

Legal Aspects of Multimedia in Europe

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Abstract

Multimedia means multilegia. The basic copyright problem arises out of the fact that multimedia producers need to integrate a huge quantity of copyrightable works (texts, pictures, music) in their products. This paper describes how the traditional European copyright law can cope with the requirements of the digital age. Instead of compulsory licensing, the collecting societies can manage digital licensing with consent of the rightsholders and through technical devices. The societies should work on the basis of uniform European supervision structure and via coordinating bureaus acting as clearing houses. The system of neighbouring rights however needs some extensions to guarantee sufficient protection for electronic publishers and phonogram producers in relation to Digital Audiobroadcasting (DAB). Finally, the dogmatic classification of loading acts and electronic transmission has to be taken into account.

Multimedia has entered the stage of computer law. Up to 1993, computer lawyers tended to stew in their own juice discussing the applicability of copyright law or traditional contract law to software and other computer-related products. But due to multimedia, the situation changed. Multimedia (e.g. the digital combination of text, music and pictures) forces the computer law to deal with music law, film law or even broadcasting law. Multimedia implies multilegia. Where text, music and pictures can be combined technically, the copyright regimes for text, music and pictures are combined legally. This complexity is further complicated by the international structure of the industries concerned. Therefore, the harmonization of national copyright law including the private international law is required. The harmonization of copyright law should be promoted. Until now, only a few details have been considered by the EC authorities, such as the term of protection, rental and software protection. Other parts of the copyright system urgently need consideration.

Not all necessary steps can be considered in this short paper.¹ But ten aspects are in my view so important that they need further discussion in the worldwide computer law community.

¹ The author has considered various aspects in detail within a research study performed under the auspices of

1. Voluntary collective administration versus statutory licensing

Multimedia does not in itself lead to legal problems. It mainly constitutes a problem of license management due to the large number of licenses required. In the view of multimedia producers, this problem could best be solved by the introduction of statutory licensing. By national legislation, the producer would be entitled to use any work for the digitisation and the implementation in a digital product without permission of the rightholders. Rights holders would be paid a remuneration collected and distributed by a collecting society. As the producer gets a license by act, considerations on the bona fide transfer of rights could be omitted. In fact, this concept would guarantee that the multimedia industry could freely use pre-existing works without difficult enquiries about the identity of rightholders and without consultations on license fees. The rightholders would get a standardized fee even where they have no bargaining power to market their rights individually.

Concepts of statutory licensing or mandatory collective administration however are yet not realistic. They contradict the Revised Berne Convention (RBC). The Convention allows statutory licensing only for sound recordings of music works and words pertaining thereto (Art. 13 (1) RBC/Paris Act) or for the communication to the public (Art. 11 bis (2) RBC/Paris Act). In addition, some further clearly defined regulations on free use are part of the RBC; these provisions mainly refer to quotations (Art. 10 (1)), illustrations for teaching (Art. 10 (2) and the use of works in newspapers and periodicals (Art. 10 bis). Art. 9 (2) RBC permits statutory licensing with regard to reproductions "in certain special cases" provided that such reproduction does not conflict with "a normal exploitation of the work" and does not unreasonably "prejudice the legitimate interests of the author." Apart from these restricted exceptions, statutory licensing contradicts the exclusive rights granted by the RBC (cf. for films Art. 14 (3) RBC).

Multimedia does not justify statutory licensing within the RBC. In particular, Art. 9 (2) RBC cannot be applied as multimedia concerns more than just the reproduction right. As considered below, it includes the digitization of a work (reproduction), the implementation in a film-like work (adaptation) and offering to the public for access (use on demand). In addition, Art. 9 (2) RBC refers to "certain special cases." But the concept of multimedia is too vague to qualify for statutory licensing. Exemptions to the exclusive reproduction right had to be drafted to the effect that any digitization of the work or the integration in a "multimedia product" were allowed. Then everybody could use the work in digital form for any private or commercial purpose. There would be no opportunity for the rightholders and/or the collecting societies to monitor the use of the work and the payment of remuneration. This monitoring problem is of extreme importance in a digital era where copies can not be distinguished from the original work.

the European Commission/DG XIII. This study will probably be published in 1995 by the Commission.

