NAMUR LE

CENTRE DE RECHERCHES
INFORMATIQUE ET DROIT
FACULTES UNIVERSITAIRES
NOTRE-DAME DE LA PAIX

LAB meeting on 26 April 1995 :

The information society :

Copyright and Multimedia

Recent developments in Belgium

SECRETARIAT : FACULTE DE DROIT • REMPART DE LA VIERGE, 5 • B-5000 NAMUR • BELGIQUE • TEL. (32)81/72.47.(8) • TELEX FAC.Nam B 59222 • TELECOPIE (32)8

On 30 June 1994, two new acts were adopted in Belgium in the field of intellectual property rights: one on copyright and neighbouring rights[1] which has implemented three EC directives[2] and the other on the legal protection of computer programmes[3] which has implemented the EC directive on the legal protection of computer software[4].

Belgium decided to implement the directive on the legal protection of computer software in a separate Act in order to ensure that some of the provisions it contains are not extended to other types of works by way of interpretation. The general Act on copyright and neighbouring rights has thereby maintained a strong protection of moral rights while the separate Act on the legal protection of computer software provides less protection of moral rights. Some commentators have pointed out that this dual legislation could carry interesting perspectives in relation to the implementation of possible rules concerning the legal protection of "multimedia" works such as the implementation of the future directive on the legal protection of data bases.

It would be a tedious exercise to describe at length the provisions contained in the Acts since many are to a large extent identical to those contained in the four EC directives mentioned above. A more relevant approach is to provide an overview of some of the provisions which could be applied to multimedia works and to assess if these two Acts provide adequate methods of protection of such works.

After having reviewed the ways in which a multimedia work could be protected under the current copyright and neighbouring rights Act, contractual issues of how to obtain the consent of the authors of the pre-existing works which are to be integrated in the multimedia work will be analysed.

---

1 Copyright and neighbouring rights Act, 30 June 1994, M.B. 27 July 1994, p. 19297; err. M.B.5 November 1994, P. 27467; err. M.B., 22 November 1994, p. 28832.

2 Rental and Lending rights and certain rights relating to copyright, Directive 92/100, OJ 1992 L346/15. Copyright and neighbouring rights relating to satellite broadcasting and cable retransmission, Directive 93/83, OJ 1993, L248/15 and Term of protection of copyright directive OJ 24 November 1993, n° L290/9.

3 Same date and references as the copyright and neighbouring rights Act.

4 Directive 91/250, OJ 1991 L122/42.

1. The legal protection of multimedia works

When analysing the legal protection multimedia works, the traditional approach consists of **classifying** the work into a pre-existing **category** of work which is already protected by copyright law and applying its rules. Various alternatives have been suggested including the following: Should a multimedia work be qualified as a literary work, a data base, a work of "collaboration" (where each individual contribution of the authors can be easily identified) an "undivided" work (where the individual contribution of the author cannot be identified) an audio-visual work or a computer programme ? Under Belgian law however, this question is not essential since the new copyright and neighbouring rights Act protects any creation provided it belongs to the literary or artistic fields and so long as it is original. [5] However, the Act does contain specific rules relating to certain types of works which could be applied to multimedia works and could have the advantage of providing a clear cut legal framework.

1.1. Concerning the qualification of a multimedia work as a **literary work**, the new copyright and neighbouring rights act provides that a literary work is "any written document of any nature, as well as lessons, conferences, speeches, sermons or any other oral expression of the mind..."[6] It could be possible to protect a multimedia work as a literary work[7] but as the law stands at this moment in time in Belgium, there is no practical reason for a producer of a multimedia work to formally seek protection as a literary work since the Act does not contain a specific set of rules relating to this type of work.

1.2 Concerning the second and more frequent qualification of a **data base**, the new legislation does not contain any specific provisions. Such works could however be protected by copyright as a collection of literary or artistic works within the meaning of article 2,5° of the Bern Convention. A proposal seeking to protect data bases is currently under discussion

1.3 An **audio-visual** work, not having been defined under Belgian law, carries the advantage of being flexible enough to cover multimedia works. Nevertheless, it is generally considered that an audio-visual work is a work of collaboration in which the individual contributions of the authors can be identified. To the extent therefore that the

[5] Article 1§1.
[6] Article 8.
[7] Just as computer programmes are.

individual contribution of each author can be identified in the end product, there should be no obstacle to applying the rules on audio-visual works to multimedia works.

