The Law of On-line and Off-line Publishing

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INTRODUCTION

Will the technology of the communication of digitally stored data via interactive computer services render obsolete the traditional publishing on paper? It would suffice to store the content of any book, journal, newspaper, image, sound, music, film or audiovisual work in a single database which is connected to a worldwide network of interactive computer services to permit any person in the world who can use these services to retrieve, download, copy or print out the work. Thus the corporeal circulation of journals and books could be replaced by the inclusion of this material in a database where it could be stored in digital form and transmitted to the reader’s technically sophisticated computer or television screen. The law of electronic publishing has not generated a particular discipline. It is rather the need to comprehend the developing technology in legal terms which determines the classification of on-line and off-line publishing within the hierarchy of legal rules. Since this technology and also its exploitation are global, the traditional method of the legal science according to which facts are analysed in relation to a national legal system may not yield satisfactory results. What is needed is the creative thought, developed upon a comparison of problems which arise in different national legal systems. This idea underlies also the Green Paper ‘Copyright and Related Rights in the Information Society’, presented by the Commission of the European Communities. In this paper the Commission repeatedly pointed out that different national regulations, in particular in the field of copyright, may negatively affect the establishment of an efficient information infrastructure in the Community’s internal market. Whereas the development of these infrastructures ‘will

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Commission of the European Communities: Green Paper Copyright and Related Rights
mean economic growth, jobs and exports for all economies to the benefit of authors, producers and performers which the European Union intends to boost with its programme INFO 2000\(^2\), differences in national legislations may create barriers to the achievement of this aim. It is difficult to foresee the legal implications of the use of a technology at a time when this technology is in its infancy. The purpose of this article is thus confined to indicate the areas where problems may arise, by reference to cases which have arisen in different national legal systems and to suggest solutions which permit the avoidance of a misallocation of resources.

1. The Definition of the Terms 'On-line' and 'Off-line Publishing'

The new technologies for the communication of digitised data may roughly be described as 'on-line' and 'off-line' publishing. Whereas traditional publishing means the communication of information printed on paper, the new technologies permit the paperless communication of information on television or computer screens, but they may also permit the making of print-outs of the information by means of a printer which is attached to the computer or the copying of the data to a coporeal carrier.

1.1. The Definition of the Term 'On-line Publishing' by Reference to the Definition of the Term 'Electronic Publishing' in the U.S. Telecommunications Act of 1996

The legal order has not yet developed a unanimous definition of the term 'on-line publishing'. The U.S. Telecommunications Act of 1996 contains the following definition in Section 274, 'Electronic Publishing By Bell Operating Companies', subsection (h)\(^3\):

'in the Information Society, document com(95) 382 final, at 58: 'It is clear that the intellectual property law applying to digital dissemination or transmission will have to be harmonised. Without far-reaching harmonisation, freedom to supply services cannot become a reality, because differences of treatment will necessarily place obstacles in the way of trade between Member States,' and at 63: 'The introduction of exclusive broadcasting rights in some Member States and not in others only would seriously distort competition in cross-border broadcasting, and would at once provoke a displacement of broadcasting activities'.


\(^3\) U.S. Telecommunications Act of 1996, Section 274(h).
Definition of Electronic Publishing

1) In general – The term 'electronic publishing' means the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.

2) Exceptions – The term 'electronic publishing' shall not include the following services:
   a) Information access, as that term is defined by the modification of final judgment.
   b) The transmission of information as a common carrier.
   c) The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.
   d) Voice storage and retrieval services, including voice messaging and electronic mail services.
   e) Data processing or transaction processing services that do not involve the generation or alteration of the content of information.
   f) Electronic billing or advertising of a bell operating company's regulated telecommunications services.
   g) Language translation or data format conversion.
   h) The provision of information necessary for the management, control, or operation of a telephone company telecommunications system.
   i) The provision of directory assistance that provides names, addresses, and telephone numbers and does not include advertising.
   j) Caller identification services.
   k) Repair and provisioning of databases and credit card and billing validation for telephone company operations.
   l) 911-E and other emergency assistance databases.
m) Any other network service of a type that is like or similar to these network services and that does not involve the generation or alteration of the content of information.

n) Any upgrades to these network services that do not involve the generation or alteration of the content of information.

o) Video programming or full video entertainment on demand.

Since the purpose of Section 274 of the U.S. Telecommunications Act of 1996 lies in the establishment of limits for vertical concentrations between Bell telephone operating companies and electronic publishing activities, the provision is more concerned with describing the content of the electronic publications – the provision does not refer to the technical means used for the communication – but it may be assumed that ‘electronic’ publishing means ‘on-line’ communication and thus a publishing which is performed via computers which are connected by means of telecommunications. Summing up, the definition of the term ‘online publishing’ with regard to telecommunications in Section 274(h) of the U.S. Telecommunications Act of 1996 excludes services from the scope of the provision which do not determine the content of the information concerned so that the transmission of the information or the providing of the access to electronic publishing services are not covered. The definition of the term ‘on-line publishing’ by reference to the term ‘electronic publishing’ as used in the Act thus extends beyond the mere publication of printed material which is stored in electronic databases and transmitted to a computer. The definition of the Act supports a broad definition of the term which would include the on-line communication of any material which is stored in databases, including films and interactive multimedia works. However, the express exclusion of ‘video programming or full video entertainment on demand’ seems to exclude from the term anything which does not constitute data which can be stored in a database but which has the quality of a programme. It seems that the definition of the term ‘on-line publishing’ would include a single communication of the information, different from traditional publishing, where publication occurs when a work is actually reproduced and distributed to the public⁴. The UK Copyright, Designs and Patents Act 1988 defines as a ‘publication’ also the making of works available by means of an electronic retrieval system. Thus the on-line publication of a work is made, when the work is included in a database from which it can be accessed or downloaded.

⁴ See e.g. Article 2 of the German Copyright Act, Article 12 of the Italian Copyright Act or Article 175 of the UK Copyright, Designs and Patents Act 1988.
without that an actual electronic transfer of the data concerned would have
to occur. It appears that the developing technology does not permit a
narrow definition of the term, taking into account of the principle that
exceptions should be given a narrow interpretation.

Some of the new forms of on-line communications may briefly be
referred to:

- Electronic libraries, where the subscriber purchases the right to access
  and retrieve data stored in a database are a typical example of electronic
  publishing. The content of the database may vary: literary works,
  artistic works, musical works or images, sequences of images, films
  and audiovisual works.

- Video-on-demand, where the subscriber obtains the possibility to
  choose certain films, videos or other audiovisual works which are
  kept in the database of the service, similar to the possibility to choose
  a video in a videotheque. The exclusion of full-video-on-demand ser-
  vices and video programming from electronic publishing in the sense
  of the u.s. Telecommunications Act of 1996, Article 274(h)(2) letter
  (o), seems to lie in the particular interest to exclude this commerci-
  ally interesting possibility of exploitation of audiovisual works from the
  restrictions which otherwise would be imposed upon Bell operating
  companies wanting to indulge into this business. Interestingly,
  Subsection 1 of the relevant provision expressly refers to images as
  subject-matter of electronic publishing. Therefore also sequences of
  images, film and other audiovisual works should be considered as a
  proper subject-matter of on-line publishing, since the technology
  employed does not justify a differentiation according to the various
  classes of works or objects transmitted.

- Pay-per-channel, where the subscriber obtains the right to see the
  programme of a television channel during a certain time. There will
  be no on-line publishing, due to the fact that the service offers a
  programme so that the service assumes the typical nature of broad-
  casting.

- Pay-per-view, where the subscriber chooses from the offers of the
  service certain contributions only, similar to a person who makes a
  choice amongst the films played in a cinema.

- Telegames, where the subscriber may, interactively, participate in
  games, in particular video-games, which are offered by an on-line
  service. This service will not be considered as on-line publishing,
insofar as the interactive nature of games and the degree of the sub-
screber’s personal involvement does not permit the drawing of a parallel to the publishing of works.

- Teleshopping, this means the offering, on-line, of goods and services, similar to the offers and advertisements in catalogues; in these cases the quality of teleshopping as on-line publishing can be assumed whereas doubts may be permitted if teleshopping is an element within a sponsored television channel.

- Teleteaching, this service may constitute electronic publishing, in particular with regard to the elements which relate to the reproduction of works of literature and the arts or images and films.

- Information Services, these services will have to be considered as electronic publishing, insofar as they do not have the nature of programmes.

Concluding, there will be on-line publishing, if the service essentially consists in the offering of the retrieval and on-line transmission of works or similar objects stored in database, similar to the service of a library or videotheque, whereas on-line publishing cannot be assumed when the service has the nature of a programme.

1.2. The Definition of the Term ‘Off-line Publishing’

No satisfactory definition of the term ‘off-line publishing’ has developed yet. The term is generally understood to comprise electronic publishing which is made on the basis of a material support such as a CD-ROM, CD-i or CD-E. It is asserted that a CD-ROM should be treated similar to a film, but also similar to a database. The traditional legal doctrines developed with regard to publishing will be applicable mutatis mutandis, taking into account that the carrier of the subject-matter of the information to be

5 A CD-ROM permits the transfer of the data which are stored on it to a computer, a CD-i to a television set and a CD-E permits also the user the modification or deletion of data and the storage of new data on the material support.


published is a material object so that the applicability of the provisions concerning the publication of works on paper may be justified. Also in the case of off-line publishing a differentiation according to the various classes of works published is not justified, taking into account that a CD-ROM or CD-i can reproduce text, graphics, images, sound and audiovisual works.

1.3. Advantages and Disadvantages of On-line and Off-line Publishing with Regard to Traditional Publishing

On-line publications are directly accessible by users without intermediate trade, leaving out of account the service which may be needed to obtain the access. According to statistics consumers of on-line publications are essentially male, and the technology involved requires a certain technical capability which also limits access. Since advertising is addressed to women at a rate of some 70 per cent, the commercial exploitability of on-line publishing appears limited at present. But the importance of on-line shopping will increase with the simplification of the technical process and equipment. Off-line publishing is considered expensive. The production of a valuable CD-ROM may cost dear due to the negotiations for the acquisition of rights in pre-existing works. Again, the market of off-line products is limited due to the consumers’ technical facilities and capabilities. The CD-i player which can be used with a television set may reduce barriers which the involvement of computers may create for the consumer.

2. The Infrastructure of On-line Publishing

The transmission of digitised data on-line presupposes the existence of networks for the communication of such data. This information infrastructure exists already, but a new infrastructure will develop and integrate the existing separate communications networks 'into an advanced high-speed, interactive, broadband, digital communications system'. The technical network required for the information infrastructure exists and is permanently adapted according to the technical progress and the conditions imposed by the legal order. The consequences which arise from the application of the existing legal order with regard to the developing technologies of on-line publishing were the subject-matter of the public discussion during the

passing of the U.S. Telecommunications Act of 1996. The issues relating to
the control over Internet and the media ownership regulation played the
most important role in the controversy. In a statement of 02 August 1995
the U.S. President threatened to veto the draft of the Bill, because it would
promote mergers and concentrations instead of investment and competition,
and on 21 February 1995 the Communications Decency Act of 1995 was
introduced to the U.S. Congress, a Bill 'to protect the public from the
misuse of the telecommunications network and telecommunications devices
and facilities' which was subsequently incorporated into the Bill. Similar
discussions take place in other countries where those who shall create the
new information infrastructure hesitate from investing unless they will be
assured that their efforts can yield a return9.

The regulations of traditional publishing are characterised by the concern
that the concentration of media ownership could lead to dangers which
derive from the power to influence the public opinion. The policy employed
to prevent concentrations aimed at the maintenance of the plurality of the
media. Also technical conditions determined the content of these regulations,
for example in the case of broadcasting where the licensing of frequencies
by public authorities was necessary in order to organise the services. These
technical constraints become increasingly irrelevant in the case of on-line
publishing so that with this respect limitations of the freedom of speech
and writing cannot be justified. But a clearance of the legal status of on-
line publishing is required insofar as it is necessary to determine whether
and up to which extent the new means of communication are subject to
existing regulations or not. An important issue constitutes the applicability
of the laws concerning broadcasting. Is the establishment of an interactive
computer service subject to licensing requirements by the national authorities
which authorise broadcasting services? The global system of on-line
publishing which has developed with the rise of the Internet to a world-
wide communication system shows that regulation is not a precondition
for success. In the case of cross-border services differing national regulations
might lead to a fragmentisation of markets. It seems that private economic
activity in the market of on-line publishing may be expected if the industry
can operate in larger markets which are regulated as little as possible. For
the future of on-line publishing this means that legislative activity should

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9 The German government plans a 'Multimedia Law' to be drafted until summer 1996,
the purpose of which is to regulate civil and criminal law issues relating to new technologies
concerning information and communication, see Frankfurter Allgemeine Zeitung of 30 March
1996.
be limited to the minimum which assures that free economic activity can develop without unnecessary interference by public administration. The subject-matter of the legislature may lie in the establishment of some guiding principles for the new media such as the regulation of the conditions for the access to the services\textsuperscript{10} and also in the regulation concerning the transparency in the ownership of the services with the aim to create the legal security about the applicability of the antitrust law which are relevant for the media sector of the economy.

2.1. Telecommunications

At the European level the services of data transmission, services for closed user groups, value-added services, satellite communications and mobile telephony have already been opened to competition so that only the public voice telephony and the basic infrastructure of telecommunications are open to liberalisation measures. The Commission adopted on 18 October 1995 under the competition rules a Directive liberalising the use of cable television networks to deliver those services which are already open to competition, and on 19 July 1995 the Commission proposed, for consultation purposes, a draft Directive liberalising the voice telephony monopoly and the use of infrastructure to provide the voice service from 01 January 1998\textsuperscript{11}. But since the regulation of the telecommunication by the Commission is directed towards the establishment of the internal market of the Community, the Community law opens up competition and does not, different from the U.S. Telecommunications Act of 1996, regulate the telecommunication in detail. Thus the Directives and draft Directives of the Community do not relate to the issues of electronic publishing and the Internet, and they do not formulate a policy with regard to communications on the Internet. Concerning packet- or circuit-switched data services, the Commission obliged Member States to abolish the adopted set of public-service specifications replacing them by declaration procedures of general authorisations\textsuperscript{12}.

The flexibility of Community action in the establishment of the infor-


\textsuperscript{11} Communication of Mr. Ben Van Houtte, European Commission, Directorate General XIII, Ref. CD XIII A/b, of 30 January 1996.

\textsuperscript{12} Commission Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, O.J. L 74/13 of 22 March 1996.
formation society depends also upon the fact that the different policies of Member States have to be taken into account. The European Community pursues actively the policy of establishing trans-European telecommunication networks with the aim to facilitate the circulation of information in the internal market so that in particular small and medium-sized enterprises in the Community may benefit from Community wide operations. In a Decision of 09 November 1995 the European Parliament and the Council established guidelines for the development of the EURO-ISDN (Integrated Services Digital Network) as a trans-European network\(^{13}\) which differs between basic services and telematic services. To the latter belong European file transfer, electronic mail and generalised access to data bases including videotext and videophony. Amongst the projects of common interest concerning the development of EURO-ISDN as a trans-European network are the development of a range of services based on the EURO-ISDN, with account also being taken of the future introduction of a European broadband communications network. Concerning new digital media and the liberalisation of the telecommunications infrastructure, the European Parliament issued a Resolution on the Communication from the Commission ‘Green Paper on the liberalisation of telecommunications infrastructure and cable television networks\(^{14}\) in which it supported the view that the full liberalisation of infrastructures and services makes it necessary to define in a Directive, in advance of any liberalisation, the public service duties of all operators and to create a regulatory model which guarantees equal and non-discriminatory access for service providers. Such a Directive should cover the granting of licences, interconnection, access to networks for users and suppliers of services, guarantee of universal service financed by operators as a whole, prices of services, security of operation (network integrity), protection of intellectual property, cryptography and electronic signatures, protection of private and personal information and consumer protection. Even if such a Directive may not provide for substantial regulatory measures of the Member States, there is a need for a harmonisation of these issues if the internal market of basic and value added telecommunications services shall be established.

The operation of an on-line database may be subject to the regulatory requirements of national telecommunications law. Thus in the UK a VADS telecommunications licence has to authorise the operation of a value added or data service according to the Telecommunications Act 1984. However,

\(^{13}\) O.J. L 282/16 of 24 November 1995.

the conditions for the grant of the licence are not demanding so that the procedure is simple according to Section 7 of the Act. The privatisation of the basic telecommunications infrastructure in Europe creates the risk that the owners of the networks grant the access to on-line services at discriminatory conditions. In order to ensure a competitive market structure it has been suggested to introduce a limited common carrier system according to which organisations which provide basic telecommunication services are obligated to make their facilities available to on-line publishers at non-discriminatory conditions\textsuperscript{15}.

2.2. Interactive Computer Services

On-line publishing may be performed in particular by interactive computer services. The U.S. Telecommunications Act of 1996 uses the following definition: ‘The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions’\textsuperscript{16}. This definition seems broad enough to include also services which are operated in-house by companies or very small operators with limited facilities.

2.3. The Internet

The use of the Internet for on-line publishing is at the centre of the public interest. The definition given to the term ‘Internet’ by the U.S. Telecommunications Act of 1996 states: ‘The term ‘Internet’ means the international computer network of both Federal and non-Federal interoperable packet switched data networks’\textsuperscript{17}. It should be remembered that, in spite of the admirable efforts of the U.S. in the establishment of this international computer network, the applicability of the U.S. Telecommunications Act of 1996 is limited to the national territory of the U.S. beyond of which it may be extended only in conformity with international law. The Internet developed without any substantial regulatory intervention and it is to be hoped that this will also be the basis for its future growth.