Finally, statutory licensing would conflict with the normal exploitation of the work. Up to now, “normal” exploitation refers to the use of works in analog form. Digitalization is a new technique which cannot yet be regarded as the usual, or common way of exploiting literature, music or films. This situation might change very quickly. With the immense growth of the multimedia industry, digital works might replace the analog substitutes in the future. The possession of printed books could be regarded as an exception compared to the distribution of electronic books. Then, the author would be deprived of the digital exploitation where statutory licensing has been implemented in the copyright acts. He would be bound to distribute his works in analog form although this market has diminished. The “normal” exploitation would be made by multimedia producers and not by the rightholders themselves. This situation would unreasonably prejudice the legitimate interest of the authors. In the long term, statutory licensing is only favourable for the multimedia industry; the rights of authors would be disregarded.

Nevertheless, multimedia requires some method for the generalized and coordinated collective administration of rights. Otherwise, the user has to bear immense costs for finding the licensors. Rightholders, especially writers and artists, are themselves often in a weak position where they cannot exploit their rights without the aid of a collective society. Collective administration increases the payments to rightholders at least in those cases where they have no bargaining powers. At present, most writers, artists, filmmakers have no way to discuss digitization on an individual and contractual basis. They are under pressure to assign copyright to new media producers and publishers of all kind. Therefore, collective administration is a most favourable way of solving the license management problems caused by multimedia. The adherence to a society is however voluntary; as mentioned above, mandatory collective licensing conflicts with the RBC and the concept of contractual freedom.

2. Gaps in collective administration

While voluntary collective administration may prove to be the solution for multimedia industry and rightholders, the collecting societies themselves are unable to administer digital rights. In this paper, I cannot describe all the deeds of assignment used by the European collecting societies, but the European Commission/DG XIII has published an extensive overview on the licensing structure.² Here, I will only refer to the structure in Germany.

2 See the detailed “Practical Guide to Copyright for Multimedia Producers” written by Gilles Vercken and produced on behalf of the European Commission/DG XIII (April 1995).

In contrast to Great Britain or France where the rightholders have assigned their digital rights widely to the societies, such extensive assignment clauses are still held to be invalid in Germany.³ § 31 IV of the German Copyright Act prohibits the extension of licenses and assignments to unknown rights; hence most such agreements are invalid. § 31 V of the Act states that the assigned rights have to be listed expressly in the license agreement, otherwise the licensee takes the risk that the license does not include these rights. Therefore, digital reproduction has to be expressly mentioned in the deeds of assignment used by the collecting societies. The GEMA as biggest collecting society in Europe regards digitisation as part of the assignment between rightholder and society. According to the GEMA regulations, the copyright owner assigns "the rights of recording on phonograms and videograms and the reproduction and distribution rights in or to phonograms and videograms."⁴ The GEMA held that disks with music data (sequencer songs and MIDI files) have to be regarded as "phonograms" while CD-I and CD-ROM integrating music are to be classified as "videograms". However, these mechanical rights only refer to the unchanged reproduction of a work of music. Where only parts of the work are reproduced or where the work is altered, the GEMA regulations do not apply.⁵ Therefore, the GEMA does not yet have competence to administer electronic rights.

The situation is even more complex within the BILD-KUNST. The BILD-KUNST only administers the reproduction rights of painters and sculptors concerning copies in newspapers, magazines and collections of works of art of different authors.⁶ The reproduction on a CD-ROM is not mentioned; the contract of representation therefore had been extended to this form of reproduction in June 1994. This extension still only refers to architects and painters. With regard to photographers, the BILD-KUNST succeeded in another attempt to adapt the contracts to digital rights. After a heated and lengthy debate, the representatives of photographers' organization agreed to a regulation whereby BILD-KUNST is able to administer the digital rights in photographs for educational purposes. With the aid of BILD-KUNST, schools and universities may thus get the right to integrate photographic works in their multimedia products. Apart from these two small areas, the society is yet not responsible for the administration of digital rights.

Similar problems may be found in the Deed of Assignment used by WORT. According to the Administration Agreement, the WORT only administers the rights re the copying and reproduction of

3 Federal Supreme Court, *Gewerblicher Rechtsschutz und Urheberrecht* 1986, 62, 65 - GEMA-Vermutung I.

4 § 1 lit. h).

