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The Green Paper on Copyright and Related Rights in the Information Society

On 19 July, the European Commission published its 'Green Paper on Copyright and Related Rights in the Information Society'.¹ The following considerations focus on certain elements in the Paper and make some critical remarks on its proposals.

The Green Paper consists of two chapters. In Chapter One, there is an excellent survey on the technological, economic and legal framework for the information society. I will not refer to this chapter, but to the second one. There, may be found a choice of specific legal subjects. At first, the Commission deals with these topics by asking a lot of questions. These questions are directed to lobbying organisations which are asked to answer these questions by the end of October. This procedure has yet to cause criticism from an academic point of view: it is a pity that universities were not asked to join the debate. With regard to green papers, I always get the impression that the Commission is afraid of dogmatic, profound and sometimes critical comments made by law faculties. It likes the lobbyists, which only refer to the interests of the represented branch and not to jurisprudence. These lobbyists can of course answer more than 70 substantial questions within three months. For an average lawyer, it is almost impossible to carry out this task. It took 50 years to create the German Civil Act and at least 10 years to establish the multimedia market; but the Commission wants to solve all legal questions regarding multimedia within three months.

Apart from the catalogue of questions, there are nine sections containing legal assessments. Due to lack of space I will not comment on every section; I will only hint at some more important issues dealt with in the Green Paper.

True or False? True!

Some proposals are in fact very accurate and well-balanced. They resemble proposals I have drawn up for DGXIII in my recently published 'Multisolution' study.²

Private copying

For instance, the Commission considered that the exceptions for private copying should be reviewed in the light of digital systems of reproduction. As Bernt Hugenholtz has already demonstrated,³ there are bewildering differences in national copyright acts in the area of exemptions and limitations. According to Article 9(2) of the Berne Convention, it shall be a matter for legislation

1 COM(95) 382 final.

2 Thomas Hoeren, 'An Assessment of Long-term Solutions in the Context of Copyright and Electronic Delivery Systems and Multimedia Products,' published by the European Commission, Luxembourg 1995 (EUR 16069 EN).

3 Bernt Hugenholtz, *Copyright and Electronic Document Delivery Services*, Luxembourg, November 1993, at 7.

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 many divergent regulations.⁴ There are different limitations — related to the media (news), technology (tape levies, equipment levies) and individual works (that is, for the written word, films and computer programs) — on the exclusive rights embodied in the national copyright acts. Almost every European copyright act contains privileges for copying for personal use (scientific, educational or other private use), archival copying, library privileges, education, freedom of quotation or freedom of news reporting and reporting of current events. In addition, Anglo-American copyright acts refer to 'fair dealing' or 'fair use' provisions. The exemptions may not be restricted by contract. It is not possible to forbid private copying in the case of a statutory licence.

These differences may lead to licensing havens.⁵ The multimedia producer may try to choose the copyright system which contains the utmost exemptions in favour of users. The rightholders on the other hand may conclude licensing agreements on the basis of author-friendly national legislation. Both parties can choose a different location with the effect that all copyright issues are governed by the most favourable law.

Extension of the neighbouring right of phonogram producers

The Commission is right in stating that 'holders of related rights ought to have an exclusive right to broadcasting, rather than merely receiving equitable remuneration'.⁶ In my own research study for the Commission, I have already demonstrated that such an extension of the neighbouring right is necessary for the effective control of digital audio broadcasting (DAB).⁷ In particular the right to control the communication to the public should be embodied in a new directive. This right has to extend to use-on-demand, irrespective of its classification (see below). However, the concrete details of this right need further consideration. The neighbouring right could only be implemented with respect to digital broadcasting; otherwise, producers could even control the distribution of musical works via 'normal', analog broadcasting. In addition, the primacy of the rights of copyright owners should be taken into account; otherwise, the hierarchy of rights would change — in favour of producers and to the prejudice of the creators.