\textsuperscript{15} Bernd Holznagel, Probleme der Rundfunkregelung im Multimedia Zeitalter, zum 1996/16-26 at 19 with regard to digital broadcasting.

\textsuperscript{16} U.S. Telecommunications Act of 1996, Section 230(e)(2).

\textsuperscript{17} U.S. Telecommunications Act of 1996, Section 230(e)(1).

Antitrust laws regulate agreements in restraint of trade and abuses of a dominant position in the market. Services providing electronic publishing will be subject to these regulations just as any other undertakings. But many national legal systems have special laws which regulate antitrust issues in the media. Traditionally, these laws are directed to avoid concentrations in the press and broadcasting markets with the aim to maintain the plurality of the media. These laws may establish limits to monomedia concentration, to equity holdings or to cross-media ownership, but they may also contain exemptions from the application of the general prohibitions of antitrust law for the benefit of publishers and the book trade.

3.1. Regulations concerning the Media and On-line Publishing

Undertakings providing on-line publishing services are subject to the regulation of antitrust, whether on a national or supra-national basis. But are they also subject to the special regulations applicable in the media market? In the absence of special legislation directed towards the regulation of electronic publishing the on-line services may have to observe the regulations applicable to other media such as broadcasting or the press services.

3.1.1. Merger and Monopoly Control

A special regulation concerning vertical concentrations of on-line publishing is contained in Section 274 of the U.S. Telecommunications Act of 1966 which regulates electronic publishing by Bell operating companies. Section 274(a) of the Act establishes the prohibition of the providing of electronic publishing services by Bell operating companies or their affiliates insofar as the on-line service is disseminated by means of the company's or the affiliate's basic telephone service. According to Section 274(b) of the Act a separated affiliate or electronic publishing joint venture has to be operated independently from the Bell operating company. It shall keep separate books, records and accounts, in the case of a default of the electronic publishing affiliate or joint venture the debtors shall not obtain an access to the assets of the Bell operating company, it shall not use for its marketing policy the industrial property rights of the Bell operating company, the Act does not permit the Bell operating company to perform the hiring and training of personnel or to perform research and development
on behalf of the separated affiliate. The law also provides for the companies' duty to perform an annual compliance review. The regulation in the Act aims at the maintenance of similar conditions for competition between on-line publishing services, and it permits the comparison of the economic performance of on-line services which are provided by affiliates of companies which supply the basic telecommunications network with those provided by independent on-line publishing services.

Within the European Community merger controls in the media industry are special in that, even in the case of a merger which, by reason of its Community dimension, is subject to Council Regulation 4064/89 on the control of concentrations between undertakings, a Member State may still take appropriate measures to protect legitimate interests for the purpose of the plurality of the media, so that national anti-trust legislation may be applicable concurrently with the Regulation.\(^\text{18}\)

3.1.2. The Applicability of the Rules concerning Broadcasting

Will on-line publishing be subject to the rules concerning broadcasting? The language of the Council Directive 'Television without frontiers' of 1989 seems to exclude point-to-point services from the scope of broadcasting in Article 1(a) which states: 'Television broadcasting' means the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services'. Whereas the Commission of the European Communities mentioned in the explanatory memorandum of 1995 concerning the proposal for an amendment of the Directive that no modification of this definition would be envisaged, since the definition would also comprise newer services such as pay-per-view or near-video-on-demand the European Parliament recommended substantial amendment in 1996.\(^\text{19}\). On the other hand the

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Commission asserted that point-to-point systems would not fall within this definition. But are not pay-per-view and near-video-on-demand point-to-point services? The German State Treaty concerning Broadcasting of 1991 uses the following definition in Article 2: 'Broadcasting is the performance and distribution of presentations destined for the general public of any kind in word, sound and images by use of electronic oscillations without a conductor or along or by means of a conductor. The term includes presentations which are distributed encrypted or which can be received against a particular remuneration or videotex'. The Heads of the State Chancelleries of the German provinces ("Landers") concluded in a Statement of 09 October 1994: '1. The definition of the term 'broadcasting' in Article 2(1) of the German State Treaty concerning Broadcasting of 1991 comprises also pay-tv, pay-per-view and near-video-on-demand. Insofar there is no need to modify the Treaty. In particular the variety of the present possibilities should be contrasted with first experiences drawn from real facts in order to avoid misdirections of the legislature'. According to this Statement there will not be a 'distribution of presentations destined for the general public' if a presentation is made in the individual case upon the personal demand of a customer, and in any case the following services will not be considered as broadcasting: e-mail and electronic data exchange, electronic services for metering, gauging and security services, or the interactive electronic shopping, teleshopping, telebanking, telegames and telebooking. However, the representatives of the German Provinces could not

definition in Article 1(1)(a): 'Television broadcasting' means the initial transmission by wire or over the air, including that by satellite in unencoded or encoded form, of television programmes intended for reception by the public whether for a mass audience or for transmission by the broadcaster for individual demand either simultaneously or sequentially. It also includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks nor the interactive exchange of information of individuals, 'television programme' means an animated or non-animated sequence of images which may or may not be accompanied by sound.

In the Explanatory Article 2 of the German State Treaty concerning Broadcasting of 1991 it was stated that the term 'broadcasting' should be defined dynamically, so that it is open for new technological developments: 'Broadcasting comprises as a generic term both, the radio and television sectors, and also other sectors which do not serve the individual communication. Sentence 2 contains for this reason not an extension of the concept of 'broadcasting' as defined in sentence 1, but a substantiation, in particular with regard to the sector pay-tv and videotext. Accordingly, the physical method used for the transmission does not matter with respect to this concept'.
agree upon the broadcasting quality of services on demand which differ not essentially from broadcasting programmes or transmissions\textsuperscript{21}. These services are, for example, those which offer, beyond the mere transmission of films or catalogues for shopping, also an editorial content such as advertising or news. The discussion shows that there is still a substantial controversy about the classification of the new digital services within the traditional concept of broadcasting. Taking into account that regulations of the broadcasting services in the past were necessary in order to ensure the freedom of speech and writing, it may be argued that in the digital era the plurality of the media and of opinion can be assured by the viewers or subscribers themselves. The increase in the offers of television broadcasting services led to a decrease of the market share of the public broadcasting organisations. Thus in Germany the market share of the public broadcasting organisation ARD fell from 43.4 per cent in 1985 to 17 per cent in 1993, and that of the ZDF from 42.6 per cent to 18 per cent during the same period\textsuperscript{22}. It may be argued that with the increase of the number of new digital services a special regulation of the content of the programmes of broadcasting services would become obsolete, because the viewers themselves will be able to decide upon the programmes they prefer and the plurality of opinion would be provided by the plurality of the services offered. However, the mere possibility of the creation of market dominating positions in the on-line publishing sector of the economy the future importance of which cannot adequately be assessed at present may justify in the public interest the issuing of special regulatory measures similar to those which are drafted to avoid concentrations in the broadcasting industry.

3.1.3. Regulation through Licensing or Notification

The systems providing for the licensing of broadcasting services and for the control of concentrations in the media market differ considerably from country to country. When frequencies for transmissions of broadcasting are scarce, their allocation through the grant of a licence will automatically ensure a market share. The new technologies of broadcasting eliminate the barrier which was created by the need for the allocation of a frequency. But the existing legal regulations which make dependent the operation of


broadcasting activities upon the grant of a licence by the public administration\textsuperscript{23} may not take into account these changes. Often the licensing procedure will follow the rules of the public administration law so that not the cartel authorities and courts which are used to evaluate economic conditions but administrative tribunals will have competence in the case of controversies. It may be questioned whether the licensing requirement for broadcasting activities should be maintained in the future, insofar as technical constraints deriving from the necessity to allocate frequencies become obsolete. The application of the general legal system imposes the observation of ethical standards by the operators of on-line publishing which seems sufficient to ensure that the new media will operate in the public interest. Thus licensing requirements should only be maintained if the technical conditions necessitate the intervention of public authorities for similar reasons. Otherwise there is no reason why programmes which are financed privately by the advertising industry or by subscribers should be subject to public licensing requirements when journals or periodicals, the traditional mass media, can be published without similar constraints. The public interest will be safeguarded if the operation of on-line publishing is made subject to a duty of notification with a public authority.

3.1.4. Cross Media Ownership Regulations

Critical issues of merger control and the control of market dominating positions relate to the ownership of undertakings which are engaged in different sectors of the media economy\textsuperscript{24}. The Italian Law concerning Broad-

\textsuperscript{23} See for example Article 16 of the Italian Law concerning Broadcasting of 1990, Law No. 223, which states: 'Licence For the Establishment And The Operation Of Private Broadcasting Installations. (1) The distribution by broadcasting (radio and television) through other organisations than the public licensees is dependent upon the grant of licences according to this Article. A licence will also be granted for the establishment of the installations concerned. (2) A licence may be granted for the operations of individual networks within the national territory or of individual broadcasters and networks in the sense of Article 3 within local territories'... (3) The licence for the distribution of broadcasting (radio) is granted for the national territory and also for the local distribution of commercial or public operation'; Alfonso Conalda, Video on Demand, Dir. autore 1995, 105-127 at 107.

\textsuperscript{24} Roberto Barzanti, Intervention in: La Televisione fra Autonomia e Controlli, Atti di Convegno di Genova, 7-8 April 1995, Cedam, Milan 1995, 109-229 who refers at 214 et seq. to different laws of European countries which provide for limitations in ownership and cross ownership of broadcasting services; Gillian Doyle: The Cross Media Ownership Debate, Media Law & Practice, (1995) at 38; the UK Broadcasting Act 1990 contains cross-media regulations which prohibit a newspaper proprietor from owning more than 20 per cent of a company with a licence to provide Channel 3, Channel 5 or a national radio service. The
casting of 1990\textsuperscript{25} contains a regulation of cross media ownership in Article 15(1) according to which a licence for television broadcasting for the national territory will not be granted, if the applicant exercises control over daily newspapers which exceeded 16 per cent of the whole annual circulation of newspapers in Italy. If the applicant holds already a licence, a second licence will not be granted if the circulation of his newspapers exceeded 8 per cent. If the applicant holds two licences, another licence will not be granted if the applicant exercises control over daily newspapers with a circulation inferior to the limits above mentioned. According to Article 15(2)(3) of the Law transfers of shares or of an interest in shares will be prohibited if the transfer leads to the establishment of a concentration of ownership in the mass media industry. Article 15(4) of the Law provides that no more than 3 licences for radio or television broadcasting may be granted to an applicant for the national territory. However, it appears doubtful whether and to which on-line publishing services the laws concerning cross-media ownership control may be applicable. The answer will depend upon the interpretation of the terms ‘broadcasting’ and ‘press’ by national jurisprudences according to which on-line publishing services may or may not be caught by the relevant provisions.

3.1.5. Reform of the State Treaty concerning Broadcasting in Germany?

The German State Treaty concerning Broadcasting of 1991 regulates the maintenance of the plurality of opinion in Article 21\textsuperscript{26}. Assuming that the proprietor of a local newspaper may own a larger stake in a regional Channel 3 service if the service covers a different local area but the proprietor of a national newspaper with a stake of 5 per cent in a holder of a licence for Channel 3, Channel 5 or national radio service may not own more than 5 per cent in another similar company. The proprietors of local newspapers may own up to 20 per cent of local radio stations in the territory of the coverage of the newspaper. Similar restrictions are applicable to the proprietors of broadcasting organisations. Accordingly, the owner of a licence for Channel 3, Channel 5 or a national radio station may not own a share of more than 20 per cent in a national or local newspaper. The Act contains detailed provisions for the establishment of the criterion of who has the control over a company and how the shares should be compounded when calculating the critical thresholds. But the Act also contains special limitations which are designed to prevent monopoly situations in a certain media. Thus within a category of broadcasting services only a limited number of licences for the operation of such services will be granted to a person. Only one licence will be granted to a person or organisation for a national Channel 3 or 5 or national radio, two regional Channel 3, six restricted radio and twenty local radio. Similar limits can be established by the government for other services such as satellite television or the radio.

\textsuperscript{25} Italian Law concerning Broadcasting of 1990, Law no. 223.

\textsuperscript{26} Article 21 of the the German State Treaty concerning Broadcasting states: ‘Safeguarding
activity of a certain on-line publishing service constitutes broadcasting, this provision would also be applicable to the provider of the service. The possibilities of a reform of the rules in the State Treaty concerning Broadcasting of 1991 are discussed with a view to adapting the rules to the developing technology. The models for regulation centre on the ‘one man – one show’ and the ‘market share’ concepts. According to the ‘one man – one show’ concept a person may not hold a financial interest in more than one broadcasting organisation which supplies a nationwide programme whereas the ‘market share’ concept permits the holding of interests in several broadcasting organisations up to a certain upper limit established by reference to the market share. The disadvantages of the ‘one man – one show’ concept which lie in the problem to evaluate complicated structures of concentrations, in the need to dissolve existing concentrations and in the non-susceptibility to consider cross-media ownership relations make its adoption unlikely. A model of the ‘market share’ concept envisages that in the case where an interest in the capital of a company exceeds 50 per cent, the company’s market share with regard to viewers should fully be attributed to the holder. An interest between 25 and 50 per cent should be attributed partially, and if the interest is below 25 per cent, an attribution of the market share should only be made if the holder can exercise a relevant influence on the broadcaster. Another model envisages the full attribution of the market share of a broadcasting organisation to any holder provided that the broadcasting organisation has a market share of more than 5 per cent. By weighing a holder’s interests the position of the holder in the market will be assessed. If the market share exceeds a critical value, say 20 or 33 per cent, an inadmissible concentration will be assumed. However,

of the Plurality of Opinion. (1) Within the Federal Republic of Germany an undertaking may, in the individual case, for the purposes of radio or television broadcasting, distribute up to two programmes, whereby only one programme may be a full programme or a special programme essentially focusing on the supply of information. When determining the admissible number or programmes, also the other programmes in the German language of the organiser shall be taken into consideration which can be received nationwide. The fact...

27 The Kirch group envisages the launching of nine film pay-television channels this summer and a Bertelsmann consortium envisages to establish ten to fifteen channels this autumn according to the Financial Times of 01 April 1996.

28 Kurt Stockmann and Sabine Zigelski, Novellierung des Rundfunkstaatsvertrages, zum 1995/537-552 at 540, 541.


30 German Joint Conference of the Working Group of the Media Institutions of the Provinces, decision of 17 September 1994.
the introduction of these models which are partially based on the policy
which the U.S.-American Federal Communications Commission pursues
according to the Telecommunications Act of 1934 (as modified by the Act
of 1996) may enforce the oligopolistic structure of the market in which
several larger media groups operate. The discussion about the scope of
applicability of the State Treaty concerning Broadcasting to on-line pub-
lishing services shows that the provisions in the Treaty which are intended
to regulate the distribution of programmes by broadcasting do not
necessarily suit the case of on-line publishing where the subscriber or viewer
determines the content of the transmission.

A possible reform of the State Treaty concerning Broadcasting in Ger-
many with a view to the covering of the new digital media should also take
into consideration the State Treaty concerning Videotex of 18 March 1983
which is now a part of the State Treaty concerning Broadcasting of 1991.
The State Treaty concerning Videotex defines videotex as ‘a system for
information and communication determined for the use of subscribers and
offering services where information and other services for all subscribers or
groups of subscribers (‘offers’) and individual communication are electro-
nically stored for demand, by use of the public telecommunications network
and of videotex mediating services or similar technical mediating services
individually retrieved and typically made visible on the screen. This does
not include the transmission of moving images’. Article 1 of the Treaty
thus differs between information which is offered upon demand (‘offers’)
and individual information. The term ‘offers’ comprises for any subscriber
or group of subscribers certain informations and other services such as
electronic billing, education or computer games. The Treaty does not relate
to private data processing systems which are accessible to a limited circle
of persons and not to the public. The exclusion of the transmission of
moving images from the scope of the Treaty had the purpose to avoid
doubts about the applicability of the State Treaty concerning Broadcasting
to these transmissions. The Treaty regulates that private persons may offer
videotex services, they may do this against a remuneration, provided that
the user is informed about the conditions, or free. The Treaty establishes
a duty of care which relates to the correctness of the information distributed
and establishes a right of counter-representation. Advertising has to be
recognisable as such. Ethical standards have to be observed (the provisions
relate amongst others to the prohibition of the incitement of racial hatred,
to the avoidance of cruelty or pornography and to the protection of minors).
Also data protection is regulated by the Treaty and the persons who ope-
rate services and the installations of videotex are bound by a duty of
confidentiality unless this obligation is obsolete because the information belongs to the public domain or does not need to be kept secret. The supervision of the Treaty is a matter of the Provinces (‘Länder’). The special regulation of videotex in a State Treaty makes it unlikely that the State Treaty concerning Broadcasting will be amended to include provisions which relate to the new digital media. It is more likely and, by reason of the technology involved and the effect on the general public more reasonable, that on-line publishing will be dealt with by a particular State Treaty to be concluded by the German Provinces.

3.1.6. Towards a German State Treaty concerning On-line Publishing

With regard to the new services which are similar to broadcasting, the conclusion of a State Treaty concerning On-line Publishing is discussed in Germany. The purpose of such a Treaty would be, first, to establish the borderline between broadcasting services and services which are similar to broadcasting but not subject to the same rules, and, second, to establish the rules applicable to these services. It may be difficult to differentiate new services from broadcasting services. In the case where an on-line service which does not offer a programme but which, by reason of its nature, can have a similar impact upon the public opinion, it can be justified to apply to the service the rules contained in the State Treaty concerning Broadcasting. A new State Treaty concerning On-line Publishing could thus be applicable to the offering and using of media services in text, sound or images by use of electronic oscillations without a conductor or along or by means of a conductor which are not subject to the German State Treaty concerning Broadcasting. The rapid development of the new technologies prohibits the exclusive enumeration of services to which the scope of the Treaty would relate, but it will be applicable to services like teleshopping, banking services, on-demand services, text services, or similar services provided that they are addressed to the general public.