5 Cf. County Court of Munich, Judgment of 30 March 1992 - 21 O 5634/92 (unpublished); Judgment of 9 April 1992 - 7 O 6691/92 (unpublished); Gernot Schulte, *Teil-Werknutzung, Bearbeitung und Werkverbindung bei Musikwerken*, in: *ZUM* 1993, 255, 260.

6 § 1 lit. l) of the Contract of Representation.

certain articles which first appear in newspapers and works broadcast on radio of a particular kind, as far as they can be put into electronic databanks or archives.⁷ Apart from these newspaper articles, the rights vested in literature are administered by the WORT.

The situation in Germany can only be described as a patchwork of puzzling and incoherent responsibilities. In an European or even international perspective, the line between individual and collective licensing cannot be seen by an average multimedia producer.

3. Loading as reproduction?

The collecting societies regard any digital storage of the work as reproduction. They held that permission is necessary for the mere storing of a digitized work in the Random Access Memory. This view has yet to be refuted although a lot of authors support this concept with reference to the EC Software Directive. It would nonetheless change the whole copyright world if the mere storage in the RAM is regarded as reproduction. Every storage would then need the permission of the rightholders or the collecting societies administering the reproduction rights. The rightholders could prevent any use of the digitized work on different hardware even where the original computer cannot be used anymore. According to the EC Software Directive, they might even sell the digitized work and forbid any use. Art 5 (1) of the Directive only guarantees the users' rights "in the absence of specific agreements."⁸

In my view, loading does not constitute a reproduction according to copyright law. Storage in a RAM cannot be regarded as equivalent to the storage on a CD-ROM or a hard disk. The RAM is used as mere temporary instrument to store the digitized data for a short period. This interlocutory step is only made for technical reasons; the user is regularly not able to take advantage of this additional "copy". From a functional point of view, the use of digitised works in the RAM cannot be regarded as reproduction similar to those on CD-ROMs or other hardcopy devices. Even where this view is not shared, the problem needs further clarification.

7 § 1 No. 9 and 10.

8 This possibility does yet contradict to the preamble which states that "the acts of loading and running for the use of a copy of a program which has been lawfully obtained and the act of correction of its errors, may not be prohibited by contract". Consequently, contractual limitations are possible under Art. 5 (1) although they are forbidden according to the preamble. It has been held that Art. 5 (1) yet still prevails; see Verstrynge, Protecting Intellectual Property Rights within the New Pan-European Framework - Computer Software -, Paper presented at the World Computer Law Congress, April 18 - 20, 1991, Los Angeles, p. 9.

4. The classification of use-on-demand

I believe multimedia involves only one problem which cannot be solved by traditional copyright law: the aspect of use on demand. Electronic delivery of documents let the consumer select the information wanted from the database. The permanent storage of a copyrightable work, for instance on a hard disk or a CD-ROM, constitutes a reproduction which can only be made with the permission of the rightholders. The downloading of the work by the user can perhaps be classified as reproduction as well. Use-on-demand however includes an act of transmission as well. This act creates some legal uncertainty as to the rights involved.

This phenomenon can perhaps be regarded as broadcasting or at least public communication. But a work is only communicated to the public when it is received by a number of people at the same time.⁹ Use-on-demand enables the customer to access the multimedia system whenever he wants to. In such cases, there is no reception at the same time.¹⁰ In literature, it has therefore been proposed to regard electronic delivery as similar to broadcasting and apply the regulations on public communication by analogy.¹¹ Alternatively, electronic delivery on demand can be classified as distribution. Distribution does yet refer to the delivery of tangible good, but not to the transfer of electronic information. In addition, the problem arises that the distribution right is exhausted where a copy has been made public.

