actual production costs were more than five times higher than estimated ($40 million compared to $7.5 million). The financier has a very difficult choice: either he stops the production of the motion picture - and loses his entire investment - or he pays the amount necessary to finish the production in the hope that a success at the box office will honor his financial risk.

The figures show, that only companies with sufficient financial resources are able to compete in the motion picture market. Therefore most movies are today financed by the majors, only low budget productions are independently financed and produced. The chance of a financial success, however, seems to be reserved for the majors; movies like Ghostbusters and Beverly Hills Cop grossed more than $230 million from box office receipts (i.e. excluding the video and television market).
The majors try to provide security for their risky investment: being not only the financier but also the distributor they assess a fee of at least 30 percent of the gross receipts. This often leads to the result that only the distributor makes a profit.

A simple example of who shares the profit in the motion picture industry is given by Baer. A motion picture with production costs of $10 million grossed $30 million. After deducting several expenses, mainly the distribution fee, the financier/distributor had a net profit of $13,000: other profit participants—writers, actors, directors etc.—received only the contractual wages; they did not succeed to obtain an additional percentage profit.

(3) PRODUCTION

The actual creation of a motion picture is the production. Combining the creative and artistic effort of usually up to 100 persons leads, after several months and extensive preparations (pre-production and post-production) to the final result—the motion picture ready for exhibition.

Until about 1950 motion pictures were mainly produced by the majors. With the beginning of the movie crisis United Artists was the first major company to change its policy: they encouraged independent filmmakers to produce motion pictures, which were financed and distributed by the
majors. By the end of the fifties most major motion picture companies followed this example; the result was greater creative and artistic autonomy in movie production. The majors provided their studio facilities and began to get involved in the television market.

Another major change concerned the situation of some persons involved in the creation of motion pictures. Especially the non-technical personnel—writers, artists, directors, etc.—were no longer bound to the majors' by term contracts, but employed on a picture by picture basis. Today most employers in the motion picture industry use detailed standard form contracts; these collective bargaining agreements are negotiated by labor unions (also called "guilds") and the production companies. The most important unions in the movie industry are:

-International Alliance of Theatrical and Stage Employees and Moving Picture Machine Operators [IATSE], representing technical personnel;

-American Federation of Television and Radio Artists [AFTRA], representing performers working on location except the five traditional film lots;

-Screen Actors Guild [SAG], representing performers of those pictures shot on the traditional film lots;

-Directors Guild of America [DGA], representing directors, production managers and technical coordinators;
the financing of the movie. The early masterpieces of cinema, "Birth of a Nation" was recognized as a big budget production at a cost of $110,000 in 1915. $59 million were the costs of "Annie" (based on the Broadway musical) in 1982, a typical "blockbuster". Especially since 1970 the production costs of motion pictures have exploded; in the seventies the average costs doubled every four years, since 1982 the rising of the costs became more modest. Average production costs of theatrical features of the majors:

$400,000 in 1941, $1,000,000 in 1949,
$1,890,000 in 1972, $2,500,000 in 1974,
$4,000,000 in 1976, $5,000,000 in 1978,
$8,500,000 in 1980, $11,300,000 in 1982,
$12,000,000 in 1984.

The standard form contracts are extremely detailed. On the one hand they grant producer and distributor all rights in the exploitation of the motion picture, on the other hand they regulate and guarantee wages, working conditions, hours of employment and other topics in the interests of the employees.

The production company itself grants all exploitation rights to the major motion picture company in exchange for the financing of the movie.

Finally it is interesting to see how production costs have increased, especially in the last two decades. One of the early masterpieces of cinema, "Birth of a Nation" was
The highly competitive climate in the motion picture industry makes a decrease of production costs unlikely.

(4) DISTRIBUTION

The first step towards the exploitation of a motion picture is the distribution. To be profitable the movie has to be presented on the right market at the right time and has to be supported by the right means (advertising etc.).

Domestic and international distribution of motion pictures is mainly in the hands of the majors: the average market share of the six traditional major companies (i.e. excluding Buena Vista/Disney Productions) on the domestic distribution market between 1977 and 1983 was 86 percent.

With the distribution fee the majors mainly make their profit. Usually the fee is a percentage participation in gross receipts from box office admissions. It ranges from 30 percent for the domestic market up to 50 percent for the distribution abroad. These percentages assure that the distributor/major profits financially, while other profit participants have to hope that the motion picture grosses more than the actual costs and expenses.

An alternative to the distribution by the business giants are independent distributors, on the domestic as well as on the foreign market. A production company can make more profit by licensing the exhibition of a motion
picture to one of these independents, but has to take into account that these companies cannot provide the advantages of a huge and influential organization like the majors. On the international motion picture market independent distributors - often limited to a certain territory - are recognized as a serious alternative to the branches of the majors abroad. Independent distributors are often more established in their horne market than the majors in the respective countries and are quite often able to provide a cheaper and more effective exploitation of American motion picture productions abroad.

There are several practices used by the majors to guarantee a profit in return for their risky investment. Because of the high production costs and the competitive climate in the entertainment industry the majors try to lower the risk by releasing fewer motion pictures: only seventy major films are released every year and the total number of motion pictures distributed by the nine largest companies, organized in the Motion Picture Association of America [MPAA] is below 170 in the last few years. Other distributors released more than twice as many pictures (264 releases compared to 165 by the MPAA members in 1983). But, as mentioned before, these companies have a very small market share.

Another way to lower the risk is a trade practice called blind bidding or block booking. In 1948 the Supreme Court defined this technique in United States
v. Paramount as "... a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it". Often the exhibitor is obliged to accept a certain number of pictures (a "block") selected by the distributor without the possibility to reject the showing of a specific picture. Blind bidding shows again the market power of the major distributors, but it is not an invention of recent years. Rather Adolph Zukor, founder of the later Paramount Pictures, is recognized as inventor of block booking as early as 1916. Being a matter of state law, block booking is prohibited in 24 states, paradoxically not in the important markets of California, New York and Texas. Because of the relative bargaining power of the distributors, these state law restrictions are held to be fair and constitutional.

(5) EXHIBITION

The last step of motion picture exploitation is the exhibition in movie theaters, where it is finally decided whether the enormous creative and financial effort is honored by the audience.

Throughout film history Hollywood has complained about the financial situation of the motion picture industry. In fact, the total amount of box office receipts has set new records every year between 1977 and 1984 and doubled
from 1974 to 1984. In 1984 box office receipts reached the $4 billion mark; the number of paid admissions was about 1.2 billion; nevertheless the estimates for 1985 were less favorable (box office receipts approximately $3.8 billion; of paid admissions less than 1.1 billion;)

Only the average admission price has increased constantly, from $2.70 in 1978 to $3.55 in 1985.

Movie theaters were owned by the majors in the beginning of film history, but had to be sold after the Supreme Court decision in United States v. Paramount in 1948. Today there is a total number of almost 19,000 theater screens in the United States, owned by smaller companies or large national theater circuits with several hundred screens each, such as General Cinema, Plitt Theaters and American Multi Cinema.

A major problem of the motion picture business is to get true statements and balances concerning the actual profit from box office receipts, because it is difficult to control the real figures of paid admissions.

(IV) COMMENT

The motion picture industry is highly concentrated and mainly influenced by the majors - on the domestic as well as on the foreign market. In the "golden age" of film history they held all four functions of creating and exploiting movies in their hands: financing, production,
distribution and exhibition. Beginning at about 1950 they lost two of these functions: independent production companies were established and motion picture theaters are now owned by smaller companies.

Nevertheless the industry is still under control of the major motion picture companies. By the means of financing they have influence on the production and, having a market share of almost 90 percent on the distribution sector, they also control the exhibition market. The extremely risky business and the enormous need for financial resources coupled with their bargaining power ensures that the majors are primary profiteers.
(C) AUTHORSHIP AND OWNERSHIP OF MOTION PICTURE COPYRIGHT

(I) AUTHORSHIP

The Copyright Act of 1976 contains, like its predecessors, no definition of authorship. But the basic concept never changed and the broad definitions given by courts usually pose no problems. As early as 1846 a court defined an author as "one who, by his own intellectual labor produces an arrangement or combination new in itself." The Supreme Court held an author to be someone "to whom anything owes its origin." These definitions are not very helpful. However, it is in most cases easy to determine the author, because the work is the result of one or a few persons' creative effort. A motion picture, on the other hand, is a highly complex work, involving usually contributions of many persons: scriptwriters, directors, actors, all kinds of technicians and - controlling and financing the whole - the producer (usually a legal person, a production company). The determination of one author or the main author, considering the value of the creative, technical and even financial effort, is almost impossible.
This was not always true. In the early days of film history fewer people were involved in the making of a motion picture and the determination of the author was easier. One of the few court decisions dealing with the question of authorship of movies is Epoch Producing Corporation v. Killiam Shows, Inc. In 1914 "The Birth of a Nation" was produced and directed by D.W. Griffith, who was also co-author of the scenario. The Court of Appeals for the Second Circuit concluded, after hearing Lilian Gish and Joseph Henaberry - both acting in the motion picture - as witnesses, that Griffith was the individual author of "The Birth of a Nation".