The State Treaty concerning On-line Publishing should establish the general conditions for the operation of these services such as the duty to provide non-discriminatory access and to notify the service, including the description of the performances supplied. The services could be obligated to publish their prices and to inform the subscriber during the transmission of the costs which he incurs. On-line publishing services which offer information relating to periodicals or which offer periodically data containing information could be obligated to name a person who carries the responsibility for the service, similar to the regulations concerning print
imprints. Ethical standards may be prescribed, similar to those contained in the Directive of the European Union 'Television without frontiers'\textsuperscript{31} and which may contain prohibitions with the purpose of the protection of minors and morals. Different from the Directive, advertising should not be regulated, since these services are not programmes in which the proportion of advertising blocks and the 'editorial' programme needs fixation in the interest of the public and the other broadcasters. Similar to the regulations in the press laws or treaties concerning broadcasting a State Treaty concerning On-line Publishing could contain rules establishing the duty to publish a counter-representation if a person was affected by a statement of facts, independently of the fact whether the original statement was wrong or true and whether the counter-representation is true\textsuperscript{32}. In the case where the service avails of the information about the identity of the subscribers who received the wrong statement of facts or defamatory statement, the service should be obligated to communicate the injured person's counter-representation to all recipients or the defamation or wrong statement. If the identity of the subscribers cannot be established, it may be reasonable to demand that the service publishes the counter-representation at a similar place where the assertion complained of was published. Beyond, it does not seem to be appropriate to regulate also the issue of the correction of any defamation which the injured person may demand from the service or the person concerned, because the general principles of the law of tort will be applicable. The observance of data protection should be regulated, in compliance with the Directive on data protection of the European Union. Finally, it may be provided that the supervision of the State Treaty will be ensured by the competent authority of the public administration. This regulation of on-line publishing would establish the basic conditions to which services may operate and clarify the relation between on-line publishing and broadcasting.

3.1.7. The Role of the European Community

The necessity for the harmonisation of the national antitrust laws applicable to on-line publishing activities within the European Community derives from the fact that these activities are increasingly international, extending to the internal market and even beyond. Therefore, there is a


\textsuperscript{32} Concerning the right to claim a counter-representation, retraction and rectification according to German law see Arnold Vahrenwald, Princess Caroline of Monaco Fights the Press, (1995) 4 Entertainment Law Review, 150-161 at 154.
need to coordinate the policy of the concentration in the electronic publishing media at least at the Community level\textsuperscript{33}. The Commission is aware of the fact that the digitisation of the communications media will have a considerable impact on the development of the media market, since these technologies favour the globalisation of markets\textsuperscript{34}. Accordingly, larger organisations from non-Member States which are not bound by the policy of the pluralism of the media which is applied in many Member States may be more competitive, because they are not bound by similar restraints in their home markets. The urgent need to harmonise the antitrust laws concerning the media of Member States was straightforwardly expressed by the Economic and Social Committee of the Union in February 1995\textsuperscript{35} and the Commission is already preparing a draft Directive which has the purpose to harmonise the different national laws and regulations concerning the concentration of the media\textsuperscript{36}. It can be expected that the rules of the draft Directive will use the criteria of the figures of actual viewers\textsuperscript{37} and possibly the criteria of the beneficial ownership by means of which a controller can establish who actually controls an undertaking. The harmonisation of the rules concerning media ownership in the Member States of the European Union will lead to legal security and encourage direct investment so that it has a beneficial effect upon the development of the economy, even if it may favour the concentration of the media.

A Report concerning the transparency and control of the media in Europe by the European Institute for the Media of 1994\textsuperscript{38} assumes the subsistence of a ‘grey area’ with regard to the new digital media which differ from the traditional mass media by their direction to the individual

\textsuperscript{33} Emmanuel Crabit, Pluralism and Media Concentration, IRIS (1995) special issue, 12-14 at 13.
\textsuperscript{34} Commission of the European Communities, Communication to the Council and the European Parliament: ‘Follow-up to the Consultation Process Relating to the Green Paper on Pluralism and Media Concentration in the Internal Market - an Assessment of the Need for Community Action’, document com(94) 353 final of 05 October 1994 at 36.
\textsuperscript{36} Mario Monti, Pluralisme et Concentration des Médias, speech before the Commission for culture, youth and the sports of the European Parliament of 26 September 1995.
\textsuperscript{37} The Position Paper ‘Feasibility of Using Audience Measures to Assess Pluralism’ prepared for the Directorate General XV, E/5 completed a review of audience measures for television, press and radio within the European Union and offered a definitive statement on the application of audience measures as indices of pluralism.
\textsuperscript{38} The European Institute for the Media: ‘La Transparence dans le Contrôle des Médias’, Düsseldorf, November 1994, document eim/3-012/94, at 188.
personality. The Report concedes that the rules concerning the audiovisual media are of limited applicability with regard to these new media, and examines briefly whether the rules concerning broadcasting are applicable to the new services. It is alleged that in Germany a minority of lawyers consider video-on-demand as broadcasting in the sense of Article 2(1) of the German State Treaty concerning Broadcasting of 1991. In Spain the definition of the term ‘broadcasting’ in the Law concerning Telecommunications, No. 31/87, may include interactive services, whereas the Law concerning Private Television, No. 10/88, seems hardly to be applicable. In France the discussion about the scope of Article 2 of the Law of 30 September 1986 is continuing, and the Report considers it as possible that agreement may be achieved that services will be excluded from the concept of broadcasting which assume the nature of a private correspondence. In Italy the text of Article 1 of the Law No. 223 of 06 August 1990 may include on-line publishing services, in the Netherlands the Law of 21 April 1987 as modified by the Law of 18 December 1991 seems to be applicable to many of the on-line publishing services, and also in the UK many of the provisions of the Broadcasting Act 1990 may be applicable to the new services. However, the Report mentions that Article 72(4) of the Act seems to exclude from the concept of Local Delivery Services communications to the public on-demand, since licences will only be required in the case where a simultaneous reception occurs at different places. Since the verification of this ‘grey area’ was not essential to the Report, no particular Community action was recommended to harmonise the laws of Member States. A particular problem for the drafting of provisions addressing on-line publishing in an anti-concentration Directive is that neither the technology nor the types of services which will succeed in the market can be identified with security. The European Parliament’s request to the Commission to draw up such a Directive, taking into account of the development of the technology as the ‘information society’ approaches, competition law being incapable of ensuring pluralism on its own, appears thus in a different light.

3.2. The Regulation of the Press and Electronic Publishing

The ownership of the press is in many countries subject to special rules the purpose of which is to safeguard the plurality of the media in the

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public interest. These special rules may be contained in antitrust laws. Article 15 of the Italian Law concerning Broadcasting of 1990, Law no. 223, contains a particular regulation prohibiting market dominating positions in the field of mass media which includes cross media ownership restraints\(^\text{40}\). Another national regulation is, for example, contained in the UK Fair Trading Act 1973. According to Sections 57 to 62 of the Act the competent minister has to refer proposed newspaper mergers or sales to the Monopolies and Mergers Commission which then has to report back to the minister ‘whether the transfer in question may be expected to operate against the public interest, taking into account all matters which appear in the circumstances to be relevant and, in particular, the need for accurate presentation of news and free expression of opinion’\(^\text{41}\). The applicability of these or similar provisions and of those of other countries which regulate concentrations of the media seems to depend upon the susceptibility of the term ‘on-line publishing’ to be classed within the categories of the terms ‘newspapers’ or ‘press’ or other similar terms which may have been used by the legislators. With this respect it may be relevant that on-line publishing has not yet become a mass media whereas the justification of the regulation of concentrations in the press lies also in the fact that dominant positions in the market of mass media products should be avoided.

Concerning the duty of notification in the case of mergers the German Act against Restraints of Competition contains a special regulation for the press media in Article 23(1) Sentence 7 according to which concentrations of the press have to be notified even if the joint turnover of the undertakings concerned is twenty times smaller than the joint turnover of undertakings in the other branches of the industry. It is asserted that this provision will also be applicable to the electronic publishing industry\(^\text{42}\). It is questionable

\(^{40}\) See above, Note 23.

\(^{41}\) Section 59(3) of the UK Fair Trading Act of 1973.

\(^{42}\) Detlev Müller-Using and Richard Lücke, *Neue Teledienste und alter Rundfunkbegriff*, Archiv für 1995/32-45 at 41; Article 23 of the German Act against Restraints of Competition states: ‘Duty of Notification in the Case of a Concentration. (1) The concentration of undertakings has to be notified instantly to the Federal Cartel Authority if the undertakings concerned achieve a joint turnover of at least DM 500 million in the year before the concentration... (sentence 6:) In the case of undertakings the business of which consists in whole or partially in the marketing of goods, only three quarters of the turnover shall be taken into consideration. (sentence 7:) In the case of undertakings, the business of which consists in the publishing, in the production or marketing of newspapers or periodicals or of their elements, with this respect twenty times the turnover shall be taken into consideration; sentence 6 is unaffected’.
whether the Acts of the German Provinces' ('Länder') concerning the Press are applicable to on-line publishing. These Acts regulate different issues, for example the print imprint, the liability of journalists, the right of a victim of an untrue statement to claim a counter-representation in particular in cases of libel and defamation, or the public authorities' duty to supply information. Defining the scope of applicability, most of these Acts focus on the quality of 'printed works' as corporeal representations of intellectual conceptions. Accordingly, the representations of data on screens will not be the subject matter of the regulation in the Press Acts, unless the laws state expressly that image carriers shall be treated similarly to printed works\(^{43}\). But even if it were assumed that the scopes of the Press Acts comprised on-line publications, the direct applicability of many provisions would be questionable, in particular, because of the inferior effect which on-line publishing has on the general public in comparison to the mass media press.

3.3. Price-fixing of CD-ROMs

In many countries publishers benefit from regulations which exempt price fixing of books from the general prohibition of this marketing practice. The European Court of Justice upheld the 'Net Book Agreement' which was drawn up by the UK Publishers' Association in its judgement of 17 January 1995\(^{44}\). However, the German Court of Appeals of Berlin of 17 May 1995 which applied Article 16 of the German Act against Restraints of Competition held that a CD-ROM does not fall within the term 'publication' of the Act so that price-fixing would not be permissible\(^{45}\). But taking into account that the purpose of the exemption from the prohibition of price fixing in the case of publications lies in the aim to maintain an efficient book trade, the Court might well have arrived at the conclusion that the price fixing of CD-ROMs is permissible if they contain literary, dramatic or artistic works and if they are manufactured by a publisher\(^{46}\).

\(^{44}\) European Court of Justice of 17 January 1995, case C360/92 P, 'Publishers' Association v Commission'.
4. Copyright Issues of On-line and Off-line Publishing

In basic terms, the copyright gives the author or his heirs exclusive rights for the exploitation of the work during his lifetime and a period up to 70 years after his death. After the lapse of the copyright the work belongs to the public domain and may freely be copied. This means that it may be copied freely, subject to the publisher’s right which may protect the typographical setting, subject to the rights of the owner of a database or to the protection against acts of unfair competition and passing off.

4.1. The Creation of Works

The creation of a multimedia work like a CD-ROM involves the cooperation of a multitude of persons. To whom does the copyright in the resulting work belong? The use of computers in the creation of a multimedia work may complicate the issue, since as an author might also be considered the person responsible for the running of the computer to produce the work or there may be no authorship where the work is exclusively computer-generated. The allocation of the right of the commercial exploitation of the works is a matter to be dealt with in the contracts concluded between the employer and his employees, or between the independent contractor who is commissioned to create the product and the commissioner, or between the producer and his staff. Concerning works made for hire, Section 201(b) of the U.S. Copyright Act states that the employer or other person for whom the work was prepared owns the copyright unless the parties expressly agreed otherwise. But this is different in many other countries where the copyright does not arise in the commissioner. If the work is made by an independent contractor, the copyright arises in the creator of the work. Accordingly, contracts relating to the creation of a multimedia work should carefully regulate to whom belong the rights of exploitation. In principle, contractual clauses may be employed which are used in contracts for the productions of films, audiovisual works or computer software.

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47 For example, Section 1(1) of the UK Copyright, Designs and Patents Act 1988 recognises the copyright in the typographical arrangement of a published edition which relates to the layout of the individual page for a duration of 25 years.


49 Concerning contracts relating to the production of films or audiovisual works see, for
4.1.1. Derivative Works

The creation of a multimedia work which involves the use of pre-existing works may constitute a derivative work as which are defined works based upon one or more pre-existing works. A derivative work is a translation, musical arrangement, fictionalisation, motion picture version, sound recording, art reproduction, abridgement, condensation or any other form in which a work may be recast, transformed, or adapted so that a work consisting of editorial revisions, annotations, elaborations or other modifications, which, as a whole, represent an original work of authorship, is a derivative work. In the case of derivative works the copyright extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work. No rights in the use of the pre-existing material will be implied, and the copyright in the derivative work is independent of any copyright protection in the pre-existing work\textsuperscript{50}.

4.1.2. Composite Works

Multimedia works may be composite works which are defined as meaning a new work in which a pre-existing work can be incorporated without the collaboration of the author of the latter work – the copyright in composite works will be the property of the author who has produced it, subject to the right of the author of the pre-existing work\textsuperscript{51}. This category seems to be applicable to works created by means of the new digital technology which facilitates the use of pre-existing works for the creation of new works. The exploitation of composite works need the authorisation of the right holder of the original works. Accordingly, the creator of a composite work should obtain the necessary authorisations before he begins the production.

4.1.3. Collective Works

A collective work has been defined as a work in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole\textsuperscript{52}. According to French law a collective work means a work created at the initiative of a natural or legal person

\textsuperscript{50} Arnold Vahrenwald, Note 48, at 4.

\textsuperscript{51} See for example Article L. 113-2 and -4 of the French Intellectual Property Code.

\textsuperscript{52} Section 101 of the U.S. Copyright Act.
who edits it, publishes it and discloses it under his direction and name, and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created\textsuperscript{53}. According to French and Italian law the copyright or the right in the economic exploitation of the collective work belongs, unless proved otherwise, to the natural or legal person under whose name it has been disclosed\textsuperscript{54}. Multimedia products are likely to be collective works. A multimedia product combines different elements of text, film, music and sound so that it may fall within the category of the collective work provided it is put together according to individual criteria\textsuperscript{55}. The category of the cinematographic film or of the audiovisual work appear as a special case of the more general category of the collective work. The imputation of authorship by way of analogy to the creation of the ‘collective work’ has, however, not yet been approved by jurisprudence. The concept of the collective work would bind all the authors participating in the development of a CD-ROM and, as a result, the economic rights would vest in the (natural or legal) person who managed its creation\textsuperscript{56}. But, the applicability of the concept of the collective work to the multimedia product is controversial and not yet approved by jurisprudence. It is alleged that the number of the classes of collective works would be limited and could not be extended to new types of works with the aim to deprive the authors of the multimedia work of their copyright\textsuperscript{57}.

4.2. Rights in Pre-existing Works

The production of a multimedia work may involve the use of pre-existing works. Producers may want to benefit from the advertising appeal

\textsuperscript{53} Article L. 113-2 of the French Intellectual Property Code.

\textsuperscript{54} Article L. 113-5 of the French Intellectual Property Code; Article 38(1) of the Italian Copyright Act of 1941.

\textsuperscript{55} According to Article L. 112-3 of the French Intellectual Property Code the authors of collections of various works enjoy copyright protection provided the collections, by reason of the selection and arrangement of their contents, constitute creations of the mind.


\textsuperscript{57} Frédéric Polland-Dullau, \textit{Die neuere Entwicklung des Urheberrechts in Frankreich}, GRUR Int. 1995/361-373 at 364.
of images, a literary text or a music which is well known by the public. The unauthorised use of these works may violate the copyright. The producer should thus examine, first, whether any copyright subsists, and, second, to whom it belongs, and then he should negotiate a licence to use the work for his purposes.

4.2.1. New Types of Exploitation of Works

It may be difficult to find out the person to whom belong the exploitation right in pre-existing works. New types of uses relating to the exploitation of a work cannot be transferred effectively according to Article 31(4) of the German Copyright Act, if they are not known at the time the contract was made and if they constitute, from the economic and technical view, an independent and separate new kind of exploitation. Such new kinds of exploitation may be, with respect to the exploitation of a film in a cinema, the exploitation for purposes of broadcasting, the exploitation by videograms, multimedia or on-line services. Videograms are an example for a new technique for the exploitation of films. According to Articles 31(4) and (5) of the Act the right to exploit films through videograms will constitute a ‘new type of use’ so that the right to exploit films through videograms will belong to the film producer (in application of Article 94 of the German Copyright Act), even if the film producer had previously transferred any rights of exploitation with respect to the film to another person, because at the time of the conclusion of the contract the exploitation through videograms was a yet unknown type of use of a film. On the other hand, the express grant of the right to exploit a film through videograms was held to include the right of exploitation on the different methods of recordings, for example on video cassettes or discs. It may be assumed that the on-line transmission of a work protected by copyright will constitute a new type of use. The French copyright law contains a less far going provision in Article L. 122-7 of the Intellectual Property Code, according to the last sentence of which the effects of a complete transfer of the rights of performance and reproduction shall be limited to the exploitation modes specified in the contract. Concluding, even if the exploitation rights were transferred by the author of a work, he may still be the person to authorise new types of uses of the work.