The Act provides that the copyright is extended for seventy years following the death of the last surviving person out of the main director, the author of the script, the author of the texts and the author of the music, with or without specific words written for the work[8]. According to article 14 of the copyright and neighbouring rights Act, the main director and the persons who have contributed to the creation of the work are the authors of the work. Furthermore, certain other persons are deemed, except proved otherwise, to be the authors of an audio-visual work. Such is the case for the author of the scenario, the author of the adaptation, the author of the texts, the author of the graphics of animated work, or the sequences of animation of audio-visual works which represent an important part of this work, and the author of the musical composition with or without specific words written for the work. The question arises whether this list of people is suited to the production of a multimedia work. It is furthermore provided that the authors of the original (first) work are assimilated to the authors of the new work if their contribution has been used in the new work. The act also contains detailed rules relating to the determination of the time when the work is deemed to be finished and relating to the case where one of the authors refuses to finish his or her contribution.[9] The granting of a right to adapt a pre-existing work must be provided in a separate contract from the publishing contract and the beneficiary of the right must undertake to exploit the work in accordance with the fair trade practices of the profession and must pay the author, except if otherwise provided, a remuneration which is proportional to the gross income which has been received[10].

The general rule is that, except if otherwise provided, the authors of an audio-visual work and the authors of a creative element which has been lawfully integrated or used in the audio-visual work [11]assign to the producer the exclusive right to audiovisually exploit the work, as well as the rights which are necessary to exploit it such as the right to add subtitles, or to dub the work[12] As a counterpart, the Act provides that the authors are entitled to a separate remuneration for each type of exploitation[13]. Finally, the Act contains detailed provisions in case of bankruptcy of the producer[14].

8 Article 2§2, al. 2.
9 Articles 14 and 15.
10 Article 17.
11 Except for the authors of a musical composition.
12 Article 18.
13 Article 19 except if the audiovisual work forms part of a non cultural activity or of the advertising field.
14 Article 20.

Article 39 of the copyright and neighbouring rights act grants a neighbouring right to the producer of a phonogramme and of a first film fixation. The producer has the exclusive right to reproduce it or to authorise its reproduction in whatever way and form[15]. The producer is also granted the exclusive right to communicate the work to the public. These rights end fifty years after the fixation or publication or lawful communication of the work to the public. It could very well be argued that the producer of a multimedia work is entitled to benefit from this neighbouring right.

The new copyright and neighbouring rights Act contains quite detailed provisions which seek to determine the joint exercise of copyright and neighbouring rights which belong to the various authors of an audio-visual work. The advantage of applying these rules to multimedia works is that they provide a clear cut legal framework for such works and the rules are designed to prevent conflicts which could occur between the various rights holders.

1.4. Concerning **undivided works** and **works of collaboration**[16] the new copyright and neighbouring rights act is less detailed. In so far as undivided works are concerned, it is provided that the exercise of the rights should be determined by contract and in the absence thereof, none of the authors are entitled to exercise the rights alone, except if the courts decide otherwise in case of conflict between them. Nevertheless, each author retains the right to act in court against a breach of copyright and to claim compensation for the damage sustained by him[17]. Concerning works of collaboration, the Act only provides that except if otherwise provided between the authors, each author does not have the right to deal with new partners in relation to the work but that each author does have the right to individually exploit his contribution so long as this exploitation does not damage the common work[18].

1.5. Qualification of a multimedia work as a **computer programme** is usually rejected for the motive that the computer programme is the instrument to create the multimedia work and not the multimedia work as such.

15 This also comprises the right to authorise the lending,renting and distribution of the work.
16 Which audiovisual works are.
17 Article 4.
18 Article 5.