The problem may not be solved by creating a new right of public access or use-on-demand.¹² Although the copyright acts of the EU member states are in general open for the establishment of new

- 9 Paul-Gerhard Brutschke, *Urheberrecht und EDV*, Munich 1972, 82; Dieter Goose, *Die urheberrechtliche Beurteilung von elektronischen und Mikrofilm-Datenbanken*, Berlin 1975, 76; Schrickler/von Ungern-Sternberg, *Urheberrecht*, Munich 1988, 15 UrhG Note 30; Hans-Peter Hillig, *Zur urheberrechtlichen Einordnung von Videotext und Bildschirmtext*, in: *Festschrift fr Georg Roeber zum 10. Dezember 1981*, edited by W. Herschel, Freiburg 1982, 165, 171; Bernd Sinogowitz, *Wiedergabe und Benutzung audiovisueller Medien in Bibliotheken*, in: *Film und Recht* 1984, 563, 567.
- 10 See among others Werner Brinckmann, *Zivil- und presserechtliche Fragen bei der Nutzung von Bildschirmtext*, in: *Zeitschrift fr Urheber- und Medienrecht* 1985, 337, 345. Another view has been taken by the County Court of Berlin, Judgment of 29 March 1967 - I ZR 23/67 = *Schulze LGZ* 98, 5 zu § 11 II LUG.
- 11 Katzenberger, *Urheberrechtsfragen der elektronischen Textkommunikation*, in: *Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil* 1983, 895, 906; Herbert Landau, *Urheberrecht im Medienzeitalter - zum gegenwrtigen Stand der deutschen Urheberrechtsgesetzgebung*, in: *ibid.*, *Urheberrecht fr das Medienzeitalter*, Schwerte 1986, 7, 27; Schrickler, *Grundfragen der künftigen Medienordnung. Urheberrechtliche Aspekte*, in: *Film und Recht* 1984, 72. Cf. Hoeren, *Softwareverlassung als Sachkauf*, Munich 1989, Notes 313 et seq.
- 12 This is however the idea of Charles Clark described in "Legal Implications of the Creative Role of the Publisher", Paper Presented at the Third International Copyright Symposium. Second Working Session on 23

rights, the international copyright treaties refer to a traditional, restricted catalogue of rights. Thus, a new international treaty would be necessary for electronic rights including the use on demand. It would take a very long time to draft and settle such a new international treaty. The problem can only be solved by analogy. In my opinion, the regulations on communication to the public should be applied *mutatis mutandis*. Communication to the public and use on demand only differ technically. On the one hand, works are transmitted to an unlimited number of users; on the other hand, an unlimited number of users is allowed to access to a collection of works. In both cases, the public gets the chance to use copyrightable works. These similarities justify an analogy.

5. Neighbouring rights for electronic publishing

Up to now, a publisher is not protected *qua* publisher. He can only refer to his license of the underlying works. If he is working as non-exclusive licensee, he has no direct rights of action against piracy. This is based upon the concept of the publishers laid down in the 19 century where the compiling and marketing of written texts has not been regarded as worth protecting in itself.¹³ The role of publishers has yet changed in the digital era. The electronic publisher has a creative role in compiling information and publishing it in forms suitable for network dissemination. These preparatory, logistic and technical efforts need a protection similar to that of producers. "Authors are not the only people on earth worth protecting."¹⁴ As Charles Clark has already stated, the electronic edition "will carry the fingerprint of the publisher in the same way as a work may bear the imprint of the personality of the author."¹⁵

May 1994. Similar proposals have been made by Irgen Becker (GEMA), *Die digitale Verwertung von Musikwerken aus der Sicht der Musikurheber*, in: *ibid./Thomas Dreier (eds.), Urheberrecht und digitale Technologie*, Baden-Baden 1994, p. 45, 64.

- 13 Cf. Irgen Granlich, *Rechtsordnung des Buchgewerbes im Alten Reich. Genossenschaftliche Strukturen, Arbeits- und Wettbewerbsrecht im deutschen Druckerhandwerk*, Frankfurt 1994.
- 14 George Metaxas, cited in Charles Clark, *Legal Implications of the creative role of the publisher*, Third International Copyright Symposium. Second Working Session on Monday 23 May 1994, p. 1.T
- 15 Clark, *Implications* (Note 14), p. 5.