4.2.2. Copyright Management

The term ‘copyright management’ means the administration of rights and licences. Since copyright arises without formalities, persons who need the authorisation for the use of pre-existing works for purposes of the making and exploitation of new products may have difficulties in the obtaining of information about the right holders. The new technologies which facilitate copying and the modification of works increase the need to obtain the authorisation for the use of pre-existing works and to obtain licences for their exploitation. There are different possibilities for an effective copyright management:

- Compulsory copyright management by collecting societies may facilitate the utilisation of works for multimedia purposes. However, the introduction of a system of compulsory licences administered by national collecting societies is likely to meet with objections from the industry involved.
- Voluntary copyright management through centres for the administration of rights.
- Copyright management through clearing houses which could be used by right holders and users to negotiate contracts and charge fees or royalties.

In France the SESAM collecting society was established to assist in particular the producers of multimedia products. The tasks of SESAM are

- to identify pre-existing or original works and their authors or creators in the fields of interest to the multimedia industry and to obtain any authorisations for the use of such works for multimedia purposes according to the French Intellectual Property Code,
- for the purpose of the identification of pre-existing or original works and in order to obtain any authorisations by the right holders of such works SESAM will have access to any databases operated by the French collecting societies,

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60 Commission of the European Communities: Green Paper Copyright and Related Rights in the Information Society, document COM(95) 382 final, at 75.
61 Commission of the European Communities: Green Paper Copyright and Related Rights in the Information Society, document COM(95) 382 final, at 75.
62 Commission of the European Communities: Green Paper Copyright and Related Rights in the Information Society, document COM(95) 382 final, at 77.
— SESAM shall establish the charges, fees or royalties payable for the use of pre-existing or original works, it shall collect the sums and make the payments to the right holders by working as efficient as possible,
— SESAM shall control the use of the pre-existing or original works and fight and infringements of rights in these works.

The French collecting societies play a particular role in the promotion of the numbering of audiovisual works. It is envisaged that the numbers should also be contained in data which are in a digital form so that an identification of the works would always be possible. The numbers should also be used by distributors. The French collecting societies promote the introduction of laws prescribing the numbering system for audiovisual works on a national and supra-national basis and they advocate that the technical equipment should be adapted to the use of the numbering system. Similar recommendations are made in the Report of the Working Group on Intellectual Property Rights of the U.S. Information Infrastructure Task Force: ‘Intellectual Property and the National Information Infrastructure’\(^6^4\) where it is suggested to use an ‘electronic envelope’ which may contain information with regard to authorship, copyright ownership, date of creation or last modification and terms and conditions of authorised uses.

4.3. Rights Arising from the Production of Works

It may be appropriate to consider the creation of a multimedia product in parallel to a film. Accordingly, the producer of a CD-ROM will own the rights of commercial exploitation see e.g. Article 45 of the Italian Copyright Act.

Attempts were made to classify a multimedia product within the category of databases\(^6^5\). However, the definition of a database as a collection of data, works or material arranged, stored and accessed by electronic means, and the electronic materials necessary for the operation of the database such as its thesaurus, index or system for obtaining or presenting information will generally not suit the multimedia product.

\(^6^5\) Arnold Vahrenwald, Note 48, at 8, 9.
4.3.1. Moral Rights of Authors and Interactivity

Digital technology facilitates the manipulation and modification of works. The user may interactively determine the presentation of works and alter them. This not only raises the question whether and to what extent there is a copying of the original work, but it increases the risk that moral rights are violated which enable authors, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. The present lack of harmonisation of national laws with regard to moral rights may create an obstacle to the achievement of a global communication of works via information infrastructures. It may be recommendable that authors should be able to waive the moral rights or consent not to avail themselves of such rights over the databases where their works are entered or to limit the applicability of the right to integrity in the case of digital communications. It may also be conceivable to provide digitally stored works with references which permit the identification of those who created the work and their individual contribution – which would mean the institution of a moral right to reference.

4.3.2. Exclusive Rights Conferred by Copyright

The copyright gives the author, artist or musician exclusive rights for the use of their works. An infringement of copyright will be caused by the unauthorised copying, distribution or performance of the work in public, the broadcasting or including of the work in a cable programme and the making of an adaptation of the work or the use of such adaptation for any of the infringing activities. On-line databases containing audiovisual works and private collections which may be created by copying will pose a considerable threat to the commercial exploitation of works. But is the transmission of a work in digital form an act reprehensible by copyright? Is it a reproduction of the work, a distribution or a public performance, a broadcasting?

— Copying (Reproduction)

The new techniques of digital communications facilitate the copying of works and also permit an exploitation of the original work which is probably not caught by the exclusive rights which belong to copyright owners. Thus there is discussion among lawyers whether the storage of data in the memory of a computer or the downloading of data into the memory of a computer which is connected to an on-line service constitutes a copying of the work. Without further indulging into the controversy, a brief reference may be made to the Report of the Working Group on Intellectual Property Rights of the U.S. Information Infrastructure Task Force of 199569 which stated the law as follows: 'When a work is placed into a computer, whether on a disk, diskette, ROM, or other storage device or in RAM for more than a very brief period, a copy is made. When a printed work is 'scanned' into a digital file, a copy - the digital file itself - is made. When other works - including photographs, motion pictures, or sound recordings - are digitised, copies are made. Whenever a digitised file is 'uploaded' from a user's computer to a bulletin board system (BBS) or other server, a copy is made. Whenever a digitised file is 'downloaded' from a BBS or other server, a copy is made. When a file is transferred from one computer network user to another, multiple copies generally are made. Under current technology, when an end-user's computer is employed as a 'dumb' terminal to access a file resident on another computer such as a BBS or Internet hose, a copy of at least the portion viewed is made in the user's computer. Without such copying into the RAM or buffer of the user's computer, no screen display would be possible'. Assuming that the downloading of a work within an on-line service is copying, the unauthorised private copying of the work may be exempted from infringing the copyright by reason of the 'fair use' exemption70. For example the German Copyright Act exempts in Article 53 the reproduction for private and other personal uses from the exclusive rights of authors. Since the digital technology facilitates copying, it may be

69 Note 2 above, at 65, 66.
70 In the case 'German Booksellers and Publishers Association v the Province of Lower Saxony' the District Court of Munich of 18 June 1995, referred to by Arnold Vahrenwald, The Publishing Industry Faces Technological Change, (1996) 2 Entertainment Law Review 50-61 at 52, Note 17, held that the copying of articles and journals through the library of the Technical University of Hanover on the orders of private users against fees did not constitute an unauthorised copying but was covered by the private use exemption according to Article 53(2) no. 4a of the German Copyright Act. The provision states that small parts of a published work or single contributions published in newspapers or journals may be copied or ordered to be copied for own use.
recommendable that the legislator excludes the digital reproduction of works from the free use exemption.

– Distribution

Since the downloading has much the same effect as the distribution of the corporeal work, it is asserted that the on-line communication may constitute a corporeal distribution of the work so that the mere placing of the work in digital form in a database from where it can be downloaded could amount to the issuing of copies to the public. The subsistence of a corporeal distribution has been assumed where the work was simultaneously printed out. However, the concept of the distribution of a work implies according to the prevailing view that corporeal copies of the work are made and distributed. If the on-line communication were a distribution, the concept of the ‘exhaustion’ of the copyright would come into play which is not necessarily useful in relation to digital communications. The actual issuing of the work to the public will take place when the file is downloaded by a user. By downloading the user creates a new copy, in addition to the copy in the database, so that the copyright in the work is not exhausted by the placing of the work in a database. However, in the view of the U.S. Information Infrastructure Task Force’s Working Group on Intellectual Property Rights the doctrine of ‘first sale’ should not apply to distribution by transmission, because the transmission by means


73 U.S. Information Infrastructure Task Force, Report of the Working Group on Intellectual Property Rights: ‘Intellectual Property and the National Information Infrastructure’, September 1995, at 69; the German District Court of Munich of 18 June 1995, ‘German Booksellers and Publishers Association v the Province of Lower Saxony’, referred to by Arnold Vahrenwald, The Publishing Industry Faces Technological Change, (1996) 2 Entertainment Law Review 50-61 at 52, Note 17, held that the activity of the library of the Technical University of Hanover which copied articles and journals and transmitted them by fax or post on the orders of users did not amount to a distribution of copies, because the prevailing jurisprudence demanded that the material embodiment of the work must exist at the time the offer for the distribution is made.


of the current technology involves both the reproduction of the work and the distribution of that reproduction. In the case of transmissions the owner of a particular copy of a work does not 'dispose of the possession of that copy or phonorecord'. A copy of the work remains with the first owner and the recipient of the transmission receives another copy of the work'.

- Broadcasting

The communication of works via an on-line service may be conceived of as a broadcasting\(^76\). The Commission of the European Communities sustains a narrow view of the term 'broadcasting' in copyright law but a broader view of the term in telecommunications law. Whereas the Commission excludes, in principle, that point-to-point services could fall within the category of broadcasting, it considers that in the case of video-on-demand or pay-per-view the rules relating to broadcasting may be applicable in the field of telecommunications law and the European Parliament focuses on the fact that programmes are broadcasts intended for reception by the public whether for mass audience or for transmission for individual demand either simultaneously or sequentially\(^77\). The national laws which regulate the content of the broadcasting right as an element of the copyright differ substantially, because 'the term 'broadcasting' covers a host of different cases and variations, with the technique irrelevant'\(^78\). If the broadcasting quality of an on-line service should be denied, it may constitute a cable programme service\(^79\). Assuming that the authorisation or prohibition of the inclusion of a work in a cable programme implies also the right or prohibition of the transmission\(^80\) the unauthorised inclusion or transmission of the work would violate the copyright. But if the inclusion or transmission of

\(^{76}\) Arnold Vahrenwald, Note 76 at 52; European Parliament, amendments proposed to the Directive 'Television without frontiers', O.J. C 65/99 of 04 March 1996.

\(^{77}\) Arnold Vahrenwald, Note 76 at 52; European Parliament, amendments proposed to the Directive 'Television without frontiers', O.J. C 65/99 of 04 March 1996.


\(^{79}\) For example, Section 7(1) of the UK Copyright, Designs and Patents Act 1988 defines a cable programme service as 'a service which consists wholly or mainly in sending visual images, sounds, or other information by means of a telecommunication system otherwise than by wireless telegraphy, for reception (a) at two or more places (whether for simultaneous reception or at different times in response to requests from indifferent users), or (b) for presentation to members of the public, and which is not, or so far as it is not, excepted by or under the following provisions of this section'.

a work on-line is broadcasting, statutory licensing provisions may be applicable according to which broadcasters may be authorised to use works in broadcasts against reasonable payments to collecting societies. A substantial problem for the subsumption of the on-line communication of works in the concept of broadcasting according to copyright law lies in the requirement that a broadcast has to be made 'to the public'. The different views which are suggested permit a variety of solutions so that the Australian Copyright Convergence Group, with the aim to avoid further controversies, recommended the introduction of another requirement - that 'broadcasting' to the public should be made for the commercial purposes.

- Transmission

In order to clarify the controversial issue of the legal status of the on-line transmission of a work protected by copyright, an electronic transmission right might be introduced as an exclusive right of the copyright owner which would cover digital communications of the work. This corresponds with the recommendation of the U.S. Information Infrastructure Task Force in the Report of the Working Group on Intellectual Property Rights of September 1995 which suggested an amendment of the U.S. Copyright Act according to which the exclusive right of publication should be defined as the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, by rental, lease, or lending, or by transmission, and it defined the term 'transmission of a performance or display' as a communication by any device or process whereby images or sounds are received beyond the place from which they were sent. The European Commission is of the view that national copyright acts may need amendment to include a broadly defined digital transmission right. However, the express inclusion of the transmission right in national copyright laws should be made with a harmonised approach so that differences in national laws which can have the effect of impeding the

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81 For example, the UK Broadcasting Act 1990 provides for statutory licensing of the copyright in sound recordings in broadcasts and cable programme services. According to Section 135D of the Act the Copyright Tribunal may settle the terms of payment and the conditions of such licences with regard to the relevant collecting society, Section 135E of the Act.

82 Report of the Australian Copyright Convergence Group: 'Highways to Change', 1994, at 19: 'The CGC is of the view that this approach would ensure that copyright owners would be entitled to remuneration in all appropriate circumstances where their works are made available to the copyright owners public, and would obviate the need for a definition of the public'.
establishment of a global infrastructure for the transmissions of works are avoided\(^{83}\).

### 4.4. Copyright Infringement by On-line Publishers

On-line publishers and also services providing access to on-line publishing may face liability for copyright infringement. With regard to U.S. law it has been observed that a trend may be recognisable that courts tend to treat the operators of on-line services more like publishers and not as legally less liable owners of book stores\(^{84}\). Concerning the activities of on-line service providers the Working Group on Intellectual Property Rights of the U.S. Information Infrastructure Task Force observed that on-line services, by permitting the uploading of material by their subscribers, act as electronic publishers\(^{85}\). The Working Group considered that it would be premature to exempt or reduce the liability of on-line services for direct or contributory copyright infringement, and, focusing on their business relationship with subscribers, the Report concluded: ‘Between these two relatively innocent parties, the best policy is to hold the service provider liable\(^{86}\). It seems that the U.S. Telecommunications Act of 1996 preferred the opposite policy with regard to the issue of the liability for the on-line publication of offensive material in Section 230(c): ‘No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider’. However, Section 230(c)(2) of the Act expressly states that ‘nothing in this section shall be construed to limit or expand any law pertaining to intellectual property’, so that the principle according to which only the information content provider will meet liability may not be applicable in copyright law. But, the case Religious Technology Center v Netcom On-Line Communication Services\(^{87}\) seems to indicate that the liberal telecommunications policy also has an impact upon the interpretation of terms of copyright law.

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\(^{86}\) Note 85 above, at 117.

\(^{87}\) See below, Notes 92-94.
According to the UK Copyright, Designs and Patents Act 1988 the unauthorised installing of material protected by copyright in an on-line database will violate the copyright by copying, and the act of possessing infringing copies may lead to another violation\(^8\). If the on-line service unauthorisedly permits the downloading of works, there may be infringement through the issuing of copies to the public\(^9\), although courts in general require the issue of copies in material form\(^10\). There may be infringement of the copyright by permitting subscribers to make infringing copies, although ‘a person does not necessarily authorise an act to be done merely because he intentionally puts into another’s hands the means by which the infringing act can be done if those means can be used for a perfectly legitimate purpose, even where it is known they will in fact inevitably be used for an infringing purpose’\(^11\). In the case Religious Technology Center v Netcom On-Line the U.S. District Court for the Northern District of California of 21 November 1995\(^12\) held that the unauthorised posting of computer copies of teachings onto another computer would not amount to copying by the defendants, since their systems operated ‘without any human intervention’, since another person had caused the copy to be made on their computers and since the copying was automatic and caused by a subscriber so that the operators of the Bulletin Board Service did not


\(^10\) U.S. Information Infrastructure Task Force, *Note 2 above, at 69* with reference to Playboy Enterprises v Frena 839 F.Supp. 1552 (MD Fla 1993); the Austrian Supreme Court of 04 October 1994, ‘APA-Image Broadcasting Network’, Medien und Recht 1995/143, held that the transmission of a photograph via an electronic press information system, constituted a distribution, since the work was simultaneously printed out; however, the German District Court of Munich of 18 June 1995, ‘German Booksellers and Publishers Association v the Province of Lower Saxony’, referred to by Arnold Vahrenwald, *The Publishing Industry Faces Technological Change*, (1996) 2 Entertainment Law Review 50-61 at 52, Note 17, held that the activity of the library of the Technical University of Hanover which copied articles and journals and transmitted them by fax or post on the orders of users did not amount to a distribution of copies, because the prevailing jurisprudence demanded that the material embodiment of the work must exist at the time the offer for the distribution is made.


commit copyright infringement. The Court held that where the bulletin board service provider merely stores and passes along all messages sent to it there would be no infringement of the right to reproduce copies which were uploaded by an infringer. The Court held that 'no purpose would be served by holding liable those who have no ability to control the information to which their subscribers have access, even though they might be in some sense helping to achieve the Internet's automatic 'public distribution' and the users' 'public display' of files,' and that 'it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. Such a result is unnecessary as there is already a party liable for causing the copies to be made'. However, the jurisprudence is still developing and it has been observed that while the Court's rule is probably correct from a policy view, it would not be supported by the definition of infringement in the U.S. Copyright Act. Taking into account that the liberal policy with regard to liability of on-line publishers in the U.S. Telecommunications Act of 1996 may have an impact upon future jurisprudence concerning copyright, it may be inferred that an on-line publisher will be liable for copyright infringement if he makes infringing material available for subscribers or users or if he knowingly permits infringing material to be copied, distributed or broadcast by subscribers or users.

4.5. Transborder Communications

Copyright laws protect authors and works within national territories. Traditional publishing occurred primarily in national markets. The establishment of a global information infrastructure implies the communication of works beyond national borders. Can the transmission of digitised data from one country to another constitute the infringing importation of copies of a work protected by copyright? If yes, this could mean that the on-line publisher who offers his services on a global basis would need copyright


licences covering the communication of the works which he includes in his
database for any countries in which he has subscribers. If he cannot obtain
licences for all countries he may have to block the communication for
those territories to which the transmission would constitute a copyright
infringement.