With the coming of the studio system the way of movie-making changed rapidly. Persons involved in the creation of a motion picture were generally employed by the studio under term contracts. Today these people are usually employed by an independent production company on a picture by picture basis.

The fact that filmmakers are generally employees is of significance for the determination of authorship. 17 U.S.C. sec.201 (b) contains the presumption that the employer is the author of a work made for hire, unless the parties have not explicitly agreed otherwise.

As defined in 17 U.S.C. sec.101 a work made for hire is either

"a work prepared by an employee within the scope of his or her employment" or
"a work specially ordered or commissioned for use as a part of a motion picture if the parties expressly agree in a written instrument that the work shall be considered a work made for hire."

Sec. 26 Copyright Act of 1909 already said that the employer is author of a work made for hire and the revision of the Copyright Act in 1976 did not intend to change this principle.

In the motion picture industry of today standard form contracts usually contain the clause that the result of the work of the employee is deemed to be a work made for hire. Therefore people actually involved in the process of a motion picture production are - unless they agree with the producer otherwise - excluded by their status as employees of the producer from becoming author of the movie. Even when the contract does not use the term "work made for hire", but the work was created within an employment relationship, there is a presumption that the employer is the author. One of the very few cases dealing with authorship of motion pictures is Woods Hole Oceanographic Institution v. Goldman. There a filmmaker was hired to produce a documentary film and the contract stated that the employer will "retain the copyright of the film". The court found that the filmmaker was an employee in the sense of 17 U.S.C. sec. 201 (b) and that the employer is the initial author and copyright owner of the motion picture.
A work created beyond an employment relationship might also be a work made for hire. The work has to be "specially ordered or commissioned," the contract has to be in a written instrument and must expressly mention this point.  

If a work, e.g. a novel or a song, is created prior to a specific relationship – whether employment or independent contract – it cannot be considered made for hire, even when the parties subsequently agree on this point. Examples for this kind of works are scripts and soundtracks. Even if the independent work, e.g. a play, was written with the intention to be used in a potential motion picture – prior to any (contractual) relationship to a producer – it is not a work made for hire, rather the motion picture is a derivative work of the independently protected play. The writer or composer remains author of his work, although he can assign his copyright.  

Generally contributions to a motion picture are made under an employment or an independent contract, which usually contains a work-made-for-hire-clause. The producer of the motion picture is therefore considered to be the only author.  

(II) COPYRIGHT OWNERSHIP  

17 D.S.C. sec.106 grants certain exclusive rights to the copyright owner. The fact that the statute does not
The major then becomes such clauses. Copyright ownership in motion pictures is generally in the hands of the major studios. Sometimes the author of the movie - the producer - remains copyright owner.
(III) RIGHTS OF PERSONS INVOLVED IN THE CREATION OF A MOTION PICTURE

As seen supra, the people creating a motion picture do not obtain the copyright; rather, those financing and producing the movie are the only copyright owners. Artists and other people involved in the production process have no copyright in the sense of an artistic property right. Besides the financial compensation, another "right" of artists becomes more and more valuable and the subject of lawsuits: credit - also called billing.

Credit is the listing of a person's contribution to an entertainment venture according to the function performed. In the entertainment industry credits have not only the function to honor the creative effort, but they are also of economic and psychological value. The public as well as potential employers are informed about an artist's contribution and the level of credit - i.e. the description of the function and even the size of the listing at the beginning or the end of a motion picture is an indication of the impact on status and salary.

Credits are not only given during the exhibition of a movie, so called screen credit, but also in advertisements in different media for a specific motion picture.

It is therefore not surprising that questions of proper credit are subject of contract negotiations, i.e. between the production companies and the guilds and even
fought for in court: the well-known actress Sophia Loren did not succeed in obtaining an injunction against a motion picture producer because she wanted her name not only in the same size but also on the same line as the main male actor's name on a Broadway outdoor advertisement. In some cases, however, the artist might be of the opinion that omitting the credit is more valuable for his or her career, for example in the case of a novelist who thinks that the motion picture based on his novel does not represent the proper intention of his piece of literature. The subject of artist credit is of such significance in the American motion picture industry because artists rarely have any other kind of property right in their contribution.

(IV) OTHER LEGAL SYSTEMS

Unlike the situation under American copyright law, the question of authorship and copyright in motion pictures is considered to be of enormous difficulty by most European legal systems. The basic difference is that those copyright laws attempt to solve the conflict between persons contributing to a motion picture by creative participation on the one hand, and the exploiter of the work, i.e. the producer and the distributor, on the other hand.
The copyright laws of some European countries, for example Germany, France and Italy, grant copyright in motion pictures only to natural people and only to those people who creatively contributed to the production. Problems arise, under the American point of view, especially because of the fact that copyright cannot be assigned totally or that a total assignment rarely happens in practice. Despite this principle there are differences between the respective European copyright laws.

The French Copyright Act of 1957 lists expressly the authors of a motion picture: it is presumed that

1. the author of the script,
2. the author of the adaption,
3. the author of the spoken text,
4. the author of the music created solely for the work and
5. the director (realisateur) are co-authors of a motion picture, Art.14 para.2 French Copyright Act of 1957. Only natural persons contributing an intellectual part are capable of becoming the author of a motion picture. Usually the producer does not fulfil these requirements of authorship. But Art.17 para.3 French Copyright Act of 1957 contains a wide presumption that exclusive rights concerning the exploitation of the movie fall to the producer, e.g. the exhibition right, even if a legal person (production company) is involved. Rights which are not needed for the exploitation of the motion picture, e.g. the right of the scriptwriter to publish his work as a piece of
literature, remain with the authors/artists. This solution intends to consider rights and interests of both, artists and producer.

Similar, but more complicated, is the regulation of authorship of motion pictures in the German Copyright Act of 1965. Although "film works" are treated in several sections, a positive statement of who is the author of a motion picture is not given. Rather the general rule of sec.7 German Copyright Act of 1965 applies: author is the creator of the work. Courts and especially commentators recognize only those contributions showing creative effort as sufficient for the authorship of a motion picture, i.e. mainly the director and also cameraman and editor are authors of a movie. Other persons might, depending in how far their contribution promoted the final result, become film authors. Generally the scope of potential authors is more narrow than under French copyright law; authors of already existing works or of separable works created solely for the motion picture, e.g. scriptwriters and composers of film music, are excluded from the authorship of a motion picture. They can acquire independent copyright protection for their works.

Similar to the solution of the French Copyright Act the German Act contains a wide-ranging presumption of assignments by the motion picture authors in order to enable the producer (who is in lack of a creative contribution usually not co-author of the movie) to exploit
the work, sec.89 German Copyright Act of 1965. There is also a presumption of assignments in favor of the producer concerning the works of authors of already existing works and works created solely for the film, but the right to public performance is excluded. Rather the producer has to get a (compulsory) license from the respective collecting societies.

Another peculiarity of German copyright law is laid down in sec.94 German Copyright Act of 1965: the producer obtains a neighboring right on the film on which the motion picture has been fixed, allowing him the exclusive right of copying, dissemination, showing and transmission. Unlike the ordinary copyright expiration period of 70 years after the death of the author, these rights expire 25 years after publication/creation of the film.

At first sight the solution provided by the Copyright Acts of the United Kingdom, Ireland and Luxembourg seem to be identical to the concept of American copyright law: copyright in motion pictures is granted to the producer. But a closer look shows the differences between copyright in motion pictures and copyright in other works. The British Copyright Act of 1956, for example, treats "copyright in original works" in its first part; "film copyright" is dealt with in the second part. Although called copyright, these rights provide less protection than the copyright in original works, e.g. the protection period of 50 years from registration or publication, sec.13 para.3
British Copyright Act of 1956, compared to the general period of 50 years after the author's death, sec.3 para.4 British Copyright Act of 1965.

Unlike the French and the German copyright laws creative personalities (e.g. director, cameraman, editor) are not authors of motion pictures under British copyright law and have no copyright protection at all.

(V) COMMENT

A real comparison of authorship in motion pictures between the American copyright law and European systems is almost impossible: the basic concept and the understanding of the purpose of copyright law is often different.

In the field of copyright in motion pictures the conflict between the author and the public is less weighty: rather there is a conflict between the primary exploiter of the work (i.e. the producer) and the creative personnel (among them especially the director). American copyright law fails to honor the creative effort of the artists and technicians involved in the creation of a movie and grants all rights to the employer/financier.

The French and the German solution attempts to provide a fair balance between the opposing interests (artistic-commercial), but also grants the producer optimum protection with regard to the commercial exploitation of the motion picture. These systems seem to be more
balanced, but only under the European understanding of the purpose of copyright law: protection of artistic creativity. The American solution, on the other hand, is consistent with the understanding of copyright law as a property-like right with primary commercial value.