6. Public Communication as part of the neighbouring right of phonogram producers

Every EU member state grants a neighbouring right including the reproduction and distribution to their sound carriers. This neighbouring right does not extend to the broadcasting right. The phonogram producer only gets a right to compensation exercised through collecting societies. This concept was developed at the beginning of this century in the face of wireless radio diffusion. In this technical context, broadcasting only constituted a secondary use of music compared to the marketing of phonograms. This background is going to change fundamentally as a consequence of Digital Audio Broadcasting (DAB) and other related digital techniques. DAB will lead to a situation where the phonograms will be replaced by digital copies made via broadcasting. The user will be able to make digital copies of broadcasted music which can not be distinguished from the original version. The phonogram producer must be able to control and monitor this way of broadcasting; otherwise he can no longer market his products. Therefore, the neighbouring right of phonogram producers must extend to the communication of a digitized work to the public.¹⁶

7. Free private copying in the digital era

As Bernt Hugenholtz has already demonstrated¹⁷, there are bewildering differences in national copyright acts in the area of exemptions and limitations. According to Art. 9 (2) of the Berne Convention, it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, "provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." The EU Member States have transformed this regulation into a lot of divergent regulations. There are different media- (news), technology- (tape levies; equipment levies) and work-specific (i.e. for writings, films and computer programs) limitations of the exclusive rights embodied in the national copyright acts.

The situation has to change due to multimedia. In the Memorandum prepared for the discussions on a Possible Protocol to the Berne Convention, the WIPO proposed in 1992 that no exemption for private use should exist when it comes to storage of works in computer systems. Otherwise there would be a

16 The IFPI has made enormous efforts to promote the idea of such a neighbouring right; cf. Norbert Thurow, *Die digitale Verwertung von Musik aus der Sicht von Schallplattenproduzenten und ausübenden Künstlern*, in: Jrgen Becker/Thomas Dreier (eds.), *Urheberrecht und digitale Technologie*, Baden-Baden 1994, 77 et seq.

17 Cf. Bernt Hugenholtz, *Copyright and Electronic document delivery services*, Luxembourg November 1993, p. 7.

clear conflict with the normal exploitation of the works concerned. A similar approach may be found in the bill for a revised Copyright Act submitted by the Danish Minister of Culture on 9 February 1994; the bill has been introduced in the Danish Parliament a second time on 18 January 1995. According to Sect. 12 (2) the private use exemption does not extend to "copies in digital format of other works, when the copying is made on the basis of a reproduction of the work in digitized format."¹⁸ A similar view has been taken by the Business Software Alliance which has promoted that exceptions to the exclusive rights of the author or other rightholder of digital works should be few and narrowly drawn. In its "White paper on Copyright Protection for the Information Highway" dated 30 June 1994, the Alliance held that "there is (...) less scope for 'private copying' or other broad copyright exceptions for digital works."¹⁹ There seems to be tendency that even the European Commission will support these restrictions. First unofficial drafts of the future EU directive on private copying exclude copies made via Internet and other telecommunication services from the exemption regulations.

In fact, the private copying exemptions have been implemented in the copyright acts focussing on analog stored works. These works (books, records, photographs) cannot be easily copied by a private user. He has no facilities to reproduce his copy of the work and distribute them to the public. In addition, the copies usually made had lower quality than the original copy and could be easily distinguished from the original. This situation has changed due to the digitization. Almost everyone can afford technical devices such as multimedia PCs and scanners digitizing works and reproducing them to a larger extent. The copies produced digitally cannot be distinguished from the original master-copy. Therefore, the border between commercial piracy and privately made/used copies diminishes. As digitization reduces fixed copying costs, self-provision becomes inexpensive and geographically dispersed.²⁰ Because of this decentralization in the dissemination of information goods, the enforcement of copyrights is going to be unreasonably expensive. This situation has led to the exclusion of software from private use exemptions.²¹ There should be considered whether the same procedure has to be taken with regard to other digitised works.

Even if the private use exemptions were abolished, there should still remain digital privileges for the audio-visually handicapped. Such an exemption is important for the sake of handicapped; it may as

18 The information is based upon a paper presented by Mads Andersen at the LAB meeting of the European Commission/DG XIII on 26 April 1995.

19 p. 10.

20 Cf. the results of Pethig, Copyrights and Copying Costs: A New Price-Theoretic Approach, in: *Journal of International Transactional Economics* 144 (1988), 462 et seq.