The U.S. Information Infrastructure Task Force concluded in the Report
of the Working Group on Intellectual Property Rights 'Intellectual Property
and the National Information Infrastructure' of September 1995\(^5\) that a
data stream can contain a work in electronic impulses, but that these im-
pressions do not fall within the category of 'copies' or 'phonorecords' the
unauthorised importation of which violates the U.S. copyright law, and the
Report inferred that the transmission of a reproduction of a protected
work via international communication links fails to constitute an 'importa-
tion' under the current law. The Report recommended an amendment of
the U.S. Copyright Act according to which an infringing importation of
copies or phonorecords in the U.S. would include the importation into the
United States, whether by carriage of tangible goods or by transmission,
without the authority of the owner of copyright of copies or phonorecords
of a work which have been acquired outside the United States.

According to Article 107(1)(b) of the UK Copyright, Designs and Patents
Act 1988 the importing into the United Kingdom of an article which is,
and which the importer knows or has reason to believe is, an infringing
copy constitutes infringement unless it is done for private and domestic
use. But is a digital data stream an article in the sense of the law? The
British Copyright Council\(^6\) considered that the importation resulting from
communication of works should require the consent of the respective right
owners. In its Communication to the European Commission the Council
observed that the communication by digital means involves operations of
emission, onward conveyance and reception of signals in various countries
and found: 'There is an analogy with dispatch and importation of books
and records, the difference (which we do not consider of consequence)
being that the import consists of signals rather than hard copy. The com-
unication right should, internationally, require all right owners (who may be

\(^5\) U.S. Information Infrastructure Task Force, Report of the Working Group on Intel-
lectual Property Rights 'Intellectual Property and the National Information Infrastructure'
of September 1995 at 109.

\(^6\) British Copyright Council, Submission to the European Commission: 'Digital Tech-
ology in the Field of Copyright and Related Rights', (1996) 1 European Intellectual Property
Review 52-55 at 54.
different in different countries) to be taken into account in each country of transmission and reception. A special regime (as under Directive 93/83/EEC ['Satellite and Cable Directive']\(^7\), Article 1,2\(^8\)) can regulate communication within the European Union. The Satellite and Cable Directive defines the concept of the ‘communication to the public by satellite’ according to which a single act of broadcasting is subject to the laws of one country only, that is to say to the laws of the country where the signals are introduced into the chain of communication. The development of the technology and the increasing international structure of networks may not lead to the consequence that by use of the application of the country of origin rule a service should be able to resort to a state which does not provide for a sufficient protection of copyright. The European Commission\(^9\) is of the view that a global solution relating to transborder communications is desirable, but it conceded that in the intellectual property sphere this principle can be applied only if there is a far-reaching harmonisation of the relevant rights at the same time.

4.6. Enforcement of Copyright

The enforcement of copyright in the digital age creates particular problems for the copyright owner who has to prove the infringement according to the general principles of the law of civil procedure\(^1\). In the Green Paper of the U.S. Information Infrastructure Task Force, ‘Intellectual Property and the National Information Infrastructure’, of July 1994\(^2\), it was stated that the copyright owner should be able to prove copying through circumstantial evidence establishing that the defendant had access to the original work and that the two works are substantially similar. However, this idea was not further developed in the final Report of the Working


\(^8\) Article 1(2)(b) of the Satellite and Cable Directive states: ‘The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth’.

\(^9\) Commission of the European Communities, Green Paper: Copyright and Related Rights in the Information Society, document com(95) 382 final of 19 July 1995 at 41.


Group on Intellectual Property Rights of September 1995. The Report stressed that the law concerning the validity of on-line licences for the uses of works is not clear\textsuperscript{102}, and jurisprudence will have to establish rules which should be similar in all countries to which on-line publishing relates. In order to cope with the unauthorised digital copying it has been suggested to introduce an ‘accessright’ complimentary to the copyright\textsuperscript{103}. According to this accessright persons who possess material protected by copyright would be prima facie infringers unless they can prove that their possession is covered by the authorisation of the copyright owner. Also technical marking of products is possible in order to avoid piracy of off-line products for example by the copyright stamp introduced by the Italian collecting society SIAE.

5. Protection of On-line and Off-line Publishing by Special Laws Concerning Databases and Unfair Competition

5.1. Protection for Databases

The common position of the European Parliament and of the Council of Europe with a view to adopting the Directive on the legal protection of databases obligates Member States to take legislative measures in order to ensure the protection of databases provided for in the Directive. The text of the Directive in the Common position suggests the introduction of a sui generis right for owners of the rights in a database against the unauthorised extraction and/or re-utilisation of a substantial part of the content of a database, independent of whether the content of the database enjoys protection by copyright. In Article 1(1) of the Directive a database is defined as a collection of works, data or other independent materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means. It has been asserted that this sui generis right which has a duration of 15 years might well be extended towards the recognition of a publisher’s right, filling the gap between copyright law, the protection of the typographical arrangement\textsuperscript{104} and the law protecting


\textsuperscript{104} Section 1(1) of the UK Copyright, Designs and Patents Act 1988 confers copyright on ‘the typographical arrangement of published editions’.
against unfair competition\textsuperscript{105}. In the text the Directive on the legal protection of databases mentions expressly, that a CD-ROM or CD-i may constitute a database and, accordingly, be protected\textsuperscript{106}.

5.2. Protection against Acts Constituting Unfair Competition

National laws protecting against acts of unfair competition may be available to prevent the unauthorised uses of works contained in electronic publications. Taking into account that the copyright laws provide a special regulation of the protection against unauthorised reproductions, it may be said that a resort to the law of unfair competition can only be subsidiary. This means that, in general, the communication of works by electronic means will not constitute an act of unfair competition, unless the activity assumes a particularly unfair nature\textsuperscript{107}. This may be the case if the copying of data and their distribution which does not constitute copyright infringement endangers the economic basis of the injured company or if the access to the data was obtained under breach of confidence.

Concerning off-line publishing the Provincial Court of Frankfurt of 4 July 1995 held that the manufacture and sale of a CD-ROM containing the data relating to a telephone directory which were taken over from a CD-ROM of the Deutsche Telekom constituted an act of unfair competition\textsuperscript{108}. Independent by of a possible violation of copyright, the taking over by the defendant of the plaintiff's performance was held reprehensible, because the defendant destroyed the plaintiff's advantage in competition by marketing the copied product at a lower cost price which constituted the particular unfairness. In a judgement of 29 March 1996 the District Court of Mannheim\textsuperscript{109} held that even if a CD-ROM which contains data relating to a

\textsuperscript{105} Harald Heker, \textit{Im Spannungsfeld von Urheberrecht und Wettbewerbsrecht}, ZUM 1995/97-103 at 103.

\textsuperscript{106} Recital 22 of the Directive according to the Decision on the common position adopted by the Council with a view to adopting a European Parliament and Council Directive on the legal protection of databases (on Council agenda for adoption on 26 February 1996), which amended the former text which had stated: ‘Whereas electronic databases within the meaning of this Directive also include devices such as CD-ROM and CD-i’.


\textsuperscript{109} District Court of Mannheim of 29 March 1996, Frankfurter Allgemeine Zeitung of 30 March '96 at 17.
telephone directory is not directly copied but if a similar product is made by copying the data from the telephone directory, there would be an inadmissible taking over of the plaintiff's performance which lied in the compilation of the data contained in the directory. The copying was also considered to violate the German Data Protection Act according to which the copying of a data collection requires the authorisation of the person concerned, the plaintiff.

6. DEVELOPMENTS IN THE LAW RELATING TO ON-LINE AND OFF-LINE PUBLISHING

The international protection of authors operates on the principle of national treatment. This means that the standard of protection prescribed by the Berne Convention, for example for literary works of authors, must be provided for in the copyright laws of the other countries of the Union not only for their own nationals but also for the works of authors from the other countries. An essential task for the successful operation of the new technologies is the attainment of a similar level of protection internationally, which means that copyrights and neighbouring rights need further harmonisation. The most efficient way to achieve an improvement in copyright protection on the international level would thus involve the amendment of the provisions of the Berne Convention by expressly defining the digital transmission right as an exclusive right. But concerning the establishment of rights for new classes of works, independent of an amendment of the Convention, countries of the Union are restrained by Article 20 of the Convention according to which the countries of the Union reserve the right to enter into special agreements among themselves, insofar as such agreements grant to authors more extensive rights than those granted by the Convention.¹⁰


was published in September 1995 deals on 238 pages comprehensively with the issues of the protection of works which are communicated on-line. More than half of the Report is dedicated to copyright problems\textsuperscript{111}. The Report recommended a modification of the u.s. laws, the inclusion of an exclusive transmission right into the copyright law which would not create a new right but constitute an express recognition that by means of new technologies the distribution right can be exercised by means of a transmission\textsuperscript{112}. With regard to the public performance right, the Report suggested that in the case where a work is publicly performed by transmission, then there would be a public performance, whether or not the distribution right is involved. Accordingly, since some transmissions may constitute also reproductions or distributions of copies to the public, transmissions which constitute public performances would also be public performances in the sense of the copyright\textsuperscript{113}. The Report recommended the inclusion of the term ‘transmission’ into the definition of ‘publication’ so that it would be clear that a transmission, even if the first or solely on-line, would publish the work, unless the communication was private, for example in the case of an e-mail or an internal communication within a private interactive computer system\textsuperscript{114}. Another recommendation related to the amendment of the provisions concerning acts which infringe the copyright – it should be added that also the importing of unauthorised transmissions would violate the copyright. The Report made a proposal for an extension of the exemption from the exclusive rights which the copyright confers in favour of libraries and the visually impaired. It was suggested that devices which circumvent copyright protection systems shall be prohibited\textsuperscript{115}. The Working Group recommended that copyright management information that is to


say information which relates to the name or other identifying information of the right holder and terms and conditions for the use of the works should be protected\textsuperscript{116}.


Different from the U.S. Report which culminates in the proposal of legislative action, the Commission’s Green Paper attempts an identification of the problems created by the digital communication of works in Europe\textsuperscript{117}. The purpose of the Paper is to unleash a discussion of the related problems which then will be analysed in a White Paper or Book and action recommended.

6.3. WIPO (the World Intellectual Property Organisation) and the Berne Convention

The World Intellectual Property Organisation (‘WIPO’) at Geneva administers the Berne Convention. In order to extend expressly the protection to the exploitation of works by digital technologies, WIPO established two working groups. One of the Committee of Experts is working towards the establishment of a possible Protocol to the Berne Convention. This Protocol will relate to the protection of computer programs as literary works, the protection of databases as compilations of information other than works and the possible elimination of compulsory licensing for broadcasting and special provisions for the use of materials in digital distribution systems. Yet the memorandum of the third session of the Committee of Experts did not include a reference to the transmission right\textsuperscript{118}. Another group is dealing with a possible New Instrument for the Protection of Performers and Producers of Phonograms which elaborates the possibility of a public performance right concerning sound recordings\textsuperscript{119}.


\textsuperscript{117} See for example Mike Pullen, The Green Paper on Copyright and Related Rights in the Information Society (Is It All a Question of Binary Numbers?), (1996) 2 Entertainment Law Review, 80-84.

\textsuperscript{118} See Copyright, November 1994, at 214 et seq.

\textsuperscript{119} WIPO document INR/CE/III/3 and memorandum, INR/CE/III/2, Comité d’Experts sur
In preparation of the fourth session of the Committees of Experts the European Community and its Member States and also the United States of America drafted proposals. In these proposals the European Community alleged that acts of digital transmission belong to a wider debate taking place with regard to authors' rights and neighbouring rights and new technologies. The Member States suggested to examine this issue globally and recommended to wait for the response to the Commission's Green Paper 'Copyright and Related Rights in the Information Society'. The proposals of the United States were in line with the Report of the Working Group on Intellectual Property Rights: 'Intellectual Property and the National Information Infrastructure', September 1995. In particular, the U.S. proposals mentioned that in world-spanning digital distribution networks, the differentiation between copyright and neighbouring rights would become irrelevant. It was proposed that the recognition of a digital transmission right for both the Berne Protocol and the New Instrument should be considered. The U.S. also suggested that the use of equipment and services which defeat hardware or software based anticopying systems should be prohibited. Technical means to limit unauthorised copying\textsuperscript{120} and statutory royalty payment systems for blank digital media to compensate right owners for 'inevitable' copying were recommended\textsuperscript{121}. The discussions at the WIPO World Forum on the Protection of Intellectual Creations in the Information Society of October 1995 showed that process of discussion is continuing and that no prevailing doctrines concerning the applicability of the Berne Convention and the copyright laws of the countries to the technologies of digital communications have emerged\textsuperscript{122}. During the fifth session of the Committee of Experts on a Possible Protocol to the Berne Convention and the fourth session of the Committee of Experts on a Possible Instrument\textsuperscript{123} progress was achieved with regard to the 'digital agenda', and drafts of the documents will be circulated later this year.

\textsuperscript{120} Such a system is the Serial Copy Management System employed in the United States and Japan.


\textsuperscript{122} Thomas Dreier, *Harmonisierung des Urheberrechts in der Informationsgesellschaft, zum 1996/69-72*.

\textsuperscript{123} WIPO document BCO/CE/V/9-INR/CE/IV/8.
6.4. *The GATT and TRIPS Agreement.*

An agreement which provides for the harmonisation of national copyright and neighbouring rights is the TRIPS Agreement concluded within the Uruguay round of trade negotiations in the GATT\(^{124}\). The Agreement envisages a minimum protection for intellectual property rights which is aligned to the Berne Convention. Yet the Agreement does not regulate the problems concerning the audiovisual sector. Since the Agreement aims at the suppression of the trade in counterfeit goods, it does not contain provisions which would regulate digital communications.

Assuming that on-line publishing may, in certain cases, constitute broadcasting in the sense of copyright, Article 14 of the TRIPS Agreement may become relevant. Concerning the protection of performers, producers of sound recordings and broadcasters Article 14(3) of the TRIPS Agreement obligates Members to provide broadcasters with the right to prohibit the unauthorised fixation, reproduction of fixations and the rebroadcasting of wireless means of broadcasts, as well as the communication to the public of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organisations, they shall provide owners of copyright in the subject-matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971)\(^{125}\).


By means of the digital communications technology libraries will become publishers. The electronic libraries project (‘Biblioteca universalis’) was set up by the G7 group at a conference in Brussels in February 1995. The G7 group which combines the seven leading industrial nations organised a meeting at a ministerial level to discuss problems of the information society. The Biblioteca universalis project is one amongst eleven projects, and it is directed towards the creation of a vast distributed virtual collection of human knowledge accessible to the general public via networks, establishing a global network interconnecting local electronic libraries\(^{125}\). The project is based on the idea that the major libraries of the G7 and other countries cooperate by collecting in digitised form bibliogra-

\(^{124}\) GATT = General Agreement on Tariffs and Trade; TRIPS = Trade-related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods.

\(^{125}\) Bulletin EU 1/2 1995/145.
graphic records and the information content itself (text, graphics, still image, sound and video information). The project will be implemented by using the advanced digital communication technologies so that the user can access the Biblioteca universalis from his personal terminal, browsing ‘through a poem of Victor Hugo or to look at the poet’s drawings or link the 16th century discoveries to outer space shuttles reports’\(^{126}\). The Biblioteca universalis will be accessible on-line, using advanced retrieval functionalities.

The Biblioteca universalis could, potentially, contain the whole cultural heritage of mankind in digitally stored data, literary and dramatic works, musical works, sounds, images, films audiovisual works, whether protected or not, accessible via an international network and upon a harmonised bibliographical system. Works protected by copyright will only be included in the databases upon the discretion of the countries involved in the project. The project may revolutionise the traditional publishing industry and many other branches of the entertainment sector of the economy. To computerise libraries means to transform them into operating systems for the production and distribution of copies of the items on-demand by end users\(^{127}\). The knowledge contained in libraries of the whole world will be accessible to anybody connected to the system by an interactive computer service. The project should attempt to define the conditions for the access. These conditions should be non-discriminatory and transparent. The efforts of publishers and authors should be rewarded by payment schemes which are similar in any country participating in the project. It could be useful to apply to the data stored in the electronic libraries methods of identification so that the source of the data downloaded will be recognisable. The wish has been expressed that national copyright laws should be harmonised with regard to the application for purposes of electronic libraries\(^{128}\). This means that the protection by copyright or related rights should include the transmission of the work in the form of digital data and a harmonisation of the right of reproduction concerning the subsequent use of the data received, for example the harmonisation of the fair use or private use exemptions in relation to reproductions.


7. Ethical Limitations of On-line Publishing

In principle, on-line publishing encounters the same limits as any other traditional publishing or broadcasting. The postal secrecy of the freedom of speech and writing, the protection of privacy which are often referred to as the basis of the freedom concerning the use of the Internet or interactive computer services cannot free a user from the duty to respect the rights of other persons and to refrain from violations of the criminal law. Thus the use of the Internet or of other interactive computer systems for purposes of a criminal action will not render the criminal activity lawful.

7.1. Defamation

The new technologies for communication via computers supply the information via multiple transmission facilities so that a network can be created even without a centralised body which assumes the task of exercising the control of the content. A single host dumb terminal network may be built up by a central computer which receives, stores and redistributes the information. The law of defamation developed with regard to traditional publications, in particular by the press media. The problems concerning the defamation through electronic publishing may in particular relate to the definition of the term ‘publication’, the form of the ‘publication’, to the legal qualification of the material complained of, the ownership of the network and the computers, the access to the ‘publication’, the editorial control over the ‘publication’ and the international jurisdiction.\(^{129}\)

The subject matter of the defamation may vary, depending upon the publication. Different from publications in the press where the motives underlying a defamatory statement will often be the purpose to increase the circulation of the publication, the defamation in the case of electronic publishing will rather be direct that is to say its only purpose will be the creation of a wrong and negative impression in the reader of the message about another person or undertaking. A month ago I read in the Internet the following invitation: ‘It’s the Return of the Insult in Writers Forum. Hey you Banana noses! Give and Get Your Due in an Art-of-Flaming Contest’. Certainly, such an invitations should not be taken too seriously, but it illustrates the challenge which the supposed anonymity of the Internet causes.