The British copyright law seems to be inbetween these contrary systems, but provides in the field of copyright in motion pictures an insufficient solution: no copyright protection for creative contribution (as, for example, the German and the French copyright law) but no granting of complete copyright ownership to the producer (as the American copyright law) either. Rather the producer obtains a right with less protection than the copyright in "original works".
(D) DURATION OF COPYRIGHT PROTECTION

(I) AMERICAN COPYRIGHT LAW

Usually copyright protection is not perpetual. With the expiration the copyrighted work falls into the public domain and the work is free for use.

One of the major revisions of the Copyright Act of 1976 was the change of the expiration system. Under the Copyright Act of 1909 copyright protection began with publication or registration (in the case that the work was unpublished). Protection was granted for a period of 28 years with the possibility of a renewal for additional 28 years (i.e. at most 56 years), sec.24 Copyright Act of 1909.

17 U.S.C. sec.302(a) now provides that copyright generally expires 50 years after the author's death. This leads in most cases to a longer period than previously, which was one of the purposes of the extension. On the other hand, it became more difficult for potential users to determine the expiration date - the date of publication was easier to determine than the date of the author's death.

Motion pictures are, however, mostly excluded from this problem. The author of a movie is usually a production
company, i.e. a legal person, as an employer of a work made for hire. The general expiration rule is not applicable to legal persons. Therefore 17 D.S.C. sec.302 (c) contains an exception to the general rule: works made for hire are protected for a term of 75 years from the first publication or 100 years from their creation, whichever comes first.

Such an important change poses, of course, many problems. There is a difficult system of transitory provisions concerning works created before January 1, 1978. Additionally, problems with pre-existing works were posed by the departure from the distinction between (perpetual) common law copyright for unpublished works and federal statutory copyright for published works.

A complete listing of expiration dates under consideration of the transitory provisions is almost impossible, but some general observations concerning published motion pictures may be given:

(1) motion pictures first published before September 19, 1906 are without exception in the public domain,

(2) motion pictures first published between September 19, 1906 and December 31, 1977 are in the public domain, if the renewal is missing or invalid,

(3) motion pictures first published between January 1, 1950 and December 31, 1977 without valid renewal are protected for a period of 28 years,

(4) all other motion pictures, especially those created after January 1, 1978, are protected for 75 years.
This shows, that many motion pictures, especially those recently released or created, will be protected for quite a long time. Nevertheless a great number of movies are already in the public domain: those for which the second renewal was invalid. In 1954, for example, less than 50 percent of all motion pictures registered in 1927 were registered for a renewal term of 28 years. Generally, the possibility of renewal registration was used by only 15 percent of the persons authorized. Some writers estimate that more than 20,000 pictures are already in the public domain.

(II) OTHER LEGAL SYSTEMS

Because of their different concept most other legal systems determine the expiration date according to the author's death plus a certain number of years - similar to the recent American copyright law.

French copyright law grants copyright protection for a period of 50 years after the author's death, Art.21 para.2 French Copyright Act of 1965.

Unusually long is the expiration period of the German copyright law: life-time of the author plus 70 years, sec.64 para.1 German Copyright Act of 1965. Another peculiarity is the protection period provided by sec.94 para.3 German Copyright Act of 1965. The producer of a motion picture obtains a neighboring right on the film for
a period of 25 years from publication/creation of the movie.

By granting copyright in motion pictures to the producer the British copyright law had to use a duration system independent from the author's death. Unlike the general period of 50 years from the author's death, a special regulation for motion pictures grants copyright for a period of 50 years from registration or publication, sec.13 para.3 British Copyright Act of 1956.
(E) FORMAL REQUIREMENTS OF COPYRIGHT PROTECTION

(I) COPYRIGHT ACT OF 1909

The provisions of the Copyright Act of 1909 are still significant for the majority of existing motion pictures; they apply to all works published before January 1, 1978. There are three formal requirements:

1. copyright notice, secs. 10, 19, 21 Copyright Act of 1909,
2. registration, sec. 11 Copyright Act of 1909,
3. deposit of copies, secs. 13 - 15 Copyright Act of 1909.

(1) NOTICE OF COPYRIGHT

A notice of copyright had to be placed on every distributed copy of the work. Motion pictures usually affix the notice in a way that it has to be shown during the exhibition, i.e. at the beginning or at the end of the movie.

Notice of copyright required the word "Copyright" or "copr." or the letter "c" in a circle plus the copyright
proprietor's name plus the year of first publication, sec. 19 Copyright Act of 1909.

A failure to attach a (proper) notice to the work resulted in loss of federal statutory copyright protection and rendered it in the public domain. 255

(2) REGISTRATION AND DEPOSIT

Every copyright owner of a published work was required to apply for registration, sec. 10 Copyright Act of 1909, and to deposit two copies for the collection of the Library of Congress at the Copyright Office, sec. 13 Copyright Act of 1909. Unlike prior Copyright Acts the deposit necessarily combined with registration - could be made after publication, sec. 13 Copyright Act of 1909: "...shall be promptly deposited."

The failure to deposit copies did not - unlike failure of notice - result automatically in forfeiture of copyright. Loss of copyright was, however, possible after default upon demand of the Register of Copyright, sec. 14 Copyright Act of 1909. A mere delay of deposit - in the Supreme Court's leading case Washingtonian Pub.Co. v. Pearson a period of 14 months after publication could never lead to a loss of copyright. The extreme delay of 27 years, for example, did not lead to a forfeiture of copyright protection. Deposit (and registration) served to record, not to create, copyright.
(3) RENEWAL OF COPYRIGHT

As mentioned above, copyright protection under the Copyright Act of 1909 was granted for a period of 28 years. Under sec. 24 Copyright Act of 1909 only certain persons were allowed to register an extension of copyright, e.g. the author himself, in the case of his death the widow, widower or children of the author. An assignment of the right to renew copyright was possible, but courts required explicit assignments of renewal rights.

Furthermore the renewal had to be registered within one year prior to the expiration date of the first 28-year-term, sec. 24 Copyright Act. Any default of these procedures resulted in expiration of copyright protection.

Authors, copyright owners and other persons entitled often failed to apply for a renewal of copyright. Other renewals were invalid because the person applying was not entitled to do so. This was the case in Epoch Producing Corporation v. Killiam Shows, Inc., where the plaintiff applied for renewal of copyright for D.W. Griffith's "The Birth of a Nation" in 1942. The court found that Griffith, the sole author of the motion picture, assigned his copyright generally, but without mentioning renewal rights. This was not sufficient to enable the assignee to apply for renewal of copyright.
(II) COPYRIGHT ACT OF 1976

(1) NOTICE OF COPYRIGHT

17 U.S.C. sec. 401 still requires copyright notice in the way as under the previous act. The Copyright Office Regulations contain detailed regulations on affixation and position of notice: in the case of public performance the notice should appear whenever the work is performed, i.e. at the beginning or the end of the movie. Only in the case of an audiovisual work distributed for private use i.e. today mainly videocassettes - the notice may be affixed, additionally, on the container.

Unlike the previous Copyright Act, omission of notice does not immediately invalidate the copyright, 17 U.S.C. sec. 405 (a). Failure of notice can be healed by registration within five years, 17 U.S.C. sec.405 (a)(2).

Therefore it is no longer a general rule, that a work without proper copyright notice is in the public domain and unprotected.

(2) REGISTRATION

The revision of the Copyright Act did not abolish the requirement of registration. But 17 U.S.C. sec.408 (a) now provides expressly that failure of registration "...is not a condition of copyright protection." Lack of registration
may, however, have legal consequences: an action for copyright infringement requires registration, 17 U.S.C. sec.411 (a) - but registration is always possible prior to an infringement suit. It is generally of minor importance that statutory damages and attorney's fees cannot be awarded then, 17 U.S.C. sec.412.

(3) DEPOSIT: THE MOTION PICTURE AGREEMENT

Another change in the copyright law concerns the deposit of copies. Under the Copyright Act of 1909 deposit was necessarily combined with registration. Now these two requirements are theoretically separated. Failure of deposit may lead to the imposition of fines by the Register of Copyrights, but not to forfeiture of copyright, 17 D.S.C. sec.407 (d).

The number of copies to be deposited varies according to the nature of the work. The rules established by the Copyright Office of the Library of Congress prescribe that the deposit of one copy of a published motion picture for each purpose is sufficient.

The regulations provide furthermore that the Library of Congress and the depositor of an published motion picture can enter into an agreement permitting the return of deposited films. In fact, the Copyright Office established -under approval of the motion picture industry-
the Motion Picture Agreement, similar to a standard form contract.

Although this agreement is mentioned nowhere in the literature concerning motion pictures, it seems to be normal practice in the motion picture industry and existed also under previous Copyright Acts. The return of motion pictures is in the interest of both sides. Copyright owners save about $1,000, the cost of one print of an average theatrical motion picture, and the urgent need of prints for the exhibition in the first weeks after the release of the movie is also satisfied.