21 Cf. Art. 4 I of the EC Software Directive.

well be narrowly drawn. It does not essentially conflict with the legitimate interests of the rightholders but is part of general public interest. Otherwise, a single right holder could prevent the distribution of, for instance, a digital newspaper being sent only to handicapped persons. The exemption can be drafted according to Scandinavian regulations. The Danish Copyright Act²² provides that literary works may be reproduced in braille (§ 18 I); in addition, literary works may be recorded on sound carriers on the basis of a levy to be paid to the author (§ 18 II). Similar provisions may be found in the Swedish Copyright Act²³ which allows the distribution of braille texts on sound carriers to handicapped persons without the permission of the author (§ 18). It should be considered whether the statutory license shall be granted for free (as in Sweden) or on payment (as in Denmark).

8. Supervision of collecting societies

The rightholders will only voluntarily assign their digital rights to collecting societies if they are satisfied with the fees paid by these societies. The confidence placed in a collecting society depends upon the standard of supervision. A uniform structure of supervision is necessary to establish at least some common standards of payments and licensing control. The European Commission has already initiated a research project on the national regulations as to the collecting societies. The final study written by Adolf Dietz of the Max-Planck-Institute in Munich was published in 1978.²⁴ The study reported serious discrepancies with regard to supervision by collecting societies. The regulations of the EC member states are totally unharmonized.²⁵ Belgium had no regulation at all. In France, Great Britain and Ireland, there were no special provisions for the establishment and organizational structure of collecting societies or for their supervision. Danish acts provided for the admission of collecting societies, but did not regulate their activities. Germany, Luxembourg and the Netherlands had fully established systems monitoring the admission, the structure and the activities of collecting societies. Italy has installed a public organization (the "Societ Italiana degli Autori et Editori/SIAE") acting as monopoly.

The situation has not fundamentally changed since 1978. The British Copyright, Designs and Patents Act 1988 still does not provide for any admission and control of the licensing societies. (Chapter VII of the CDPA only contains regulations regarding the licensing schemes; especially sect. 129 states the

22 Lov om ophavsretten til litteraere og kunstneriske vaerker, 31 May 1961.

23 Lag om upphovsrätt till litterära och konstnärliga verk given Stockholmm slott den 30 December 1960.

24 Adolf Dietz, *Das Urheberrecht in der Europäischen Gemeinschaft*, Baden-Baden 1978.

25 Cf. Dietz, *Urheberrecht* (Note 25), p. 277 et seq.

competence of the copyright tribunal to forbid an unreasonable discrimination of licensees.) Only in France and Belgium, the legislators have amended the copyright acts to deal with collecting societies. In arts. 38 - 44 of the French Act of 3 July 1985²⁶, the legislator installed a supervision structure based upon the Minister of Culture and the Tribunal de Grande Instance. Collecting societies can work without permission, but are under a permanent control of the Minister of Culture. The Minister may appeal to the Tribunal de Grande Instance in order to prevent the foundation of a collecting society (Art. 39 II of the Loi du 3 juillet 1985). In Belgium, the new copyright act has entered into force on 1 August 1994.²⁷ Unlike in France, the establishment of a collecting society requires permission (art. 67 al. 1). The societies work under the supervision of a delegate nominated by the competent minister (art. 76 al. 1); the supervision relates to the fulfillment of statutory obligations and the implementation of tariffs (art. 76 al. 3). This rigid system of supervision has been criticized as being excessive.²⁸

These recent developments demonstrate the unharmonized status of supervision installed in the national EU member states. Each member state has established a different system of control over collecting societies - irrespective of the internationalization of copyright licensing - especially in cases of multimedia.

9. Coordinating bureaus for the administration of electronic rights

Multimedia producers want global licensing through a one-stop shopping, providing multiple licensing options at a reasonable rate without complicated administration. Consequently, an international collecting society for digital rights has to be founded across jurisdictions. Digitization does not stop at a national border; it is a pan-European and even a worldwide phenomenon. The digital use of works can only be monitored by an international organization, comparable to the WIPO. As the

26 Loi no. 85-660 du 3 juillet 1985 relative aux droits d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes, et des entreprises de ...-audiovisuelle, JO 4 juillet 1985, p. 7495.