The law of defamation differs from country to country. In general, the

law of that country will be applicable where the publication occurs and where the publication is circulated. In the case of on-line publishing the relevant date when the publication is made may be the date when the text or images are made accessible and the publication may be considered circulated in those countries where it is accessed. Again, there is a difference between the distribution of a traditional publication and an on-line publication, because the access to traditional publications is, by reason of their corporeal nature, much easier to prove than in the case of digital data which may be accessed, read or regarded, but not stored in the receiving computer. Accordingly, the plaintiff of a suit concerning defamation may have problems of proving the scope of the circulation of the electronic publication.

7.2. Obscenity, Sex Discrimination and Racial Hatred

In January 1996 CompuServe of Germany indicated in an official statement that it had blocked customers’ access to certain Internet-Newsgroups. These Internet-Newsgroups provided in particular images relating to sex and sex with children. CompuServe was informed by the competent Public Prosecutor in Munich that the relevant Internet-Newsgroups allegedly violated the German criminal laws. CompuServe decided to block the access to the relevant Newsgroups until the legal questions are cleared, latest until the termination of the criminal court proceedings. CompuServe indicated that it was not involved in the choice of the relevant Newsgroups and that it did not influence the criteria of the choice. The Public Prosecutor is concerned that the content of the information provided by certain Internet-Newsgroups contains pornography relating to children, unlawful pornographic material for adults and other pornographic material which is lawful for adults but the making available of which for children is prohibited. CompuServe stated that as a mere provider of access it did not have the possibility to influence the content of the data provided on the Internet so that it could not be liable for the origin or the kind of the content of the Internet. Also in January 1996 the Public Prosecution, Mannheim, investigated in a case which concerned the offence of the incitement of the people through the communication of inciting information via the Internet. Informed by the Prosecutor about the facts, six online services which provided access to the Internet blocked the access of their customers to the service which offered the material complained of.\footnote{Arnold Vahrenwald, The Legal and Ethical Dimensions of Online Publishing, documentation prepared for the MILIA, Cannes 1996, pp. 8, 9.}
In the absence of special legislation public order violations via on-line communications will be treated according to the ordinary principles of criminal law. In the case of on-line publishing, particular attention may be paid to the perpetrator and the place where the criminal offence occurred. Pornography, and in particular the protection of minors is of relevance. According to Section 274(h)(2)(c) of the U.S. Telecommunications Act of 1996 states that the transmission of information as part of a gateway to an information service which does not involve the generation or alteration of the content of information, does not constitute electronic publishing, even if the transmission comprises introductory information and navigational systems provided that they do not affect the presentation of the electronic publishing to users. The U.S. Communications Decency Act of 1996 which amends Section 223 of the Telecommunications Act of 1934 by stating in subsection (e) that, in addition to any other defences available by law, a person shall not be guilty of obscene or harassing use of telecommunications facilities under the Communications Act of 1934 solely for providing access or connection to or from a facility, system or network not under that person's control. The issue whether the service which provides the access exercises any 'control' over the service which contains the obscene or harassing communication would thus assume essential importance. German criminal law seems to focus on the fact of the 'mere publicly making otherwise accessible' of the indecent material in Article 184(3) no. 2 of the German Criminal Code. Thus the offering of hard pornography to closed user groups via teletext will be offensive, unless the access was limited to a small circle of users. Likewise Article 130(2) no. 1(b) of the German Criminal Code incriminates the publicly making otherwise accessible of publications which incite the people to hatred against a part of the population or against a national, racial, religious group or a group which is determined by its customs. It seems that, different from U.S. law, the element of the 'publicly making otherwise accessible' of the publication complained of would also render those services liable which only provide the access to the Newsgroups which offer the offensive material even if they do not have the possibility to influence the content or to modify it.\footnote{Arnold Vahrenwald, Note 130 at 10; on 11 June 1996 the District Court for the Eastern District of Pennsylvania granted an interlocutory injunction in ACLU v Reno, directed against the enforcement of provisions in Sections 223(a) and (d) of the Telecommunications Act. The provisions concerned in particular the prohibition to provide obscene and patently offensive information via telecommunications and interactive computer services to persons under 18 years. The Court held that there is no effective way to determine the identity or
7.3. Technical Possibilities to Limit the Communication of Offensive Material

The technical means available to limit the risks for services offering access to on-line publishing permit the control of the content of the on-line publishing. Compuserve thus established a Compuserve Parental Controls Center. It offers a Microsystems Software, incorporated is Cyber Patrol Internet filtering software by means of which parents can limit the Internet access to certain times of a day and limit the total time spent on-line in a day or week. Parents can also block the access to those Internet sites they deem inappropriate and control access to applications. Passwords may be introduced and transmissions may be encrypted. Technical equipment may be provided to limit access to certain publications. It is also possible to check which user had access to a certain data or information. The technology is progressing in this field, and the possibilities to control or monitor transmissions may cause problems in the future in particular with regard to data privacy.

8. LIABILITY RELATING TO ON-LINE AND OFF-LINE PUBLISHING

The discussion of liability issues of on-line and off-line publishing will centre on the problems of liability for defamatory statements and other offensive material. Comparisons will be drawn to the law concerning traditional publishing.

8.1. The Schemes of Liability in Traditional Publishing and Broadcasting

Problems relating to liability in the case of a defamation centre on the issues of the attributability of the defamatory statement and on editorial

the age of a user who is accessing material through e-mail, exploders, newsgroups or chat rooms, and that there is no method currently available for web page publishers who lack access to Common Gateway Interface scripts to screen recipients on-line for age. 'Tagging' indecent speech would require content providers to label all of their indecent or patently offensive material by imbedding a sting of characters. To be effective, a tagging system would require a worldwide consensus among speakers to use the same tag to label indecent material. Until such software exists, all speech on the Internet will continue to travel to whomever requests it, without hindrance. The Court found: 'Plaintiffs have established a reasonable probability of eventual success in the litigation by demonstrating that 223(a)(1)(B) and 223(a)(2) of the CDA are unconstitutional on their face to the extent that they reach indecency. Sections 223(d)(1) and (2) of the CDA are unconstitutional on their face. Accordingly, plaintiffs have shown irreparable injury, no party has any interest in the enforcement of an unconstitutional law, and therefore, the public interest will be served by granting the preliminary injunction'...
control. Directly liable will be the person who wrote the defamatory statement and who, knowingly, caused its publication. In the case of electronic publishing a parallel may be drawn to traditional publications. Much will depend upon the question who has and who could or should have exercised editorial control over the defamatory publication. The operator of a bulletin board service may try to escape liability upon the reason that he is ignorant of the content of the messages.\textsuperscript{132}

Concerning liability in the case of on-line publishing a parallel may possibly be drawn to liability in the case of broadcasting. Concerning off-line publishing it may be justified to apply the rules concerning audiovisual works or films or the press. However, in the case of criminal liability, the application of legal provisions by way of analogy will not be permissible so that particular problems may occur if the interpretation of the law does not permit the applicability to digital communications.

8.1.1. Rights of the Victim of a Defamation

Concerning liability for violations of the general personality right through defamatory statements in the press, also particular legal rules developed. These rules are not only special with regard to the establishment of the liability but also with respect to the damage. According to the German jurisprudence a person who is the victim of a statement of untrue facts, may claim, from the disturber the removal of the disturbance, in application of the principles of tort law. Violated persons have the following rights.\textsuperscript{133}: First, they may, on the principles of tort law, apply for an injunction against the disturber, for example the journal or author, in the case where there is a risk or danger of a (repeated) violation of a legally protected position. They may, second, ask for a counter-representation which is regulated in the press laws, broadcasting and media laws and related treaties of the German provinces, based on the general personality rights. Third, and also on the principles of tort law, an injured person may claim a correction of the untrue facts from the disturber. Fourth, and in relation to material and immaterial injuries, the victim may claim damages, in the latter case, however, only subject to the conditions that there is a serious violation of the general personality rights, fault of the tortfeasor and no other remedy providing a compensation. Yet these remedies of which a victim of a defa-


mation made in the traditional media avails himself such as the rights to claim a counter-representation, retraction and rectification may not easily be available by way of analogy to the defamation via online transmissions. This may be different, if the persons who accessed the defamation could be established. In such a case it may be conceivable that the 'removal of the disturbance' could be achieved if the liable person corrected the statement and apologised in an appropriate form.

8.1.2. Damages

The methods for the calculation of the amount of damages awarded in the case of defamatory statements differ considerably between the various national legal systems\(^\text{134}\). Factors are the seriousness of the defamatory statement, the consequences for the victim, the intention of the wrongdoer and the number of the circulation. In comparison with traditional publishing the establishment of the 'circulation' of an on-line publication will be very difficult, taking into account that on-line publications are often limited to academic circles.

8.2. The Liability of the Providers of Basic Services, of On-line Services and of Content Providers

In the U.S. the Statement of the Attorney General of Minnesota concerning Internet jurisdiction of September 1995 was received with much attention. The Attorney General said:

'Warning to all Internet users and providers. This Memorandum sets forth the enforcement position of the Minnesota attorney General’s Office with respect to Certain Illegal Activities on the Internet. Persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws'.

This means, in the case of on-line publishing, that whoever causes information from any place whatsoever to be transmitted on the Internet or, very likely, any other interactive computer service, which can be received in Minnesota will be liable according to that state’s jurisdiction. It may be assumed that the legal situation is similar in many other countries.

\(^{134}\) Arnold Vahrenwald, *Princess Caroline of Monaco Fights the Press*, (1995) 4 Entertainment Law Review 150-161 who, at 158 to 160, compares the English and German laws concerning the award of damages for violations of the general personality right through the publication of untrue facts.
In the absence of special legislation public order violations via online communications will be treated according to the ordinary principles of criminal law. In the case of online publishing, particular attention should be made to the definition of the liable person and the place where the criminal offence occurs. Section 274 of the U.S. Telecommunications Act of 1996 concerns electronic publishing by Bell operating companies. Subsection (h)(2)(c) of this provision states that the transmission of information as part of a gateway to an information service which does not involve the generation or alteration of the content of information, does no constitute electronic publishing, even if the transmission comprises introductory information and navigational systems provided that they do not affect the presentation of the electronic publishing to users. Also other provisions of the U.S. Telecommunications Act of 1996 seem to focus on the fact whether a person can decide upon the content of the information transmitted or not.\footnote{Title V of the U.S. Telecommunications Act deals with obscenity and violence. Section 502 of the Act concerns obscene or harassing use of telecommunications facilities. It amends Section 223(a) of the Communications Act of 1934:}

\begin{itemize}
\item[a)] Whoever —
\begin{itemize}
\item[1)] in interstate or foreign communications —
\begin{itemize}
\item[A)] by means of a telecommunications device knowingly —
\begin{itemize}
\item[(i)] makes, creates, or solicits, and
\item[(ii)] initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;
\end{itemize}
\item[B)] by means of a telecommunications device knowingly —
\begin{itemize}
\item[(i)] makes, creates, or solicits, and
\item[(ii)] initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;
\end{itemize}
\item[C)] makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communication; or
\end{itemize}
\item[2)] knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18 United States Code, or imprisoned not more than two years, or both;
\end{itemize}
\end{itemize}

The Telecommunications Act of 1996 also adds new subsections (d) and (e):
\begin{itemize}
\item[d)] Whoever —
\begin{itemize}
\item[1)] in interstate or foreign communications knowingly —
\begin{itemize}
\item[A)] uses an interactive computer service to send to a specific person or persons under 18 years of age, any comment, request, suggestion, proposal, image, or other communication
\end{itemize}
\end{itemize}
Accordingly, in U.S. law the definition of the terms ‘information content provider’ and ‘information service’ assume importance\textsuperscript{136}, because the se-

\begin{itemize}
  \item[2)] knowingly permits any telecommunications facility under such person’s control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.
\end{itemize}

\textbf{e)} In addition to any other defenses available by law:

\begin{itemize}
  \item[1)] No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system or network not under that person’s control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.
  \item[2)] The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.
  \item[3)] The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.
  \item[4)] No employer shall be held liable under this section for the actions of an employee or agent unless the employee’s or agent’s conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorises or ratifies such conduct, or (B) recklessly disregards such conduct.’
\end{itemize}

Section 230 subsection (c) of the of the U.S. Telecommunications Act of 1996 concerns liability for activities relating to the use of offensive material and states:

\begin{itemize}
  \item\textbf{c) Protection for ‘good samaritan’ blocking and screening of offensive material} – No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user of interactive computer services shall be held liable on account of –
    \begin{itemize}
      \item[1)] any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
      \item[2)] any action taken to make available to information content providers or others the technical means to restrict access to material described in paragraph (1).
    \end{itemize}
\end{itemize}

\textsuperscript{136} Section 230 of the U.S. Telecommunications Act of 1996 which concerns the protection for private blocking and screening of offensive material and the Federal Communications Commission regulation of computer services prohibited, defines in subsection (f):

\begin{itemize}
  \item[3)] \textbf{Information content provider} – The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided by the Internet or any other interactive computer service, including any person or entity that creates or develops blocking or screening software or other techniques to permit user control over offensive material.
  \item[4)] \textbf{Information service} – The term ‘information service’ means the offering of a
paration between the different functions of an information content provider and a mere information service will be helpful for deciding the question of the liability.

8.2.1. The U.S. Policy concerning the Internet and Interactive Computer Services

Section 230 of the Telecommunications Act of 1996 which concerns the protection for private blocking and screening of offensive material, FCC regulation of computer services prohibited, establishes a policy with regard to the Internet and other interactive computer services in (a) and (b):

a) FINDINGS – The Congress finds the following:

1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

2) These services offer users a great degree of control over the information that they receive, as well as the potential for ever greater control in the future as technology develops.

3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

5) Increasingly, Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

b) POLICY – It is the policy of the United States to –

1) promote the continued development of the Internet and other interactive computer services and other interactive media;

2) preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation;

3) encourage the development of technologies which maximise user control over the information received by individuals, families, and capability for generating, acquiring, storing, transforming, processing, retrieving, utilising, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.
schools who use the Internet and other interactive computer services;
4) remove disincentives for the development and utilisation of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and
5) ensure vigorous enforcement of criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

8.2.2. Regulation of the Internet

Concerning the regulation of the Internet and other interactive computer services Article 230 subsection (d) of the Bill ‘Telecommunications Act 1996’ states:

FCC [= Federal Communications Commission] REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED – Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services.

8.2.3. Conclusions

According to the U.S. Telecommunications Act of 1996 the essential factor which is decisive for liability seems to be the possibility to affect the content of the information. It can hardly be expected from an on-line service to examine whether the use of the data might constitute copyright infringement or give rise to an action for defamation. The on-line service provider should thus obtain a written statement from the information or content provider in which the latter recognises that:

- the on-line service does not regulate the content of the on-line service,
- the information or data which the information or content provider is uploading will be considered to be in the public domain,
- the information or content provider will save harmless the on-line service in the case of any claims arising in relation to the data or information uploaded by the information or content provider,
- the information or content provider warrants that he has any rights necessary to provide the data or information uploaded,
- the on-line service will not take any responsibility with regard to the content of the data or information.
With regard to the liability of the providers of basic services such as the telephone companies, it seems that no question of liability can arise, due to the lack of causality between a possible violation of rights and the performance of the basic service¹³⁷.

8.3. Evidence Relating to Criminal and Civil Law Liability in On-line and Off-line Publishing

The rules concerning evidence are, in general, contained in the laws concerning criminal and civil procedure. Obtaining evidence in electronic publishing may be difficult, because the pressing of a single button may destroy data or even databases.

8.3.1. Criminal Law

The European Council’s Recommendation of the Committee of Ministers to Member States concerning Problems of Criminal Procedural Law Connected with Information Technology of 1995 covers many aspects which are of interest to interactive computer systems¹³⁸.