The Copyright Office, on the other hand, saves space in its collection; a print of a motion picture with a weight of about 50 pounds needs more space than other works. The Motion Picture Agreement prescribes that instead of depositing a copy of the "best edition", i.e. the film-reels ready for projection in theaters, but a "copy of archival quality" shall be sent to the Copyright Office. However, the deposit of a copy of archival quality is not mandatory. Therefore motion pictures on filmstrips are usually returned to the copyright owner. However, the latter may obtain the advantages of deposit (e.g. evidence in a lawsuit) by sending a videotape containing the movie to the Copyright Office. The agreement contains also provisions limiting performance, exchange, loan, reproduction etc. of deposited copies of motion pictures.
Among the nations of the world only the United States require the observance of statutory formalities like copyright notice, registration and deposit. It might be asked whether these requirements fulfil any defendable function or whether they should be eliminated. The legislative history of the Copyright Act of 1976 named four functions of copyright notice under the Copyright Act of 1909:

"(1) •••effect of placing in the public •••material that no one is interested in copyrighting;

(2) •••inform the public as to whether a particular work is copyrighted;

(3) •••identifies the copyright owner, and

(4) •••shows the date of publication."

Functions (1) and (2) have little application today, because the omission of notice does not necessarily lead to forfeiture of copyright. Function (4) is of less significance, because the duration of copyright protection no longer depend on the date of publication. Therefore only the identification of the copyright owner remains being served by the copyright notice. This and the fact that the notice requirement is no longer mandatory lead to the conclusion, that a justification of notice of copyright is very questionable under the present Act. Especially the argument that copyright notice was a requirement since
the first Copyright Act in 1790 is not at all conclusive. Also with regard to international collaboration in the field of copyright law the legislator should think this point over and abolish the notice requirement soon.

It is more difficult to argue against the requirements of registration and deposit. According to the Copyright Office there are values to copyright owners as well as to potential users: an official record, proving the existence of works and constituting prima facie evidence of these facts are helpful in the case of copyright infringement litigation.

On the other hand, there are certain disadvantages: the Copyright Office is required to expend an enormous effort to handle all registrations and deposits. The fact that both requirements are not mandatory lowers the potential values.

With regard to motion pictures the requirement of deposit is almost abolished by the Motion Picture Agreement.

Because of the commercial power of the motion picture industry the values of registration are of less significance in this sector: the entertainment industry can usually deliver sufficient evidence in the case of an infringement suit itself.

The conclusion cannot be that the requirements of registration and deposit should be abolished entirely. But
the observations and the practice concerning motion pictures make registration and deposit superfluous with regard to those works.
(F) FAIR USE: THE VIDEOCASSETTE CONTROVERSY

As a result of the enormously growing market for videocassette recorders [VCR] there is a lively discussion in how far videotaping infringes copyright or might constitute fair use. The legal consequences of taping motion pictures from television broadcasts or from other videocassettes is probably the most discussed subject in American copyright law currently, especially after the Supreme Court's decision in the so called Betamax case.

(I) THE DOCTRINE OF FAIR USE APPLIED TO MOTION PICTURES

The doctrine of fair use is one of the most significant fields of copyright law and - as one court pointed out - "...the most troublesome in the whole law of copyright." Fair use, now for the first time given express statutory recognition, provides that specific uses, which would otherwise infringe the exclusive rights of the copyright owner does not posess the exclusive right to such a fair use.

Previously fair use was a judge-made rule of reason and the revision of the Copyright Act in 1976 did not
intend to change, rather to "...restate the present judicial doctrine of fair use ..."

17 U.S.C. sec.107 contains the general rule of fair use, while 17 U.S.C. secs.108 to 118 list some specific exemptions from copyright infringement. Most of these provisions are not applicable to motion pictures.

Motion pictures are explicitly mentioned in 17 U.S.C. sec.110 (1). This provision deals with performance and display of works for certain -educational purposes. The performance of unlawfully made copies can - provided the person responsible is not in good faith - never be an exemption from infringement. However, the scope of application is very narrow: only "face-to-face teaching activities" are included.

17 U.S.C. sec.107 mentions four factors which are supposed to be considered in the determination whether specific uses constitute fair use:

1. purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. nature of the copyrighted work;
3. amount and substantiality of the portion used; and
4. effect upon the plaintiff's potential market.

These factors will be examined with special regard to motion pictures and the use of VCRs.

17 U.S.C. sec.107 (1) mentions the commercial nature of the use. Commercial use does not necessarily exclude
fair use, but is - according to the Supreme Court presumably an unfair exploitation. That does not mean that any non-commercial use constitutes fair use. Using a copyrighted work for the purposes of "criticism, news reporting, teaching, scholarship or research" usually constitutes fair use. Although being generally a non-commercial use the videotaping of motion pictures for private use fulfills none of these requirements. Rather it serves the purposes of entertainment and convenience and was therefore held to tend against a fair use exemption.

For the second factor - nature of the copyrighted work - it should be taken into consideration whether a work is unpublished or circulated in limited copies - then fair use is less likely. An aspect in favor of fair use might be whether the original work serves educational purposes or whether it is of informational nature (this has to be distinguished from the first factor, where the purpose of the copy, not of the original is decisive). Works considered to be "entertainment" - motion pictures usually fall into this category - are less likely to be accepted. And the Supreme Court said obiter that "copying a news broadcast may have a stronger claim to fair use than copying a motion picture." Therefore the second factor can generally not be used by VCR owners copying motion pictures as an argument in favor of fair use.

The application of the third factor seems to lead to the same result. Professor Nimmer, author of the leading
treatise on copyright law and recognized as an authority, treats the factor "amount and substantiality of the portion used" with only nine lines. He merely states that, whatever the use, a fair use may not be constituted if the entire work is reproduced. If this is true copying of a motion picture on videotape, which covers necessarily the entire movie, would be generally excluded from the fair use exemption. But then the statements of the House Report allowing expressly the duplication of motion pictures made before 1942 for archival purposes would be useless. Therefore the opinion of the Court of Claims, calling remarks like the one of Professor Nimmer an "overbroad generalization and rejected by years of accepted practice", seems to be more appropriate. Nevertheless this factor is also not favorable for VCR owners taping motion pictures.

The fourth and last factor - effect upon the potential market of the plaintiff - is regarded to be the most important and decisive. The potential economic impact of copying motion pictures by the means of VCRs depends mainly on the source from which the duplicate is made. There are two sources: copying from television and copying from other videocassettes, whether acquired by rental or by sale. The copyright owners of motion pictures, the majors or independent production companies, are profiting financially from both sources: they license the television broadcasts (the license fee depends on the potential number of viewers)
and they are selling and leasing pre-recorded videocassettes themselves. The potential impact feared by the motion picture industry is mostly a decrease of box office receipts. But the fact that the copyright owners of motion pictures are able to negotiate and determine the price for television rights and videocassette rentals and sales shows that they can balance a potential loss in one market by raising prices in other markets. Additionally, the usual practice of copying a motion picture and showing it to family and friends, has only a minimal effect upon the traditional movie market.

Nevertheless there are exceptions. The duplication of a rented or sold videocassette might violate contractual obligations imposed by lessor or seller. Sophisticated machines make it very easy today to videotape a great number of motion pictures in a relatively short time and it is difficult to control whether this is purely for private use or for commercial use - with a more significant effect upon the market of the copyright owner of movies.

(II) THE BETAMAX DECISION

A landmark case with a potential impact on the question whether videotaping motion pictures might constitute fair use is the so called Betamax case. The question there was whether the private use of VCRs for taping television programs off the public airwaves was an
infringement of copyright and whether a manufacturer of VCRs was liable for contributory infringement. The District Court decided in favor of the manufacturer, holding that there is a special exemption from copyright infringement for off-the-air-taping for private use besides fair use. The Court of Appeals reversed by denying an exemption from copyright infringement and was finally reversed by the Supreme Court, who granted VCR owners the right of fair use for certain activities and hold the manufacturer not liable.

The Supreme Court relied mostly on two findings:

(1) although the defendant (i.e. Universal and other majors) possessed copyright on a large number of motion pictures, their market share in the total spectrum of television programming was below 10 percent. A substantial number of copyright owners has no objections to have their programs taped to be watched at a later time (so called authorized time-shifting).

(2) Even unauthorized time-shifting is not necessarily an unfair use, because the harm to the potential market is only minimal. Therefore the Supreme Court held VCRs capable of noninfringing uses and the manufacturer not liable for contributory infringement. This holding is, however, restricted to the taping of broadcasts on the public airwaves and for time-shifting purposes. The practice of building a "film library" by taping and collecting movies was held to be of minor importance.
(III) EFFECT OF THE BETAMAX DECISION AND POTENTIAL SOLUTIONS

The impact of the Betamax decision on the question whether the videotaping of motion pictures constitutes fair use is unfortunately very narrow. The Supreme Court failed to provide a general guideline on the legality of home-videotaping.

At first, the decision does not cover the taping of subscription television broadcasts (so called pay-TV). While the availability of recent motion pictures is limited on the public airwaves, there are several channels specialized on the broadcasting of motion pictures, e.g. Home Box Office [HBOJ, Cinemax and Showtime. The arguments used by the Supreme Court in the Betamax case are not applicable to these programs.