27 Moniteur Belge of 27 July 1994, 19297-19314. For the long-lasting copyright discussion in Belgium cf. Doutreleont, *Nouvelles de Belgique: Une proposition de révision de la loi belge du 22 mars 1886*, in: RIDA 1987, No. 134, 70 - 195; Berenboom, *Une nouvelle loi sur le droit d'auteur?*, in: *Journal des Tribunaux*, 1989, 117 - 123.

28 Berenboom, cited according to the report of de Clerck of 17 March 1994, *Documents de la Chambre des Représentants* 450 (S.E. 1991-1992), No. 33, p. 315.

digitisation requires cross-jurisdictional licensing, this organization has to act as umbrella body for the administration of all electronic rights.

In fact, the WIPO has considered this task in its program for the 1994-95 biennium. According to its memorandum, "it could be useful to set up a centralized international data base of licensing sources."²⁹ But the rightholders' organization seem to be sceptical about this concept. This fear was demonstrated at the meeting of working group on the establishment of a voluntary international numbering system for printed works held at June 9, 1994 in Helsinki. There, most participants stressed that

"no bureaucratic system (e.g. of deposit) should be established and that any solution should be industry-driven and implemented by organizations representing rights holders, in cooperation with users. WIPO (...) should not have a direct role to play in the day-to-day- administration of the network."³⁰

The fear of a bureaucratic nightmare might be unreal. Yet this fear has to be taken into account. Especially the national collecting societies will have problems in accepting a pan-European or even international rival. They will probably want to administer electronic rights themselves. If the concept of a new international collecting society cannot be implemented, alternatives should be considered by the parties concerned. For instance, an international bureau - comparable to the BIEM - could be installed which is responsible for the clearing of electronic rights especially in international cases. This bureau could assist in solving the difficult legal problems arising from multimedia and the collective administration of electronic rights. Finally, it might help the multimedia industry to find the competent collecting society. The French collecting societies have already established such a coordinating bureau called SESAM. The German societies are going to cooperate in the multimedia question within a discussion forum called "Arbeitsgemeinschaft Multimedia" within which tariffs and licensing control will be harmonized.

These recent developments are however endangered by the European Commission/DG IV which is responsible for anticompetitive practices. It has recently declared that the present status of European collecting societies might contradict to Art. 85 of the Rome Treaty. This is not the place to consider all these competition issues in detail. However, there is a dangerous contrast between the needs of multimedia industry for a uniform licensing management of collecting societies and the desires of the DG IV for more competition between these societies.

29 INS/CM/94/1, p. 16.

30 Note on the conference, Internal paper, 1994, p. 3.

10. Electronic copyright management systems

Royalty distribution systems are based on the distribution of analog works. Tracking of use data is only possible with the digital encoding and processing of the data. Fair royalty distribution can only be achieved by the universal digital identification and tracking of works. In addition, electronic licensing is possible only if we can administer individual tariffs. As mentioned above, collecting societies only use blanket licensing because otherwise it would not be possible to cope with the amount of relevant data. An Electronic License Management would enable the control of the information necessary to individualize licensing. With the aid of electronic means, a society could implement an all purpose universal pricing mechanism that deals with the wide range of electronic use options. Therefore, digitisation of copyrightable works has to be accompanied by the establishment of some electronic tools for effective copyright management. Where thousands of rightholders are involved in the development of a multimedia product, electronic clearing of rights is essential. Therefore, technical devices have no disadvantages per se; indeed they are mandatory for solving multimedia licensing problems.

There are a lot of technical devices usable to improve the licensing of multimedia. Projects such as CITED should be extended. As the Committee on New Technologies reported at the 1993 IFRRO Annual General Meeting, the devices are “still in relatively rough form, and do not address the problems inherent in persuading the entire electronic universe to operate within the framework of a single particular product or technology.”³¹

In addition, an EDI-like standard for the electronic transfer of rights and works has to be created. In a digital era, it must be possible to get licenses via online. This still requires suitable technical methods and guidelines, and especially the standardization of electronic data interchange. Thus, the efforts in the EDI discussion have to be taken into consideration. EDIFACT is focussing on commerce and trade of goods and services. The EDI standards have not been adapted to the licensing of immaterial information. For instance, the EDI standard “ORDERS” is defined as “United Nations Standard Purchase Order Message to be used in Electronic Data Interchange (EDI) between trading partners, involved in administration, commerce and transport.” It claims to be “not dependent on the type of business or industry.” A purchase order may refer to goods items or services related to one or more delivery schedules, call-offs, etc. Therefore, the standard presupposes the idea that the contract is closed electronically while the good is transported afterwards. Consequently, the good is marked in the message by its markings and labels used on individual physical units (packages). The identification of rights is more complex than that of goods. Here, information such as identification of the rightholders is required.