4 See Hoeren, Note 2 above at 17 onward.

5 This problem has already been dealt with in the EC Council Directive 93/83/EEC on Satellite Broadcasting and Cable Retransmission (Directive of 27 September 1993, OJ 1993 L248/15). The preamble of the directive refers to the 'series of differences between national rules of copyright and some degree of legal uncertainty' which lead to the situation where 'holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration' (at Note 5).

6 Note 1 above, at 61.

7 Hoeren, Note 2 above, at 16 and onward.

'One stop shopping'

I also agree with the concept of 'one stop shopping'.⁸ In a digital era, it is necessary that collecting societies offer a copyright clearance system to facilitate access to works and other protected matter. Collective administration is justified wherever a right cannot be exercised practically on an individual basis.⁹ In general, multimedia and digital delivery of works requires a generalised and co-ordinated collective administration of rights. Otherwise, the user has to bear immense costs for finding the licensors. The 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.

The Commission also rejects the concept of compulsory licensing; as it states, 'the establishment of such centres should be voluntary, as should membership'.¹⁰ In fact, the needs of an information society cannot justify compulsory or statutory licensing within the Revised Berne Convention (RBC). In particular, Article 9(2) RBC only allows compulsory licensing with regard to reproduction 'in certain cases' where it does not conflict with the normal exploitation of the work. This regulation cannot be applied as multimedia does not concern only the reproduction right; it comprises the digitisation of a work (reproduction), the implementation in a film-like work (adaptation) and the offering to the public for access (use on demand). In addition, Article 9(2) RBC refers to 'certain special cases'. The concept of multimedia is too vague to determine the extent of statutory licensing. Exemptions to the exclusive reproduction right had to be drafted to the effect that any digitisation of the work or the integration in a 'multimedia product' were allowed. Then everybody could use the work in digital form for every private or commercial purpose. There would be no possibility 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 could not be distinguished from the original work.

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. Digitisation is a new technique which cannot be regarded as a usual, common way of exploiting literature, music or films. This situation might yet change very quickly. With the immense growth of the multimedia industry, digital works might replace the analog equivalents in the future. The possession of printed books could be regarded as the 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 by multimedia producers and not by the rightholders themselves. This

8 *Ibid.*, at 22 and onward.

9 See Charles Clark, *Collective Administration of Reprographic Rights. A General Overview*, London, 1993, at 5.

10 Note 1 above, at 75.

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.

Technical devices

The Green Paper stresses the importance of accompanying technical facilities such as identifying devices, protection systems and copyright management models. I also fully agreed with the need for international harmonisation expressed in the Green Paper: 'It would appear necessary for these systems to be introduced and accepted at international level if the information society is not to operate to the detriment of rightholders'.¹¹

Exhaustion doctrine

Finally, the Commission correctly restricted the application of the exhaustion doctrine to the distribution of a work in a material form throughout Europe. Therefore, the exhaustion of the distribution rights does not yet extend to other rights 'such as the right of reproduction or adaptation',¹² to works in immaterial form or to works first sold in a third, non-EU or EFTA country.

True or False? False!

There are however four proposals which I cannot accept: the question of private international law, the extension of the reproduction right, the classification of digital transmission and the moral rights.

Private international law

The Commission is right in prioritising the crucial question of private international law. The question of the applicable law arises wherever a situation contains some foreign element. In a trans-frontier system like the information society the problem is especially acute, and special solutions will have to be found. The Commission proposes to let the parties choose the applicable law by contract. If no contractual choice has been made, 'the applicable law ought to be the law of the Member State from which the service originates'.¹³ The application of this country of origin rule however means that 'additional criteria and provisions are necessary'.¹⁴

This proposal is in my view unfortunately wrong. First, the parties of international contracts are not free to choose the relevant copyright law. In general, the parties' choice only applies to the contractual obligations. It does not apply to the transfer of rights necessary to fulfil these obligations, where the principle of territoriality has to be used. Copyright problems are governed by the law of that state where the work is or shall be used (*lex loci protectionis*). This principle has been codified in the Revised Berne Convention, the Universal Copyright Convention (UCC) and the Rome Treaty. It has also been implemented in several national acts on private international law.