Furthermore 'there was a significant change in viewing practices and the use of VCRs between 1978 - i.e. at the time of the first trial before the District Court, whose findings were used by the Supreme Court in 1982 - and 1986. The number of VCRs in use in the United States increased from 800,000 in 1978 to 15 million in 1984. Estimates for the following years expect a total number of 24 million VCRs in 1985, 34 million in 1986 and 45 million in 1987. Although this enormous increase of VCRs is not itself evidence for an increase of taping copyrighted motion pictures, it might be presumed that more movies are copied
from television or other sources. So it is likely that the Supreme Court might have to review its decision in the near future.

All three Betamax decisions, i.e. in all three instances, caused an immense flood of comments, criticisms and proposals. It is almost impossible to give an overview over all opinions. Rather it might be remarked that the Supreme Court failed to provide legal security and predictability; the public has no guidelines whether it has to fear infringement suits after videotaping motion pictures, whatever the source is.

The primary aim is therefore a solution providing predictable results. The current copyright law, as applied by courts, is obviously not sufficient. Some writers favor a legislative solution, i.e. they ask Congress to regulate the subject matter "videotaping for private use". It is very likely that Congress would have acted, if the Supreme Court would have affirmed the decision of the Court of Appeals (i.e. holding the use of VCRs in this case not to be covered by the fair use exception). This shows that the Betamax case deals not only with legal - especially copyright law - questions, but has risen to a political issue.

Additionally there are problems of practical nature: videotaping might be prohibited in certain cases, but it is impossible to control in which way VCR owners use their machines. And prohibiting the sale of VCRs and blank videotapes is completely unrealistic.
A potential solution should therefore allow VCR owners to tape motion pictures to a greater extent than under the Betamax doctrine. The current Copyright Act cannot provide such a solution. Rather Congress has to take action.

Allowing the videotaping of motion pictures generally might neglect the financial interests of copyright owners. Although some writers suggest that Congress should exempt home videorecording generally from copyright infringement, a more balanced solution, taking into account the interests of both parties, seems to be more appropriate. This means, videotaping for private use should be allowed, but the copyright owners should be compensated.

Two kinds of compensation were suggested: several bills of Congress proposed to impose a tax on the sale of video recording equipment, others favored a tax on blank videotapes.

The German Copyright Act of 1965 originally imposed a tax only on equipment capable of copying, i.e. photocopy machines, taperecorders and VCRs, former sec.53 para.3 German Copyright Act of 1965. The Copyright Act was recently amended and contains now, additionally, a levy on blank tapes, sec.54 para.1 German Copyright Act of 1965.

Both taxes are imposed on the manufacturer, sec.54 para.1 German Copyright Act of 1965. Originally the levy was dependent on the price of the machine, the maximum was 5 percent of the sale price. The amended Act imposes a
tax of 18 Deutschmark (about $8) for the sale of a VCR, and 17 Pfennig (about 7.5 cents) for each hour on a videotape, sec. 54 para. 4 German Copyright Act of 1965.

Considering the situation in the United States after the Betamax decision a levy on blank tapes seems to be the fairest solution. A tax on VCRs - the charge is estimated to be about $50 to $100, i.e. approximately 20 percent of the sale price - ignores that a VCR can be used for noninfringing uses. The levy on blank tapes takes into consideration that people who collect taped material need to buy more videotapes. The charge would then be more appropriate. However, the estimated fee of $1 or $2 per videotape is unreasonable high compared to the average price of a videotape of $5. The levy imposed by German law - about 1.5 percent of the sale price of the videotape - is reasonable and would effect the market minimally.

Another problem of imposing a fee is to determine who should collect and distribute the fee. In Germany collecting societies, controlled by the government, fulfil this function.

In the United States there are several choices: the Copyright Royalty Tribunal, organizations like ASCAP (for the use of copyrighted music) or the Copyright Clearance Center [CCC] (for photocopying of copyrighted material). The choice of an organization should be negotiated between Congress and the motion picture industry.
An advantage of the highly concentrated movie industry is, that the distribution of collected fees is less difficult than, for example, in the sound recording industry. Television ratings may provide a considerable basis for the assessment of a distribution key. However, it cannot be expected that the distribution of the fees reflects exactly the amount of videotaped motion pictures. But it can be expected that the disbursements provide a more or less fair distribution.

A reasonable fee, i.e. less than 10 percent of the sales price, currently about 50 cents compared to a price of $5 per videocassette, has the advantage that VCR owners will be allowed to use their machines without fear of copyright infringement suits and that copyright owners get at least some compensation for their potential loss. It is not a perfect solution, but seems to be the fairest under the current situation on the videomarket.

A levy on blank tapes combined with an unrestricted use of VCRs for private purposes protects the interests of the public in a better way than any other proposal and should therefore be adopted by Congress.
(G) TRANSNATIONAL PROBLEMS WITH MOTION PICTURES

(I) INTERNATIONAL CONVENTIONS

(1) REVISED BERNE CONVENTION [RBC]

The most important international convention in the field of copyright law throughout the world is the Revised Berne Convention [RBC]. The RBC is ratified by the vast majority of the industrialized nations but the list of 76 nations does not contain the United States, the Soviet Union and the People's Republic of China. Nevertheless the RBC might be applicable to American nationals: Art.3 para.1 (b) RBC provides that the convention is also applicable to the works of authors who are not nationals of RBC member countries in the case that their work is first (or simultaneously) published in a country of the Union. Therefore a simultaneous publication in the United States and, for example, the United Kingdom makes the work eligible for protection under the RBC, so called "back door to Berne".

The underlying principle of the convention is national treatment, i.e. member countries are obliged to grant works of foreign authors the same protection as those of domestic
authors, Art. 5 para. 1 RBC. Copyright protection does not depend on the fulfilment of any formality, Art. 7 para. 2 RBC, which means that member states are prohibited from imposing any formal requirement. Certain minimum rights, depending on the nature of the work are guaranteed by the RBC. Art. 7 para. 1, 6 grant protection generally for a period of at least 50 years after the death of the author.

Motion pictures, referred to as "cinematographic works to which are assimilated works expressed by a process analogous to cinematography" are expressly protected. Cinematographic works are frequently mentioned and there are several provisions providing a special treatment of these works: member countries may protect cinematographic works for a period of fifty years from first publication, Art. 7 para. 2 RBC. Art. 14bis RBC contains several rules and presumptions concerning the protection of cinematographic works; for the determination of ownership of copyright Art. 14bis para. 2 (a) points to the law of the country where protection is claimed.

Since the enactment of its original version, in 1886, several revisions and amendments have made the RBC to a useful and workable instrument of international copyright law.
(2) UNIVERSAL COPYRIGHT CONVENTION [UCC]

More significant for works of American authors and copyright owners in the field of international copyright protection is the Universal Copyright Convention [uec], which the United States has ratified. This convention was initiated by the United States, because several provisions of the RBC incompatible with American copyright law prevented from the ratification of the RBC.

The UCC provides protection of copyrighted works generally in the same way as the RBC: principle of national treatment, Art.II para.1 UCC. Minimum rights are also recognized, but the scope of rights is more narrow than the one provided by the RBC. Formalities are not prohibited, rather they can be required by a member country, Art.III para.1 UCC. The minimum protection period is generally 25 years from the author's death, Art.IV para.2 (a) UCC compared to 50 years from the author's death by the RBC.

In order to guarantee the participation of RBC member countries Art.XVII UCC was introduced: no Berne country can renounce the RBC and rely only on the UCC in its copyright relations with Berne Union members, so called Berne safeguard clause.

This clause, the more detailed provisions of the RBC, the broader protection of works and the fact that more countries are RBC members make the Berne Convention predominant over the DCC.
(3) POSSIBILITIES OF RATIFICATION OF RBC BY THE UNITED STATES

American copyright proprietors as well as copyright consumers and government representatives are realizing that American interests in the protection of copyrighted works are insufficiently guaranteed by the UCC. The discussion on a potential ratification of the RBC has become very lively recently. The withdrawal of the United States from participation in the UNESCO - the UCC is administered through this international organization - probably had an accelerating effect on this discussion.

Generally all parties involved strongly recommend the adherence to the RBC. The discussion mainly centers around the compatibility of the American Copyright Act of 1976 in the light of the RBC provisions. Nine provisions are held to be incompatible. Some provisions are less significant, but there are still some fundamental obstacles: the most important is that 17 U.S.C. sec.401 requires notice of copyright, which is prohibited by Art.5 para.2 RBC. Dr. Bogsch, executive director of the World Intellectual Property Organization [WIPO], proposes to solve this problem by making notice (and registration) optional for foreign works. On the first view this seems to be a proper solution, but it is likely that it would lead to confusion in the American registration system.
It is difficult to understand why now - after the centennial of the original Berne Convention - a membership of the United States is becoming so urgent now. With the enactment of the Copyright Act of 1976 Congress had the chance to make the Copyright Act compatible with the RBC requirements, since the revision in 1976 was the result of a discussion over more than two decades. Despite some changes, especially the expiration system, which is now compatible with the RBC requirements, the legislator failed to provide a basis for a potential RBC membership. There are, for example, good arguments against the imposition of formal requirements, but instead of abolishing these requirements completely Congress chose another way: formalities are still required, but not as a condition of copyright protection.