31 Report of the Committee in New Technologies to the 1993 IFRRO Annual General Meeting, Lugano, October 13, 1993, p. 3 f.

The content of the right has been specified locally and individually. The rights have to be linked with the digital copy as a kind of digital package. The link between copy and right has to be secured electronically in a way that ensures the customer may only use the copy in a legitimate way. The system has to be designed so that the licensee can report the purported use of the work so as to resolve the moral rights. In conclusion, an EDI-like standard for the transfer of rights has to be created.

In addition, the value of electronic documents needs further attention. Electronic delivery is only possible where electronic documents are accepted as evidence in court. Otherwise, the user may claim that he has never received the electronic copy of the work. Or the net provider may claim that he has never agreed upon any license. The proposals mentioned above therefore tried to solve the problem by integrating digital signatures in their systems.³² However, the problem will be that electronic signatures (however secure they are) will not be accepted in court as valid. Unlike in the United States³³ or in Great Britain³⁴, the German legislature is unwilling to accept electronic documents as deeds. Some proposals for an amendment to the German Civil Procedure Act have been rejected or not been discussed by parliament.³⁵ Therefore, EDI documents will not be accepted as private deeds in the future (with the exception of documents fixed in a WORM storage.³⁶) This is one of the main reasons why the German banks are unwilling to accept EDI.

In conclusion, multimedia needs multi-solutions including direct licensing, collective licensing and technical devices. The answer to the machine is not only in the machine, but it can only be found by an approach combining all aspects of entertainment, copyright and telecom munication law.

- 32 The discussion has been summarized in GMD (ed.), Projekt: Bestandsaufnahme über die elektronischen Signaturverfahren". Auftragsnr. 1219/91, St. Augustin 1992.
- 33 Cf. Rule 1001 (3) of the "Uniform Rules of Evidence": "If data are stored in a computer or similiar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original."
- 34 Cf. Sect. 5 of the Civil Evidence Act 1968. In September 1993, the English Law Commission published a report on the use of 'hearsay' evidence in civil proceedings which proposes the evidential treatment of computer records as the same as paper records.
- 35 Cf. GDD/AWV (Eds.), Besteht Handlungsbedarf seitens der Bundesregierung und des Gesetzgebers im Hinblick auf elektronische Signaturverfahren?, in: AWV-Informationen 39 (1993), Heft 5, 3 et seq.; Seidel, Das elektronische Dokument als Regelungsobjekt gesetzgeberischen Handlungsbedarfs, in: Proceedings of the BIFOA-Congress. SECUNET 1992, Wiesbaden 1992; *ibid.*, Signaturverfahren und elektronische Dokumente. Rechtliche Bewertung und Regelungsvorschläge, in: GMD (ed.), Projekt "Bestandsaufnahme" (Note 187), 76 et seq.
- 36 See Seidel, *supra*, in: GMD (ed.), Projekt "Bestandsaufnahme" (Note 35), p. 25; Sponeck, Der Beweiswert von Computerausdrucken, in: Computer und Recht 1991, 269, 273.

Legal Aspects of Multimedia - ten arguments

1. Voluntary collective administration is preferable to statutory licensing
2. At the present state, the collecting societies cannot administer the digital rights.
3. The classification of memory loading digitized works needs to be resolved.
4. The classification of use-on-demand (as distribution or public use) needs further clarification.
5. The publishers need a neighbouring right protecting them against illegal reproduction and distribution of their products.
6. The neighbouring right of phonogram producers should include the communication of their products to the public.
7. The question of free private copying should be reconsidered in the face of digitization.
8. The national regulations on the supervision of collecting societies have to be harmonized.
9. An international collecting society or at least a coordinating bureau for the administration of electronic rights should be established.
10. The establishment of electronic copyright management systems should be promoted.