11 *Ibid.*, at 79. See also Note 2 above, at 40 and onward.

12 Note 1 above, at 44.

13 *Ibid.*, at 41.

14 *Ibid.*, at 42.

Now, the Commission wants to replace the principle of the *lex loci protectionis* with the principle of the country of origin. According to this principle, the copyright regulations of that state where the work was first made or published have to be applied. The copyright regime of this country of origin determines all the rights of the copyright owners throughout the world. This principle has been implemented in the Treaty of Montevideo; it is also the position of lawyers throughout the world.¹⁵ But this alternative concept contradicts the RBC and UCC where the principle of *lex loci protectionis* has been implemented.¹⁶ In addition, copyright is a question of national legislation. Therefore, the validity of copyright ends at the state border.¹⁷

The Commission however refers to the EC Satellite Directive which is in its view using the country-of-origin principle. This is wrong: the EC Satellite Directive does not deal with problems of private international law. As the Commission itself has declared in a Position Paper on the Satellite Directive,¹⁸ the Directive only contains principles on the interpretation of licence agreements as to the extension of the satellite rights.

The problem of the applicable law may only be solved by establishing a principle of European territoriality (*lex loci Europaei protectionis*). To the extent that the national copyright acts in the EU Member States have been harmonised, the rightholders enjoy the same rights in every Member State. Therefore, it does not matter in practice that the applicable copyright system depends on the national law.

Reproduction right

The Green Paper also contains statements concerning the reproduction right. According to the Commission, the 'digitization of works or other protected matter should generally fall under the reproduction right, as should such things as loading on to the central memory of a computer'.¹⁹ The Green Paper seems to distinguish between the act of 'digitization' and the act of loading. However, digitisation is in general the same as the mere storing of a digitised work in the Random Access Memory. This

15 See Paul Heinrich Neuhaus, 'Freiheit und Gleichheit im Immaterialgüterrecht', *Rebels Zeitschrift* 1976, at 191 and onward; Soergel and Drobnitz, BGB, 12. Aufl. Stuttgart 1990, Anh. nach Art. 7 EGBGB Note 34; Haimo Schack, *Zur Anknüpfung des Urheberrechts im Internationalen Privatrecht*, 1979, Nos 18 to 19, 99 and onward, 137; 'Urheberrechtsverletzung im internationalen Privatrecht', *Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil* 1985, 523 and onward; 'Kolorierung von Spielfilmen: Das Persönlichkeitsrecht des Filmregisseurs im IPR', *IPRax* 1993, 46, 48.

16 Another view has been taken by Haimo Schack and others that the RBC and the UCC do not contain any regulation on private international law. See Schack, *Zur Anknüpfung des Urheberrechts im Internationalen Privatrecht*, 1979, Nos 10 and onward, 27 and onward; 'Der Vergütungsanspruch der in- und ausländischen Filmhersteller aus § 54 I UrhG', *Zeitschrift für Urheber- und Medienrecht*, 1989, 275; Nikola Kleine, *Urheberrechtsverträge im Internationalen Privatrecht*, 1986, 11, 16 to 17; Koumantos, 'Le droit international privé et la Convention de Berne', *Droit d'Auteur* 1988, 439, 443, 451.

17 Federal Supreme Court, judgment of 16 April 1975 — I ZR 40/73, BGHZ 64, 183, 191.

18 Position Paper on copyright questions of satellite transmission and cable retransmission of 8 November 1990, 5263/90, Note 4.1.13.

19 Note 1 above, at 52.

storage is, however, not to be regarded as reproduction according to the Revised Berne Convention. Storage in a RAM cannot be regarded as equivalent to storage on a CD-ROM or a hard disk. The RAM is used as a mere temporary instrument to store the digitised data for a short period. This interlocutory step is only made for technical reasons; the user is not able regularly 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.