The motion picture industry was previously not in favor of an adherence to the RBC. The majors have subsidiaries with a relatively strong market power in most countries of the world; these subsidiaries guarantee an optimal exploitation in the respective markets. American movie producers might feel that American copyright law provides the best protection of their interests. Under some European systems the rights of the producer are limited, e.g. he is usually not the author or copyright owner, rather a licensee with certain rights necessary for the exhibition of the movie.
Recently also the motion picture industry seems to recommend that the United States becomes a member of the Berne Union. A reason might be that they feel that the longer protection period and the number of minimum rights which are granted to the copyright owner protect their interests better than e.g. the UCC.

Therefore the choice is obvious: either Congress holds some principles of American copyright law far too significant to abolish them - and renounces a potential adherence to the RBC - or it makes the Copyright Act compatible with the RBC by amending certain provisions and opens the way to the Berne Convention. The growing significance of transnational copyright transactions, especially in the motion picture industry, makes the second choice more desirable, although the chances for this solution are currently minimal.

(II) TOPICS NOT COVERED BY INTERNATIONAL CONVENTIONS

Both the RBC and the UCC are working with the principle of national treatment. This doctrine guarantees foreign copyright owners protection which does not differ from the protection of domestic copyright owners. But neither convention determines the applicable law if two copyright laws are in conflict. The diversity of copyright laws with often basic differences contains a potential for conflict cases. Because these interesting situations are
not covered by international conventions each country has to think about own solutions. However, this field is highly complicated and deserves much more than the following general observations.

(1) LAW APPLICABLE TO ASSIGNMENTS OF COPYRIGHT

Copyright laws differ on the question of the validity of copyright assignments. 17 U.S.C. sec.201 (d)(1) allows the transfer of copyright without restrictions. Many other countries impose restrictions on the transferability of the whole copyright. Which law is, for example, applicable in the case that a German director and copyright owner of a motion picture wants to enter the American market? Would he be allowed to transfer his copyright, which is allowed by the American Copyright Act, or would he need to transfer certain rights, i.e. according to German copyright law?

Assignments are generally contracts and it was therefore suggested to apply the ordinary choice of law rule for contracts. This opinion does not take into consideration the special nature of copyright law, especially in some European countries, which treat rights of authors of artistic works very different from ordinary property rights. It might, for example, be asked, if parties should be free to choose the applicable copyright law. Many mandatory provisions in the field of copyright law intend to protect the weaker party. In the motion
picture industry the market is highly influenced by entertainment giants. They have usually a bargaining power sufficient to introduce a choice of law clause in the contract which favors their interests.

A fair choice of law rule for copyright assignments would be to apply the law of the state where the relationship between assignor and assignee (or grantor and grantee) is centered (center of gravity theory) with special regard to the place where the grantee's business is located. Although this is usually the place of business of the stronger party (in the example it would be the motion picture company in the United States) this solution leads to predictable results and avoids that the stronger party can enforce the application of the law more favorable to him.

(2) CONFLICT OF COPYRIGHT LAWS

One of the most difficult but also most interesting questions in the field of international copyright law is the determination of the applicable law in conflicts between copyright laws outside the scope of international conventions. Problems arise in the case of certain rights, recognized in one country but not in the other country and not mentioned as a minimum right in the RBC or DCC.

The most important question, however, is the determination of authorship and ownership of copyright in
cases with contacts to different states. There might be the situation that the work of a French scriptwriter, which was already published in France, is wanted by an American motion picture producer for a movie production. Under French law, Art.14 para.2 French Copyright Act of 1957, the scriptwriter would be among the authors (and copyright owners) of the motion picture while under American copyright law only the producer will be recognized as author and initial copyright owner.

The international conventions do not say who is the copyright owner. Rather Art.14bis para.2 (a) RBC provides that the legislation of the country where protection is claimed may determine the ownership of copyright in a cinematographic work. If the country does not do so the RBC fails to provide a solution, although Art.14bis para.2 (b) RBC grants certain rights to the movie producer for the case that authors contributing to the work are recognized as copyright owners.

Professor Ulmer wants to apply the law of the protecting country, i.e. the law of the territory for which protection is demanded. The assessment of authorship of a motion picture would therefore depend on the market in which the movie is exploited. Especially motion pictures are often shown all over the world and each time another legal system would determine authorship and ownership of copyright, often with a different result.
Another solution would guarantee equal treatment all over the world: application of the law of the origin of the work, i.e. where it was published first. Besides the advantage of uniformity it would also provide the recognition of "acquired rights" (droits acquis) of the author under his national copyright law.

This would mean for the example mentioned above, that the French scriptwriter would be co-author of the motion picture produced in the United States. The production company does not have to fear that they lose important rights for the exploitation of the movie; like many other Copyright Acts Art.17 para.3 French Copyright Act of 1957 contains a wide presumption in favor of the motion picture producer. It might even be that another country with a potential market grants rights to scriptwriters to an extent which would seriously disturb the exploitation of the motion picture there.
(H) CONCLUSION

The field of motion pictures in copyright law is very wide and cannot be treated completely here. However, some interesting observations are possible.

The definition of motion pictures in the American Copyright Act of 1976 is very clear and does fortunately not require proof of creativity.

It is still unclear whether motion pictures on videotapes are protected prior to 1978. The Apollo doctrine is still applicable, but both the Copyright Act of 1976 and the look to some other legal systems show that there is no convincing argument to refuse copyright protection to motion pictures on videotape.

There are four major functions of the motion picture industry: financing, production, distribution and exhibition. The major studios controlled all four functions for several decades. Beginning in 1950 they lost two of them: production and exhibition. Today the motion picture industry is highly concentrated and influenced by the "majors". A movie is financed and distributed by a major, produced by an independent production company and exhibited by movie theater chains. The primary profit participant is
mostly one of the seven major companies, most of which are subsidiaries of huge entertainment conglomerates.

Author of a motion picture – usually a result of a work made for hire – is the production company. This differs basically from the solution of most other legal systems, where creativity is held to be essential. There mostly director, editor and cameraman are considered to be authors of a motion picture. In the United States only "credits" honor the creative effort of artists.

The copyright is often transferred completely to the major. An assignment of the entire copyright is possible under American copyright law while other legal systems impose restrictions.

Motion Pictures are works made for hire and therefore protected for a period of 75 years from the first publication or 100 years from creation, whichever comes first. The change of the expiration system in 1976 caused some difficult transitory provisions. However, most motion pictures are protected for quite a long time.

The significance of formal requirements for copyright protection was diminished but not abolished by the revision of the Copyright Act in 1976. Copyright notice fulfills almost no function today and should be abolished. Registration and deposit of copies are probably useful for certain kinds of works. The Motion Picture Agreement leads to the situation that movies are generally excluded from
the deposit requirement. Therefore formalities are superfluous with regard to motion pictures.

It is uncertain whether home videotaping of copyrighted motion pictures constitutes fair use. The scope of the Betamax ruling is relatively narrow and only of limited application to motion pictures.

The interests of copyright owners, but mainly of VCR owners are respected at best by imposing a reasonable tax on the sale of blank videotapes. Allowing home videotaping generally will promote legal security for a considerable part of the American society.

In the field of international copyright law the Revised Berne Convention is predominant over the Universal Copyright Convention. Generally it is strongly recommended that the United States should become a member of the Berne Union. Rather the chances are very small; some provisions of the Copyright Act of 1976 are not compatible, especially those requiring certain formalities. Because an amendment of these provisions is unlikely the chance of a potential adherence to the Revised Berne Convention is currently minimal.

None of the conventions says which law is applicable to assignments of copyright. Usually the law of the place where the assignee's (or grantee's) business is located should be applicable.
In the conflict of copyright laws, e.g. in the determination of authorship, the best solution is to apply the law of the country where the work was first published.
FOOTNOTES:


2) On April 14, 1894, in New York City; see D.COOK, A HISTORY OF NARRATIVE FILM 7 (1981).

3) 122 F.2d 240 (3rd Cir 1903).

4) Id.

5) Id. at 242. The court defined motion pictures as a series of pictures "...in rapid succession, on a single highly sensitive celluloid film...each of which was a shade different from its predecessors and successors...may be thrown on a screen in rapid succession so as to give the effect of actual motion...", id. at 240. See also American Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262 (D.N.J.1905) agreeing with Edison v. Lubin and defining motion pictures as "...[a] series of separate pictures on a positive film from a number of negatives taken by a camera, and designed for use in a moving picture machine, and which, taken together, tell a connected story..."


11) Id. at 56.

12) Id.