The recommendation takes into account of the ‘unprecedented development of information technology and its application in all sectors of modern society’, of the fact that an increasing part of economic and social relations will take place through or by use of electronic information systems, that evidence of criminal offences may be stored and transferred by these systems and that criminal procedural laws of member states do often not yet provide for appropriate powers to search and collect evidence in these systems in the course of criminal investigations. The purpose of the

¹³⁷ However, the question of the liability may also be solved by focusing on the ‘granting of access’ to the information complained of. German criminal law seems to focus on the mere ‘publicly making otherwise accessible of the indecent material’ in Article 184(3) no. 2 of the German Criminal Code. Thus the offering of hard pornography to closed user groups via teletex will be offensive, unless the access was limited to a small circle of users. Likewise Article 130(2) no. 1(b) of the German Criminal Code incriminates the publicly making otherwise accessible of publications which incite the people to hatred against a part of the population or against a national, racial, religious group or a group which is determined by its customs.

recommendation is that governments of Member States should be guided by the principles appended to the recommendation. These principles are separated into seven different parts, dealing with:

1) Search and seizure: it should be differered between searching computer systems and seizing data and intercepting data in the course of a transmission; the provisions of search and seizure should be applied mutatis mutandis; a search may be extended to computers connected via a network;

2) Technical surveillance: the laws pertaining to technical surveillance for the purposes of criminal investigations such as the interception of telecommunications should be reviewed with regard to the convergence of information technology and telecommunications; the investigating authorities should have the right to avail themselves of technical measures which enable the collection of traffic data in the investigation of crimes; data collected in the course of a criminal investigation should be secured in an appropriate manner; ‘criminal procedural laws should be reviewed with a view to making possible the interception of telecommunications and the collection of traffic data in the investigation of serious offences against the confidentiality, integrity and availability of telecommunications or computer systems’;

3) Obligations to cooperate with the investigating authorities: subject to legal privileges or protection, provisions should be made that investigating authorities can order persons to submit any specified data under their control in a computer system which may serve as evidence; these provisions should ensure that investigating authorities have the power to order persons to provide the necessary information to enable access to a computer system and the data; specific obligations should be imposed on operators of public and private networks which offer telecommunication services to the public so that investigating authorities may avail themselves of the necessary technical measures which enable the interception of telecommunications; likewise obligations should be imposed on service-providers who offer telecommunication services to the public to provide information to identify the user to investigating authorities;

4) Electronic evidence: procedures and technical methods for handling electronic evidence should be further developed in a way as to ensure their compatibility between states; criminal procedural law rules concerning evidence relating to traditional documents should apply to data stored in a computer system;
5) Use of encryption: ‘Measures should be considered to minimise the negative effects of the use of cryptography on the investigation of criminal offences, without affecting its legitimate use more than is strictly necessary’;

5) Research, statistics and training: the development of the information technology should be assessed continuously with a view to the possible risks with regard to the commission of criminal offences; data relating to these offences should be collected and analysed; the criminal justice personnel should establish special units and be trained specifically;

7) International cooperation: if immediate action is required the investigating authorities should have the power of search if the other computer systems are located in a foreign jurisdiction and upon an unambiguous legal basis to be established through negotiating international agreements; existing mutual legal assistance instruments should be supplemented to permit the request of foreign authorities to collect evidence, to search computer systems and seize data with a view to the subsequent transfer. ‘The requested authorities should also be authorised to provide trafficking data related to a specific telecommunication, intercept a specific telecommunication or identify its source’.

Of interest for European attempts to adapt the laws of criminal procedure to technological change may serve the U.S. Federal Guidelines for Searching and Seizing Computers of 1994 which were established by an interagency group, the ‘Computer Search and Seizure Working Group’. Yet the purpose of the European Council’s Recommendation did not lie in the establishment of detailed rules but in the creation of a set of principles for further action by the states.

8.3.2. Civil Law

Concerning international interactive computer systems problems of evidence may arise in civil law. Courts will apply the national laws applicable in the country concerned. The rules differ in the various national systems, and it cannot be expected that the European Community which has authority in economic issues according to Article 2 of the Treaty on European Union will develop initiatives aimed at the harmonisation of the relevant laws of civil procedure of Member States.

In English law there is a general rule that where the original of a document exists it must be produced. But, the 'original' of an electronic mail cannot be read by human eyes so that a copy on a paper or on the computer screen must be made. This does, however, not prevent the copy from being admissible in the court. Concerning the authenticity of the copy which is produced from the original of the message, oral evidence of witnesses may be given.

Interesting proposals concerning evidential issues were made in the UNCITRAL's Draft Model Law for Electronic Data Interchange. Article 8 of the draft states:

Admissibility And Evidential Weight Of Data Messages.

1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence: a) on the sole grounds that it is a data message; or, b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

3) Subject to any other rule of law, where subparagraph (b) of paragraph (1) of Article 8 is satisfied in relation to information in the form of a data message, the information shall not be accorded any less weight in any legal proceedings on the grounds that it is not presented in its original form.

Article 11 of the draft states:

Attribution Of Data Messages.

1) A data message is that of the originator if it was communicated by the originator itself.

2) As between the originator and the addressee, a data message is deemed

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to be that of the originator if it was communicated by a person who had the authority to act on behalf of the originator in respect of that data message.

3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if: a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure for that purpose which was (i) previously agreed by the originator; or (ii) reasonable in the circumstances; or b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

4) Paragraph (3) shall not apply: a) after the addressee has received notice within a reasonable time from the originator that the data message is not that of the originator; or b) in a case within paragraph (3)(a)(ii) or (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure that the data message was not that of the originator.

5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to regard the content of the data message as received as being what the originator intended to transmit, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the content of the data message as received.

6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption unless it repeats the content of another data message, and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the repetition was a duplication and not the transmission of a separate data message».

It may suffice to mention that the U.S. Federal Rules of Evidence have been adapted to the technical progress.\textsuperscript{142}

\textsuperscript{142} U.S. Fed. R. Evid. 1001(1) gives a definition of the term 'writing' which includes any mechanical or electronic recording or other form of data compilation, 1001(3) explains as an 'original' writing any printout or other output readable by sight, if that printout accurately reflects data stored in a computer or similar device. 1002 establishes that the proof of the content of a writing, recording or photograph requires the original writing, recording or

The technological progress increases the demand for the protection of privacy. The right to privacy may comprise the right to be left alone and the right to exercise control over one’s personal information. Privacy issues in relation to on-line publishing are of a mixed technical and legal nature:

- the electronic leash created by the enhanced tracking capabilities of personal communications systems whereby the movements of an individual can be tracked,
- the data shadow which a user of an online system causes and which permits inferences with regard to his intelligence, life style and habits or preferences,
- the registration of the consumer’s use of services and consumption,
- the surveillance at home through systems of security services by electronic means which may be combined with electronic publishing equipment without the knowledge of the user,
- the uncontrolled use and marketing of personal information,
- lacking security measures of services dealing with personal information,
- cross-border transfers of personal information.

Within the sector of electronic publishing information may be stored about consumers who interactively communicate with the relevant services. Also the mere way how a person reacts when it uses the electronic means of communication may be stored which permits conclusions with reference to the intelligence and other factors. This information may be commercially exploited in a manner over which the person concerned has no control. It has been observed that ‘there will be a need to build privacy into the system by means of encryption or other methods, that still allow for the interactive transactions to take place’.

photograph. The Advisory Committee notes to rule 1001: ‘Traditionally the rule requiring the original centred upon accumulation of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments’.


The protection of privacy is regulated differently in the Member States of the European Union. The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data\textsuperscript{145} which was adopted by the European Parliament and the Council of the European Union focuses on the right to privacy which is recognised in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{146}. The importance of the Directive may be derived from the number of 72 Recitals which are very useful for the explanation of the background and the interpretation of the Articles.

According to Article 1 of the Directive the Member States of the European Union shall protect the fundamental rights and freedom of natural persons, and in particular the right to privacy, with respect to the processing of personal data. This provision imposes on Member States of the Union the obligation to protect privacy – a right which was not established in all Member States before\textsuperscript{147}. The purpose of the Directive is to harmonise the laws in the Member States of the European Union so that the undertakings of the internal market are subject to similar rules; according to Article 32(1) of the Directive Member States shall adopt their laws to the requirements of the Directive within three years that is to say by October 1998. The scope of applicability of the Directive is related to the techniques used to capture, transmit, manipulate, record, store or communicate sound and image data relating to natural persons. However, concerning the processing of sound and image data carried out for purposes of journalism or for the purposes of literary or artistic expression in particular in the audiovisual field, the principles of the Directive are to apply in a restricted manner according to Article 9 of the Directive.

\textsuperscript{145} O.J. L 281/31 of 23 November 1995.

\textsuperscript{146} Article 8 of the European Convention European for the Protection of Human Rights and Fundamental Freedoms states: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

\textsuperscript{147} E. Susan Singleton, Data Protection Developments, Computer Law & Practice (1994) 14-16 at 15, refers to the position of the UK which objected to this provision that her constitution does not recognise a basic right to privacy so that the implementation of the Directive would mean a substantial change to English law.
The Directive provides\(^{148}\) that

- personal data are any information relating to an identified or identifiable person (data subject),
- processing of data means operations performed on personal data whether or not by automatic means (collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction),
- a controller is the person or body which determines the purposes and means of the processing of personal data,
- a processor is the person or body which processes data on behalf of the controller,
- personal data may be processed only if the data subject has given his consent and if processing is necessary\(^{149}\),
- subject to exceptions, it is prohibited the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and the processing of data concerning health or sex life\(^{150}\),
- Article 9 of the Directive states: 'Member States shall provide for exemptions or derogations from the provisions of this Chapter\(^{51}\), Chapter IV\(^{152}\) and Chapter VI\(^{153}\) for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression,'
- the controller must provide a data subject from whom data are collected with information on the identity of the controller, the purposes of the processing and other information such as concerning the recipient if this is necessary to guarantee fair processing in respect of the data subject\(^{154}\),


\(^{149}\) Article 7 of the Directive 95/46/EC.

\(^{150}\) Article 8 of the Directive 95/46/EC.

\(^{151}\) Chapter II of the Directive 95/46/EC concerns General Rules on the Lawfulness of the Processing of Personal Data.

\(^{152}\) Chapter IV of the Directive 95/46/EC concerns the Transfer of Personal Data to Third Countries.

\(^{153}\) Chapter VI of the Directive 95/46/EC concerns the Supervisory Authority and Working Party on the Protection of Individuals with Regard to the Processing of Personal Data.

\(^{154}\) See Articles 10 and 11 of the Directive 95/46/EC.
- the data subject has a right of access to the data within reasonable intervals which includes the right to information about the data processed, the purposes of the processing and the recipients or categories of recipients to whom the data are disclosed,
- restrictions with regard to the scope of the data subject's rights may be made if this is necessary for purposes of national security, defence, public security, the prevention and prosecution of criminal offences, for the protection of the data subject or of rights and freedoms of others and also for important economic or financial interests of a Member State or of the Union,
- the data subject has a right to object to the processing on compelling legitimate grounds relating to his particular situation or if the data are used for direct marketing\textsuperscript{155},
- the confidentiality of data processing is provided by the provision that data may be processed on instructions from the controller,
- the security of data processing is provided by the implementation of technical and organisational measures to protect data against unlawful or unauthorised destruction, loss, alteration, disclosure or access and processing, and by the duty to impose the obligation on the processor to act upon the instruction of the controller,
- the transfer of data to third countries may only be made if these countries ensure an adequate level of protection,
- Member States shall establish a supervisory authority which is responsible for monitoring the application of the Directive in the Member State,
- the controller must notify the supervisory authority before carrying out automatic processing operations, the notification must relate to the name of the controller, the purpose of the processing, the description of the category of data, the recipients of the data and the transfer of data to third countries,
- a working party on the protection of individuals with regard to the processing of personal data is established which is composed of representatives of the supervisory authority of Member States and which shall examine the application of the Directive by Member States and advise the Commission on the level of protection in the Community and in third countries and make recommendations on all matters relating to the protection of persons with regard to the processing of personal data.

\textsuperscript{155} Article 14 of the Directive 95/46/EC.
The implementation of the Directive by Member States will require considerable efforts, taking into account of the broad definition of the term ‘personal data’. It has been criticised that the administrative efforts needed will be very costly and do not take into consideration the technological evolution so that, in fact, the Directive could prevent the establishment of a global information infrastructure.

10. **Advertising and Trade Marks in On-line Publishing**

Since on-line publishing has not yet become a mass media, its attractiveness for the advertising industry is limited. However, the global market structures of on-line publishing demand a regulation of the issue which facilitates global advertising strategies. The issue of advertising on the Internet or interactive computer services involves in particular problems deriving from trans-border advertising. It suffices to mention that in Portugal advertising for cigarettes is unlawful and comparative advertising in Germany. Will the company which launches an advertising campaign on the Internet have to comply with the laws of all countries where the advertising can be accessed? The problem has not yet arisen, but with the increasing commercial exploitation of interactive computer systems it is likely that advertising will assume more importance. In the U.S. the Federal Trade Commission issued its first release concerning advertising on ‘Information Superhighway’ on 14 September 1994. The advertisement concerned the unlawful credit programme: ‘For just $99 we will show you how to create a brand new credit file’... The European Commission is reported to have suggested in its Admedia project report – the future of media and advertising, that advertisers will have a period of five years for experimentation with the new media, since interactive technologies are unlikely to reach mass audiences before 10 or more years. In the absence of an express regulation of advertising on the Internet or interactive computer services it seems that the advertiser would have to comply with the strictest

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156 The expenses for the implementation of the Directive were estimated in 1993 by the UK banking services to amount to £80 to £100 million and the running costs to £60 to £100 million per annum, see E. Susan Singleton: ‘Data Protection Developments’, Computer Law & Practice (1994) 14-16 at 15.


standard of any country where the advertisement can be accessed on-line in order to avoid liability.

10.1. Self Regulation of Advertising

Apart from regulations by the legislatures, advertising is essentially a matter of self-regulation of the relevant bodies of the advertising industry. Taking into account of the importance of advertising in the traditional media, it is evident that the increasing importance of on-line publishing will attract advertisers. This may be the case even if on-line publishing seems to be a nearly exclusively male activity, and advertising is, in general, addressed to women at a rate of some 70 per cent. In particular the European self-regulation of advertising may be concerned in the case of on-line publishing, due to the fact that many on-line publishing services will operate beyond national borders. The European Advertising Standards Alliance (EASA) was established in 1991. Its purpose is to bring together the organisations which operate the self regulation in European countries. The organisation represents the interests of its members – the national self-regulatory bodies of European countries – so that it does not serve as a supra-national European authority of self-regulation. One of the aims of the Alliance is to promote a system whereby complaints received against advertising in foreign media can be speedily and effectively dealt with by reference to the relevant self-regulatory body in the country of origin of the advertising action. The Alliance is developing a convergence of the principles of self-regulation in the face of a growing number of proposed Directives emanating from the Commission of the European Communities, in order to promote the role of national bodies of self-regulation\textsuperscript{159}. The Alliance facilitates the settlement of cross-border complaints\textsuperscript{160}. The principle should be that the advertising is subject to the laws and regulations of that state where the medium which carried the advertising action originates, that is to say where the broadcasting was emitted or where the journal was published. However, some codes of self-regulation apply the principle that the rules of the country shall be applicable, to the nationals


\textsuperscript{160} Cross-border complaints concern complaints against advertising which originate from another state, for example in the case in which journals or television-programmes which are made and broadcast in one country contain advertising which is also distributed or received in another country and meets with complaints.
of which the advertising action was addressed\textsuperscript{161}. Beyond, the Alliance offers a place for the discussion of any issues of self-regulation in Europe, whether it involves the advertising industry, consumer bodies or lawmakers. However, in the view of the Alliance the aim of the creation of a unitary European code of self-regulation is secondary due to the substantial differences in the concepts of the regulation of advertising in the European countries\textsuperscript{162}.


Taking into account that national laws will be applicable to on-line publishing wherever the on-line publication is received\textsuperscript{163}, in principle, the advertising should comply with the strictest standard of any country to which the on-line publication is addressed. The relevance of the applicability of different national laws derives from the fact that on-line publishing by interactive computer services or the Internet will often involve trans-border transmissions of data or information. The proposal for an amendment of the Directive ‘Television without frontiers’ contains a revised definition of advertising\textsuperscript{164}: «television advertising’ means any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade business, craft or profession in order to promote the supply of goods or services including immovable property or rights and obligations in return for payment. It does not include teleshopping».

Teleshopping is defined as meaning television programmes and spots containing direct offers to the public with a view to the sale, purchase or

\textsuperscript{161} For example, in the case of the Swiss Code of self-regulation, see Alliance Director-General’s Activity Report No. 6, March 1995-May 1995.
\textsuperscript{162} Roberto Cortopassi, \textit{Re-Examining the Origins; a New Outlook on the Future}, Alliance Update No. 3 of April 1995, p. 2.
\textsuperscript{163} In the u.s. the Statement of the Attorney General concerning Internet jurisdiction of September 1995 was received with much aoction. The Attorney General said: ‘Warning to all internet users and providers. This Memorandum sets forth the enforcement position of the Minnesota Attorney General’s Office with respect to Certain Illegal Activities on the Internet. Persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws’.
\textsuperscript{164} Article 1 of the proposal for an amendment of the Directive ‘Television without frontiers’; for the amendment by the European Parliament see O.J. C 65/96 of 04 March 1996.
rental of products or with a view to the supply of services in return for payment. Teleshopping is, in general, considered as advertising\textsuperscript{165}. However, its exclusion from the concept of television advertising is justified in cases in which it is not included in television broadcasting programmes. Accordingly, teleshopping channels are not subject to time limits applicable to television advertising. With respect to telepromotion, promotion of products or services by means of games or studio shows, the Commission observed that this form of programme should be treated as a form of advertising which is lawful in principle and therefore subject to any provisions on advertising contained in the Directive\textsuperscript{166}.

In the view of the Commission the amended Directive will be applicable to other new forms of communication such as pay-per-view or near video-on-demand\textsuperscript{167}. The Commission thus seems to assert a broader view of the term 'broadcasting' in the law of telecommunications than in the law of copyright where it excludes the applicability of the concept of 'broadcasting' to any point-to-point services and the European Parliament sustains the view that 'television broadcasting' means the initial transmission of television programmes whether for a mass audience or for individual demand either simultaneously or sequentially\textsuperscript{168}. Whereas it is unanimous that the term 'television broadcasting' includes transmissions through the intermediary of cable operators\textsuperscript{169}, it is not yet clear whether the Directive or the proposal for an amendment of the Directive would be applicable to advertising on the Internet or interactive computer services\textsuperscript{170}. The Commission suggested in its Admedia project report – the future of media and advertising\textsuperscript{171} that

\textsuperscript{165} See, for example, Werner Schroeder, Teleshopping und Rundfunkfreiheit, ZUM 1994/471, 474; Rupert Stettner and Wolfgang Treuenreiter, Sperrstunde im Teleshopping, ZUM 1994/669, 674.


advertisers will have a period of five years for experimentation with the new media since interactive technologies are unlikely to reach mass audiences before 10 or more years\textsuperscript{177}.