It would change the whole copyright world if the mere storage in the RAM has to be 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 digitised work on different hardware even where the original computer is no longer used.

Digital dissemination or transmission right

Furthermore the Commission dealt with the transmission of works over networks, such as the Internet or Compuserve. With reference to the EC Directive on Rental and Lending Rights,²⁰ it held that lending and rental rights may be applied by extension to these digital transmissions.²¹ This proposal is wrong. The Directive does not apply to the transmission of digital works; such transmission cannot be regarded as rental or lending. These terms are defined in Article 1(2) and (3) of the Directive with reference to copies in material form. The use of immaterial copies is not mentioned in the Directive.

There has, however, been some discussion in the Council whether the Directive should also apply to so-called electronic rental or lending, that is video-on-demand. In the end, the Council refuted the extension of the Directive to such methods of dissemination. Some authors still held that rental or lending rights might be applicable by extension to video-on-demand.²² But this questionable approach does only refer to video-on-demand as the immaterial equivalent of the rental of material copies of a videocassette. It cannot be used as an argument for the extension of the rental right to any on-line service. Most on-line services provide information for an unlimited period of time; their services are equivalent to the selling of books and not to the rental of videocassettes.

The classification of digital transmission as rental or lending would, too, have detrimental consequences for publishers. According to the EC Directive, public libraries are allowed to lend works without the permission of the rightholders. If digital transmission has to be regarded as lending, public libraries would have the right to offer on-line copies of a copyrightable work. This scenario is already a reality in Germany and has been forbidden by several courts as copyright infringement.

This legal uncertainty has led to proposals for the introduction of a new right of electronic access or digital transmission.²³ Although the copyright acts of the EU Member States are in general open for the establishment

of new 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 view, 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 access to a collection of works. In both cases, the public has the chance to use copyright works. These similarities justify an analogy.

Moral rights

Finally, the Commission stresses the importance of moral rights in an information society. Where it will be very easy to modify and adapt digitised works, 'one vital consideration will be the author's moral rights, including the right to object to any unauthorised modification of its work and to claim the right of author's paternity'.²⁴ Coming from a 'droit d'auteur' country, I of course agree with this consideration.²⁵ However, Anglo-American countries will have more problems with the statement. I am therefore afraid of the Commission's interest in harmonising moral rights on a pan-European level. In my view, it is impossible to mingle common and continental law traditions with regard to moral rights; a kind of low-level system of moral rights would be insufficient and incompatible with both divergent systems.

As a matter of fact, the Commission has no competence to harmonise the moral rights. These rights are part of the property rights exempted from European regulations according to Article 222 of the European Treaty. The *Phil Collins* judgment mentioned in the Green Paper²⁶ only relates to economic rights apart from moral rights.

Summary

In general, the new Green Paper of the Commission has been written in a very sophisticated and well-balanced manner. However, there are some aspects which will still need further consideration. Especially, it has to be clarified whether digital transmission via on-line systems can be regarded as reproduction, distribution, communication to the public or subject of a new exclusive right under copyright. Apart from that, the problem of private international law has not been sufficiently regarded in the Green Paper. To sum up, it might be said: Brussels *locuta* — *causa non finita*.

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20 OJ 1992 L346/61.

21 Note 1 above, at 56.

22 See Silke von Lewinski, 'Vermiet- und Verleihrecht', in: Schulze, Ulmer *et al.* (eds), *Quellen des Urheberrechts*, May 1994, Volume V, Europ. Gemeinschaftsrecht/II/2, at 7.

23 This is 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 May 1994. Similar proposals have been made by Jürgen Becker (GEMA), *Die digitale Verwertung von Musikwerken aus der Sicht der Musikurheber*, Munich, 1994, at 45, 64.

24 Note 1 above, at 65.

25 See Hoeren, Note 2 above, at 8 to 9, 16 to 17.

26 Note 1 above, at 66.