13) Id. See also M.NIMMER, NIMMER ON COPYRIGHT 2.09 [C]


15) I.e. the Federal Republic of Germany.


20) Id.


22) See Art.70 - 87 German Copyright Act of 1965; Ulmer, supra note 21, at 165.

23) Cf. VON GAMM, supra note 19, Art.95 note 1.


25) See Art.3 French Copyright Act of 1957.


27) Id. at 153.

29) Id. Art.1: "...autres oeuvres consistant dans des séquences animées d'images, sonorisées ou non, dnommées ensemble oeuvres audiovisuelles."

30) Cf. supra p.5.

31) 188 U.S. 239 (1903).

32) Id. at 251.

33) The date the Copyright Act of 1976 became effective, see sec. 102 of the Transitional and Supplementary provisions of the Copyright Act of 1976, 90 Stat. 2598.

34) Cf. 17 U.S.C. sec.101: "...regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."


36) 209 U.S. 1 (1908).

37) Id. at 12.

38) Id. at 17.

39) Id. at 18.


41) See only Goldstein v. California, 412 U.S. 546, 566 (1972).

42) The copyright law relating to sound recordings was modified prior to the revision of 1976 by the Sound Recording Amendment, Act of October 15, 1971, P.L.92-140, 85 Stat. 391.

43) NIMMER, supra note 13, at 2.02.

44) 412 U.S. 546.

45) Because they were fixed before February 15, 1971; See supra p.10.


47) Id.

48) Id. at 566.
49) Cf. NIMMER, supra note 13, 2.10 [B][2] n.74.

50) N.Y. Penal Law, sec. 441-c; Cal. Penal Code, sec.653 (h).


52) 222 U.S. 55 (1911).

53) Id. at 61.


56) Cf. NIMMER, supra note 13, at 2.09 [D][2].

57) 185 U.S.P.Q. 830.

58) Id. at 832.


60) Id. at 52.

61) See supra note 36.


63) Id. at 10.

64) See supra note 24.


66) For the current economic significance of videotapes in the motion picture industry see infra p.67.
67) See the numbers published by the Motion Picture Association of America (MPAA) reprinted in: Atlanta Journal/Constitution, Dec. 7, 1985, at I-B.


69) See T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW, 2.03 (1985).


71) See COOK, supra note 2, at 7.

72) Id. at 10.

73) Id. at 11.

74) Id. at 10.

75) Id. at 31.

76) Id.

77) Id. at 35.

78) Id.

79) Id. at 37.

80) 522 F.2d 737 (2d Cir. 1975).

81) This was significant for the question whether Griffith was author of The Birth of a Nation and therefore unlike the defendant - allowed to renew the copyright, see infra p. 54.

82) 522 F.2d 737, 740.

83) Lilian Gish, one of the main actresses, said: "Only Griffith knew the continuity of The Birth of a Nation in its final form." See COOK, supra note 2, at 76.

84) Id. at 243.

85) Id.
86) I.e. MGM, Paramount, Warner Brothers, Twentieth Century Fox and RKO, which ceased production in 1953, See id at 269 - 277.

87) I.e. Universal, Columbia and United Artists, see id at 277 - 281.

88) Id. at 267.

89) Cf. YELDELL, supra note 70, at 1.01 [B]; COOK, supra note 2, at 267.

90) See YELDELL, supra note 70, at 1.01 [B].

91) Cf. COOK, supra note 2, at 269.

92) Average between 1930 and 1945: 500 movies per year; distribution of features by the most important companies in 1983: 173 movies, including 28 reissues; see INTERNATIONAL MOTION PICTURE ALMANAC, 33 A (R. Gertner ed. 56 ed. 1985).

93) Cf. YELDELL, supra note 70, at 1.01 [B].

94) 334 U.S. 131 (1948).

95) Id. at 141.

96) Antitrust problems are not subject of this thesis and will only be treated to the extent that they are significant for copyright purposes.

97) 334 U.S. 161.

98) See YELDELL, supra note 70, at 1.01 [B] n.2.

99) Cf. COOK, supra note 2, at 411.

100) Cf. INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 30 A.

101) See YELDELL, supra note 70, at 1.01 [B].

102) Id.; see also COOK, supra note 2, at 637.

103) Cf. BROWN & DENICOLA, supra note 40, at 392; SELZ & SIMENSKY, supra note 69, at 1.05, which both do not include Disney/Buena Vista in the listing of major studios.

104) See COOK, supra note 2, at 279.

105) Id. at 277, 278.
106) Id. at 637; INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 505, 506; see also SELZ & SIMENSKY, supra note 69, at 1.05.

107) Cf. COOK, supra note 2, at 279.

108) Id. at 280.

109) See BROWN & DENICOLA, supra note 40, at 392; SELZ & SIMENSKY, supra note 69, at 1.05.

110) Cf. COOK, supra note 2, at 275.

111) Cf. SELZ & SIMENSKY, supra note 69, at 1.05; See also COOK, supra note 2, at 276; YELDELL, supra note 70, at 1.01.

112) Cf. COOK, supra note 2, at 276; INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 501.

113) See INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 491; COOK, supra note 2, 44.

114) Cf. COOK, supra note 2, at 44 n.*.

115) Id. at 637. Mel Brooks' Silent Movie satirized in 1976 the business methods of this corporate giant as "Engulf and Devour". The motion picture was not distributed by Paramount, rather by Twentieth Century Fox.

116) Id. at 273.

117) Id. at 42.

118) See INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 507.

119) Id.; COOK, supra note 2, at 637.

120) See COOK, supra note 2, at 274.

121) Id. at 280.

122) See INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 484.

123) Id.

124) Id.

125) Id. at 483; COOK supra note 2, at 42.
126) Cf. COOK, supra note 2, at 269 - 271.

127) See INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 484.

128) Id. at 483.

129) See generally Atlanta Constitution, March 30, 1986, at I-E.

130) Cf. YELDELL, supra note 70, at 1.01 [BJ; COOK, supra note 2, at 637.

131) Id.

132) See INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, 34 A. The inflation of production costs is treated infra p.30.


134) See SELZ & SIMENSKY, supra note 69, at 2.06.

135) Id. at 2.03.

136) Id.

137) Cf. Atlanta Journal, December 7, 1985, I-B.

138) See Baer, supra note 133, p.5 col.3; Bernstein, supra note 133, p.5 col.1.

139) Supra note 133, p.5 col.4,5.

140) The complicated process of film producing is treated at length in: YELDELL, supra note 70, at 1.03 - 1.07. Only some of these aspects are of significance for the subject of this thesis.

141) See supra p.21,22.

142) See YELDELL, supra note 70, at 1.01 [BJ; INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 484.

143) Id.

144) Cf. YELDELL, supra note 70, at 1.01 [BJ.

145) Id.
146) Id. at 4.01.
147) Id. at 4.02.
148) I.e. Burbank Studios, MGM, Paramount, Twentieth Century Fox and Universal, id. at 4.03.
149) Id.
150) Id.
151) Id.
152) For a detailed description of these agreements see id. chapters 4 - 7; see also the sample agreements reprinted in: YELDELL, supra note 70, appendices 1 - 15; SELZ & SIMENSKY, supra note 69, Sample Forms 2 - 20.
153) Cf. YELDELL, supra note 70, at 1.01 [B].
154) See COOK, supra note 2, at 75.
155) See SELZ & SIMENSKY, supra note 69, at 2.03.
156) See INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 34 A.
158) See YELDELL, supra note 70, at 18.02 [C][1]; Baer, supra note 133, p.5 col.3; Bernstein, supra note 133, p.5 col.1.
159) Cf. YELDELL, supra note 70, 18.02 [C][1]; Hyde, How Foreign Distribution Works, Variety, Febr. 19, 1986, p.18 col.1.
160) See supra p.28, and the example given by Baer, supra note 133, p.5 col.4,5.
161) See YELDELL, supra note 70, at 1.08 [C].
163) Id.
164) MPAA members are the seven majors plus Embassy Pictures and Orion Pictures.

166) I.e. up to twenty national and about ninety local distributors, see ide

167) Id.

168) See supra p.31.


170) 334 U.S. 131.

171) Id. at 157 n.11.

172) See COOK, supra note 2, at 44.

173) As of 1984, see YELDELL, supra note 70, at 1.08 [B] n.4; see also for a list of state statutes: Bartasi, supra note 169, at 105 n.60.


175) New forms of exhibition - mainly television broadcasts and the extremely growing videocassette market - is treated infra p.67.


179) Cf. YELDELL, supra note 70, at 1.08 [B].
180) See INTERNATIONAL MOTION PICTURE ALMANAC, supra note 92, at 28 A. Cf. the number of theaters in Germany: 3,613, ide at 66-4.894 in France, ide at 660.

181) Cf. YELDELL, supra note 70, at 1.09.

182) See generally Baer, supra note 133, p.5 col. 4-6.

183) Id.


186) 522 F.2d 737.

187) Id. at 740.

188) Id. at 748.

189) See supra p.20, 21.