10.3. Trade Marks and On-line Publishing

The use of online publishing over the Internet involves a great number of different names and fictitious names. The Internet Assigned Numbers Authority ("IANA") allocates the Internetworking Protocol Addresses ("IP addresses") by means of which the computers differentiate themselves from other machines\textsuperscript{173}. IANA is a private enterprise which has delegated the administration of IP addresses to Internic Registration Service, which is operated by a company called Network Solutions. Internic (Internet Network Information Center) which works under the sponsorship of the National Science Foundation (U.S.) employs a policy according to which names will be registered on a first-come first-serve basis, and if the name would violate another person's trade mark, Internic allows the applicant to change the name requested. In the case where the applicant has trademark protection for his name, he will be able to continue the use of the name if he agrees to defend, indemnify and hold harmless Internic in the event of a lawsuit\textsuperscript{174}. There are also domain names whereby the right field indicates the top-level domain which in general indicates the type of organisation or the country. Thus 'uk' indicates 'United Kingdom', 'net' indicates an organisation operating a computer site or network and 'com' indicates a commercial organisation\textsuperscript{175}. Internic also administers domain names. Disputes concerning the use of domain names relate to the names 'wired.com' and 'wired.net', the continuing use of the domain 'mtv.com' by a former employee of the MTV cable television channel, the use of the domain name 'kaplan.com' by a competitor of the Stanley Kaplan Review which, however, was not active on the Internet and the use of the domain name 'ronald@mcdonalds.com' to which the McDonald's company

\textsuperscript{172} The Commission is more careful in approach than U.S. authorities, see statement of the Attorney General of the U.S. state Minnesota, Note 163.


\textsuperscript{175} Dan L. Burk, Trademarks Along the Infobahn, Richmond Journal of Law & Technology, April 10, 1995, paragraph 13.
objected\textsuperscript{176}. The administration of the domain names by Internic means that users of the Internet will have to get acquainted with the U.S. trademark law if they want to employ their name or trademark for registration of a domain name.

11. Security of Communications On-line

The security of communications in on-line publishing can be provided by technical and legal means. On-line publishing services may provide for access control by user identification and authentication procedures and special software may be designed to control the use of the work transmitted\textsuperscript{177}.

11.1. Encryption

The increase of the use of communication via information infrastructures led to an increase in the need of encryption. Since the ‘overhearing’ of the communication of digital data is possible without leaving tracks, an efficient encryption system is a need for the maintenance of confidentiality of the data.

11.1.1. The Admissibility of Encryption

The legal conditions for encryption differ between countries. Whereas in France encryption is not permissible unless licensed by public authorities, it is even covered by the constitutional principle of the secrecy of telecommunications in Germany\textsuperscript{178}. Public safety authorities may supervise and register telecommunications under certain circumstances. Thus the public prosecution can tap communications in application of Article 100a of the German Code of Criminal Procedure\textsuperscript{179}, and the secret services for the


\textsuperscript{179} Article 100a of the German Code of Criminal Procedure states: Supervision Of Telecommunications. The supervision and registration of telecommunications may be ordered where certain facts justify the suspicion that a person as perpetrator or accomplice has
'Protection of the Constitution', the Federal Intelligence Service ('BND') and the Military Counter-intelligence ('MAD') for the purpose of the prevention of an imminent danger for the constitutional free and democratic order of the republic and the security of the foreign troops of NATO countries on Germany territory. The BND may also tap the not wired international telecommunications for the purpose of strategic controls, for example in order to prevent the threat of an armed attack or terrorist attacks. The person whose communication was supervised or registered has to be informed after the purpose of the measure has been achieved\(^\text{180}\). The power of the public safety authorities includes also the decoding of encrypted messages\(^\text{181}\). The operators of telecommunication services may be obligated to cooperate with the public safety authorities according to Article 100b(3) of the German Code of Criminal Procedure, but this obligation cannot be extended to services which offer the encryption of data.

11.1.2. Licensing and Prohibition of Encryption

The public discussion concerning encryption relates in particular to the question whether it should be prohibited or, at least, licensed. The licensing of encryption equipment by public authorities\(^\text{182}\) permits the safety authorities to keep a copy of the key for the decoding of the encrypted data and to license the operation of the encryption of data and their communication\(^\text{183}\). The French Act concerning Encryption\(^\text{184}\) contains a comprehensive regulation of the issue which subjects also the operation of encryption committed 1.a) the crime of a high treason (...) 2. the crime of a counterfeiting (...), trafficking in human beings (...), a murder (...). According to Article 100b(1) of the Code the order must be in writing and may only be given by the judge, and, in a case of an imminent danger also by a public prosecutor up to a duration of three days.

\(^\text{180}\) Article 101(1) of the German Code of Criminal Procedure.


\(^\text{182}\) Ansgar Heuser, *Verschlüsselung im Spannungsfeld von staatlichem Anspruch und individueller Freiheit*, in: Jahrbuch Telekommunikation und Gesellschaft 1995/224-228 at 226. Reference may be made to the 'Clipper-Chip initiative' of the u.s. government according to which the keys used for encryption would be administered by the state as a trustee. The public authorities would make use of the keys only if the legal presuppositions for tapping are met. However, this initiative met with considerable objections from industry.


\(^\text{184}\) 'Décret No. 92-135$ de 28 décembre 1992 définissant les conditions dans lesquelles sont souscrites les déclarations et accordées les autorisations concernant les moyens et prestations de cryptologie'
to licensing. The administration of the keys may lead to risks which cannot be controlled by the user, for example that not authorised persons may obtain an access. The prohibition of encryption facilitates the operation of monitoring services but it would deprive the content of the constitutional principle of the secrecy of telecommunications of an essential element. Although services and equipment for encryption would become unlawful, private users and industry may develop his own facilities for encryption. On the international level the regulations concerning encryption of the different states should be included in law enforcement treaties.

11.1.3. *International Regulations concerning Encryption*

The NAFTA ('North American Free Trade Agreement') of 1994 provides that Member States make it a criminal offence to manufacture, import, sell, lease or otherwise make available a device or system which is primarily of assistance in decoding an encrypted programme-carrying satellite signal without the lawful authorisation of the lawful distributor of the signal, and a civil offence to receive, in connection with commercial activities, or further distribute, an encrypted programme-carrying satellite signal which has been decoded without the authorisation of the lawful distributor of the signal or to engage in the activity prohibited as a criminal offence. The term 'encrypted programme carrying signal' means: 'a programme-carrying satellite signal which is transmitted in a form whereby the aural or visual characteristics, or both, are modified or altered for the purpose of preventing the unauthorised reception, by persons without the authorised equipment that is designed to eliminate the effects of such modification or alteration, of a programme carried in that signal'.

The European Council's Recommendation of the Committee of Ministers to Member States concerning Problems of Criminal Procedural Law Connected with Information Technology\(^{185}\) states that measures should be considered to minimise the negative effects of the use of cryptography on the investigation of criminal offences, without affecting its legitimate use more than is strictly necessary'. It has been feared that the Recommendation would permit a limitation of the use of encryption, but it seems clear that in the view of the Council and also of European countries, for example in...
the UK, the Recommendation reflects the need to achieve a balance between
the interests of the industry in the confidentiality of information and the
interests of governments in the safeguarding of national security.\textsuperscript{186}

Within the framework of the programmes concerning the information
society, the European Commission is drafting a proposal concerning the
establishment of Europe-wide Trust Services (ETS) for public information
services. The draft proposal is concerned with the task to provide
information on how to guarantee the integrity and confidentiality of data.

11.2. Digital Signatures

Although digital signatures are a means to be employed essentially in
individual communications on-line, the concept may assume relevance for
on-line publishing. Digital signatures and passwords may permit an
authentication of an electronic data interchange message, when a statement
of origin such as fax reports will not suffice to establish authentication.\textsuperscript{187}
Concerning the trustworthiness of evidence to be authenticated, "according
to the majority rule, an electronic data interchange message should be
considered authentic if the computer and transmission methods are appar-
tently reliable, when neither the source of information nor method or
circumstances of preparation or transmission indicate a lack of trustwor-

The British Standard Code of Practice for Information Security Man-
agement of 1995 defines the term ‘digital signature’ as follows: ‘A digital
signature is a special form of message authentication, usually based on
public-key cipher techniques, which provides authentication of the sender,
as well as assurance of the integrity of the message content’. By means of
the digital signature the recipient of the message will be assured that the
content of the message has not been altered after the signature. Digital
signatures are of particular relevance in the case of electronic data inter-

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\textsuperscript{186} Penny Campbell, \textit{Council of Europe Recommendation Relating to Encryption –

\textsuperscript{187} According to Robert W. McKeon, Jr.: ‘Electronic Data Interchange: Uses and Legal
Aspects in the Commercial Arena’, (1994) Journal of Computer & Information Law, 511-
536 at 519, fn. 46, identification messages may be falsified and the identification message
only identifies the machine, not the sender.

\textsuperscript{188} Robert W. McKeon, Jr.: ‘Electronic Data Interchange: Uses and Legal Aspects in the
48, with reference to United States v. Miller, 771 F. 2d 1219, 1237 (9th Cir. 1985).
ture of documents if an appropriate technical and legal framework for a public code system is established\textsuperscript{189}. Digital signatures may possibly be used to mark a digital product so that even if unauthorised copying cannot be prevented, it may permit the rightholder to verify that unauthorised copying took place\textsuperscript{190}. The protection of a digital signature could be provided by criminal law if it is considered as the contents of a computer so that a hacker who modifies the signature or abuses it may be guilty of a criminal offence. A first statute regulating digital signatures is the Utah Digital Signature Act\textsuperscript{191}. The Act provides for a reliable means of signing computer-based documents and a legal recognition of digital signatures using a technique relying on asymmetric cryptography.

11.3. Passwords

Protection may be provided by technological means, since a software may be written to control the access, and cryptography and digital signatures may also provide security in the case of on-line transmissions\textsuperscript{192}. The security on the Internet was strongly improved over the recent months. The protection of passwords was strengthened so that the user is protected against connection stealing if his portable computer is replaced against another one, and the standards for encryption were published in July 1995\textsuperscript{193}.

11.4. Technical Equipment

The advancement of the technique generates technical equipment which, complemented by the appropriate software, permits the regulation of the access to on-line publications, the registration and metering of the relevant


\textsuperscript{192} Jim Clark (President of Netscape Communications Corp.): Keynote Address, given at the INTERNET@TELECOM.95 Conference of the International Telecommunication Union, The Internet and the ITU, Geneva, 07 October 1995.

\textsuperscript{193} Christian Huitcma (Research Director of INRIA): Keynote Address, given at the INTERNET@TELECOM.95 Conference of the International Telecommunication Union, The Internet and the ITU, Geneva, 07 October 1995.
transmissions and control the use of the on-line publication. Thus ‘technological solutions can be used to prevent or restrict access to a work; limit or control access to the source of a work; limit reproduction, adaptation, distribution, performance or display of the work; identify attribution and ownership of a work; and manage or facilitate copyright licensing’\textsuperscript{194}. It may also be conceivable to prohibit devices, products or components which circumvent technological methods of preventing unauthorised uses of on-line publications. A corresponding proposal was made by the U.S. Working Group on Intellectual Property Rights of the National Information Infrastructure Task Force in its Report ‘Intellectual Property and the National Information Infrastructure’\textsuperscript{195}. However, it does not seem advisable to aim at a limitation or prohibition of the use of new technologies, because this may, in the end, lead to a misallocation of resources and favour the national economies which are not hampered by such restrictions\textsuperscript{196}.


The transmission of on-line publications will be made freely, unless the parties stipulated otherwise. In general, the service will conclude a contract with its subscribers which specifies the terms and conditions relating to the service’s use. Whereas in the common law the nature of contracts relating to on-line publishing services do not pose particular problems, the classification of this contractual type in the civil law countries may cause problems; the contract by means of which the service transmits digital data to the subscriber may be analysed as an atypical contract with reference to provisions in the civil code which concern the leasing contract and the contract of sale\textsuperscript{197}. The right holder of works which are not in the public domain but protected by exclusive rights has an interest to receive a remuneration for the transmission. There are different possibilities for the stipulation of a remuneration.


\textsuperscript{197} Rainer Moufang, Datenbankverträge, in: Urhebervertragsrecht, Festgabe für Gerhard Schricke zu seinem 60. Geburtstag, C.H. Beck, Munich 1995, 571-595 at 583, 584 and 585 with regard to on-line contracts in the German legal system.
12.1. Rental of Works

Concerning the remuneration for the use which is made of works for purposes of the on-line communications such as by downloading from electronic databases, a possible solution was indicated by the European Commission in its Green Paper "Copyright and Related Rights in the Information Society"\textsuperscript{198}. The Commission proposed that the transmission of a work from a database to a personal computer may amount to a 'rental' of the work as opposed to a public broadcasting so that the on-line communication of a work from a public library should be treated similarly to the borrowing of a copy of a work from a public library. According to the Council Directive concerning Rental Rights\textsuperscript{199} an author has a right to obtain an equitable remuneration for any rental of his work, a right which could, by way of analogy, be applicable to any case of communication of a work via digital downloading from a database. The Rental Rights Directive provides in Article 4 that authors and performers enjoy a right to an equitable remuneration which they cannot waive so that contractual clauses cannot be invoked against this provision. According to the Directive Member States may regulate whether and to what extent collecting societies will administer the right to obtain the equitable remuneration. The introduction of a system of compulsory royalties in some countries only may constitute an impediment to the establishment of an international digital communications system\textsuperscript{200}.

12.2. Contracts

In general, the communication of a work protected by copyright via an on-line service implies the grant of a licence, namely a licence to use or access the work. The licence should expressly define the scope of the lawful use which may be made of the work. However, the law of on-line contracts is not yet settled, and in particular the paperless communications between the parties may give rise to problems. In the case of conditions for the transmissions of works communicated on-line, the user can accept or reject the terms. The remuneration stipulated for the communication

\textsuperscript{198} Commission of the European Communities Green Paper, 'Copyright and Related Rights in the Information Society', document com(95) 382 final of 19 July 1995 at 58.


of works may be dependent upon the single work communicated or upon a monthly basis. Concerning contractual royalties it has been observed that no particular methods have emerged for the negotiation of the appropriate amount, owing to the fact that the market is only developing.

12.3. *Clauses Securing a Remuneration in Contracts Concerning Off-line Publishing, Limitations of Use*

The acquisition of a CD-ROM may be bound up with conditions for its use. This may, in particular, be the case, if the CD-ROM does not relate to entertainment but to professional purposes. Thus, it may be stipulated that the purchaser has the right to give back the CD-ROM and change it against an updated version at a preferential price if the publisher has produced a new edition. The contract may provide that the purchaser does not obtain the property but a mere licence for the use of the CD-ROM which excludes the right to pass it on or to transmit its content to third persons. It may be provided that the use shall be limited to the purchaser personally and that copies for use in-house may only be made against an additional remuneration. Thus principles similar to those applied in software use contracts may be applicable which includes that licence agreements which exceed the exclusive rights conferred by copyright or which concern information in the public domain may be subject to the general prohibitions of the antitrust

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202 Concerning agreements on use of software see for example Henry Carr and Richard Arnold, *Computer Software: Legal Protection in the United Kingdom*, Sweet & Maxwell, 2nd ed., London 1992, 155-160; Jochen Pagenberg and Bernhard Geissler, *Licence Agreements*, Carl Heymanns, 3rd ed., Cologne 1991, 595-601; Herbert Stumpf and Michael Gross, *Der Lizenzvertrag*, Recht und Wirtschaft, 6th ed., Heidelberg 1993, 622-631; concerning software use contracts, Article 69c of the German Copyright Act may be relevant which states: 'Restricted Acts. The right holder shall have the exclusive right to do or to authorise: 1. the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the right holder; 2. (...); 3. any form of distribution of the original of a computer program or of copies thereof, including rental. Where a copy of a computer program is put into circulation by way of sale on the territory of the European Communities with the consent of the right holder, the distribution right in respect of that copy will be exhausted, with the exception of the rental right.'
laws and have to be in writing\textsuperscript{203}. The contractual practice concerning contracts relating to products of off-line publishing has not yet been tested before the German Federal Cartel Authority.

\textsuperscript{203} Rainer Moufang, \textit{Datenbankverträge}, in: Urhebervertragsrecht, Festgabe für Gerhard Schricker zum 60. Geburtstag, C.H. Beck, Munich 1995, 571-595 at 587, 594; Article 18 of the German Act against Restraints of Competition states: ‘Annulment of Tying Agreements. (1) The cartel authority may declare agreements between enterprises in respect of goods or commercial services to be of no effect either immediately or as from some future date to be determined by it, and forbid the implementation of new, similar agreements, insofar as the latter impose on one of the parties: 1. restrictions as to its freedom to use the supplied goods, other goods or commercial services, or 2. restrictions as to the purchase of other goods or commercial services from, or their sale to, third parties, or 3. restrictions as to the sale of the supplied goods to third parties, or 4. (…) and insofar as a) by such agreements a significant number of enterprises in relation to competition in the market are similarly bound and unfairly restricted in their freedom of competition, b) by such agreements market entry by other enterprises is unfairly restricted, or c) by the extent of such restrictions competition in the market for these or other goods or commercial services is substantially impaired. (2)’… Article 34 of the Act states: ‘Form of Cartel Agreements and Decisions. Cartel agreements and decisions (Articles 2-8) and agreements containing limitations of the kind referred to in Articles 16, 18, 20 and 21 have to be in writing’…