190) Cf. YELDELL, supra note 70, at 1.01 [B].

191) Id.


193) See the sample agreements in: YELDELL, supra note 70, Appendices 1 [Scriptwriter], 5 [Certificate of Authorship], 8 [Theatrical Performer] and 13 [Director]; SELZ & SIMENSKY, supra note 69, Sample Forms 5 [Screenplay Employment Agreement], 8 [Director's Agreement], 13 [Performer's Agreement], 14 [Actor's Agreement] and 17 [Composer's Agreement].

194) See H.R.Rep.1476, 94th Cong., 2d Sess.120.


196) Id.


198) See NIMMER, supra note 13, at 5.03 [B] [1] [a].
199) See H.R.Rep. 1476, 94th Cong., 2d Sess. 120; a "derivative work" - as defined by 17 U.S.C. sec. 101 - is based upon preexisting material, the author of the original (e.g. the play) remains copyright owner and the author of the derivation (e.g. the movie producer) obtains copyright protection only for the material he contributed, 17 U.S.C. sec. 103 (b).

200) Id.: "...this is clearly a case of independent authorship."

201) One of the reasons for the purchase of MGM/UA by Turner Broadcasting System [TBS] was, that the new owner is now copyright owner of 3850 motion pictures and is free to use them, especially on its own television station WTBS; see Atlanta Constitution, March 30, 1986, at I-E.

202) See YELDELL, supra note 70, at 1.08 [B].

203) Id.

204) See SELZ & SIMENSKY, supra note 69, at 8.01.

205) Cf. YELDELL, supra note 70, at 14.01 [A].

206) Cf. SELZ & SIMENSKY, supra note 69, at 8.05.

207) See YELDELL, supra note 70, at 14.01.

208) Id.

209) See supra p.29 for the role of the guilds.


211) Cf. YELDELL, supra note 70, at 14.01 [E].


213) Id. at 51.

214) For the German copyright law see ide at 197.

215) For the French copyright law see ide at 201.


217) Art.14 para.1 French Copyright Act of 1957.
218) See also DIETZ, supra note 212, at 54.
219) See Art.17 para.1 French Copyright Act of 1957.
220) See sec.15 para.2 French Copyright Act of 1957.
221) See sees. 88 - 94 German Copyright Act of 1965.
222) See also DIETZ, supra note 212, at 53.
223) Id.; BOHR, DIE URHEBERRECHTSBEZIEHUNGEN DER AN DER FILMHERSTELLUNG Beteiligten [Relation of persons involved in the creation of a motion picture under copyright law] 57 (1978).
224) See BOHR, supra note 223, at 62.
225) Cf. DIETZ, supra note 212, at 53.
226) See sec.88 German Copyright Act of 1965.
227) Cf. DIETZ, supra note 212, at 53.
228) See the definition of neighboring rights, supra p.6.
229) See also DIETZ, supra note 212, at 53.
230) Sec.64 para.1 German Copyright Act of 1965.
231) Sec.94 para.3 German Copyright Act of 1965
232) See DIETZ, supra note 212, at 55.
233) Id.
234) Id. at 57.
235) Id. at 55.
236) Id. at 56; see also infra p.51.
237) See DIETZ, supra note 212, at 58, 59.
238) See supra p.42-46.
239) See also DIETZ, supra note 212, at 54.
240) Reason for this time limit is that u.S. Const. Art.I, sec.8, cl.8 grants copyright only for "limited times".

242) These are two reasons given by the legislat~ve history for the change of the expiration systemi ~ H.R.Rep. 1476, 94th Congo 2d Sess. 135.

243) See 17 D.S.C. secs. 303, 304.

244) See the transitory secs. 17 D.S.C. sec. 303.

245) See the extremely detailed regulations of 17 D.S.C. sec.304.

246) The reason is that the maximal protection term of 56 years is expired, and the extensions of renewal terms provided by numerous acts beginning on September 19, 1962 do not apply to works created 56 years before this date.


247) Cf. sec.24 Copyright Act of 1909.

248) Cf. 17 D.S.C. sec.304 (a).

249) Cf. 17 D.S.C. 304 (b) for those works first published before January 1, 1978 and 17 D.S.C.sec.302 (c) for those created after this date.

250) Cf. BROWN & DENICOLA, supra note 40, at 302.


253) See supra p.45.

254) Cf. sec.3 para.4 British Copyright Act of 1956.

255) See NIMMER, supra note 13, at 7.03.

257) 306 U.S. 30 (1939).

258) Id. at 36.


260) See NIMMER, supra note 13, at 7.16 [A][2][b].

261) See supra p.48.


263) See the figures mentioned supra p.50.

264) 522 F.2d 737.

265) Id. at 746.

266) Id.


269) See NIMMER, supra note 13, at 7.16 [B][1].

270) See 17 U.S.C. see.504.


277) See the arguments of the MPAA, id.

278) See Motion Picture Agreement, para.1 & 4, id. at 12322.

279) Id. at para.3.

280) Id. at para.9.

281) See NIMMER, supra note 13, at 7.02.


283) See also the critical remarks of Professor Nimmer, NIMMER, supra note 13, at 7.02.


285) See infra p.75, 76.


288) See generally NIMMER, supra note 13 at 13.05.


290) See NIMMER, supra note 13, at 13.05.


292) See 17 U.S.C. sec.110 (1) and id. at 82.


294) Id.


297) See NIMMER, supra note 13, at 13.05 [AJ[2J.

298) Id.

299) See Universal City Studios v. Sony Corporation of America, 659 F.2d 963, 972.


301) NIMMER, supra note 13, at 13.05 [A] [3J.

302) Id.


304) See Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1353 (Ct.Cl. 1973).


306) In fact, the majors already control the video market to a high extent: in 1983 the seven majors had a market share of 82 percent in the distribution of prerecorded videotapes; ~ Waterman, supra note 157, at 229.


311) Id. at 443.

312) Id. at 445, 446.
313) Id. at 456.

314) Id.

315) Id. at 420.

316) Id. at 423.

317) Id.; see also NIMMER, supra note 13, at 13.05 

318) Id.

319) Id. at n.172.


321) Id.

322) See also NIMMER, supra note 13, at 13.05 [FJ5J[bJ.


324) See supra p.65,66.

325) Contra Diedring, supra note 307, at 822, 823, by stating that copyright owners have been compensated sufficiently from other sources ("overcompensation").

326) Id. at 823.


331) Cf. former sec.53 para.5 German Copyright Act of 1965.

332) Cf. note supra note 327, at 90.

333) Id.; see for the German law: Hubmann, supra note 329, at 119.

334) International Union for the Protection of Literary and Artistic Works, signed at Berne, September 9, 1886. The original convention was amended and revised several times: May 4, 1896 at Paris (additional Act and Declaration); November 13, 1908 at Berlin (Revision); March 20, 1914 at Berne (additional Protocol); June 2, 1928 at Rome (Revision); June, xx at Brussels (Revision); July 14, 1967 at Stockholm (revision, but not in force because of lack of sufficient number of ratifications); July 24, 1971 at Paris (Revision). The most recent Act, the Paris Revision, is reprinted in: NIMMER, supra note 13, Appendix 27.

335) Cf. the list id. Appendix 22.


337) See e.g. Arts.11, 11bis, 1Iter and 12 RBC.

338) See Art.2 para.1 RBC.

339) See only Art.3 para.3, Art.4 (a), Art.7 para.2, Art.14 para.1 cl.1, Art.14 para.2 RBC.


341) Universal Copyright Convention, September 6, 1952, 6 U.S.T. 2731 (Geneva Version). The United States has also signed the revised version on July 24, 1971.
342) See infra p.75,76.


344) See Senate Panel is Told that U.S. should Accede to Berne, Pat. Trademark & Copyright J. (BNA) No.776 at 527 (April 17, 1986); Ad Hoc Group Report on Adherence to Berne is Available for Comment, Pat. Trademark & Copyright J. (BNA) No.766 at 265 (Febr.6, 1986); Senate Panel is Told that U.S. Should Adhere to Berne Copyright Convention, Pat. Trademark & Copyright J. (BNA) No.731 at 69 (May 23, 1985).

345) See Duboff, Winter, Flachs & Keplinger, supra note 336, at 204.

346) See generally supra note 344.

347) Cf. the listing in Ad Hoc Group Report on Adherence to Berne is Available for Comment, Pat. Trademark & Copyright J. (BNA) No.766 at 266 (Febr.6, 1986).

348) Cf. Senate Panel is Told that U.S. Should Adhere to Berne Copyright Convention, Pat. Trademark & Copyright J. (BNA) No.731 at 69 (May 23, 1985).

349) See the discussion with special regard to motion pictures supra p.58-60.

350) See supra p.55-57.

351) See only the examples given by NIMMER, supra note 13, at 17.11 [A] n.5, mentioning restrictions of the French, German and British Copyright Acts.

352) Id.

353) Id. at 17.11 [B][2].

354) See also E.ULMER, INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS, 50 (1978).

355) Id. at 36-39.

357) Id.