2. Contractual issues

Since a multimedia work is generally defined as a work combining text, image and sound and because these elements usually originate from pre-existing works, one of the key issues is to determine how to trace the author of the pre-existing work and how to obtain his or hers consent.

Concerning the first issue, since there is no "multimedia clearing house" in Belgium, the only alternative is to trace the author personally or to put in a request at one of the collecting societies.

Obtaining a licence from the author is paramount since the copyright and neighbouring rights Act provides, in relation to economic rights, in clear terms that all contracts must be evidenced in writing[19]. In addition, contractual provisions relating to copyright and methods of exploitation thereof are of strict interpretation. The sale of the medium on which the work is fixed does not entail the right to exploit the work. The author retains the right to have access to his work in a manner which is reasonable to exercise his economic rights. For each method of exploitation, the remuneration, scope and duration of the licence must be expressly determined. The licensee has a duty to exploit the work in a manner which is not contrary to fair trade practices of the profession. The licence contract must not contain unknown methods of exploitation at the time of signature of the contract.

It must also be kept in mind that under Belgian law, the author of a work has strong moral rights (right to decide when the work should be divulged, right to be recognised or not as the author of the work, right to oppose any modification brought to the work, deformity, mutilation or other breach which would damage honour or reputation) which cannot be assigned. This means for example that a collecting society could not decide if the integrity of a work has been respected. Any global renunciation of future uses of such rights is null and void[20]. However, an author could accept a posteriori to have his film dubbed or interrupted by advertisements. Prior renunciation could also be valid. This would be the case if an artist provides in a contract that he shall accept slight alterations of his work which are necessary to the exploitation of his work on a specific medium.

[19] Article 3.
[20] Article 1§2.

An important chapter of the new copyright and neighbouring rights Act is devoted to collecting societies[21]. These provisions can be summarised as follows: The administration of copyrights must be carried out by a society which is validly organised in one of the Member States of the European Union in which it lawfully carries out the tasks of collecting and paying royalties. The partners of the society must be authors, performers, producers of audio or audio-visual works, editors, or eligible party[22]. A society cannot refuse a request for administration coming from the copyright holder of a recognised right[23]. The internal rules and regulation of the society could in no way limit the choice of a right holder to go to one type of collecting society rather than another, nor could it prohibit a right holder from administering himself his rights[24]. Societies must nevertheless be authorised by the minister who is competent[25]. It must be noted that the copyright and neighbouring rights Act does not provide a system of mutual recognition of the authorisations which have been granted in other Member States and therefore suggests that societies which function under rules of other countries should apply for a Belgian authorisation if they wish to carry out their activities on the Belgian territory. Collecting societies are supervised by auditors in the same way as any other public limited companies are[26]. In addition, a representative of the minister is appointed to each society to supervise the correct implementation of the Act, tariffs and rules of distribution of the royalties[27]. Lastly, collecting societies are empowered to enter general agreements relating to the exploitation of the copyrights and neighbouring rights they administer[28].

3. Conclusion

From this short overview, it appears that even though the issue of determining the qualification of a multimedia work is not essential under Belgian law, since copyright protection will apply provided the work is original, applying the rules relating to audio-visual works[29] could be advantageous in the sense that they could form the basis of a clear cut legal framework. It must be recalled however that some of these specific rules are not always suited to the creation process of a multimedia work.

21 Chapter VII, articles 65 to 78.
22 Article 65.
23 Except if the right falls outside the object or the articles of incorporation of the society.
24 Article 66.
25 Article 67.
26 Article 68.
27 Article 76.
28 Article 71.
29 In the absence of suitable rules concerning the legal protection of data bases.

The legal protection of multimedia works is therefore possible under Belgian law provided the work is original. However, as it stands, the current situation is perhaps not adequate since a producer wanting to develop a multimedia work will face numerous practical problems in relation to obtaining the necessary licences from the right holders of pre-existing works which will be integrated into the final product. This situation stems from the fact that there are many collecting societies in Belgium which have up until now administered rights in relation to the type of work. Tariff setting has also been dependent on the type of medium which is used to communicate the work. A specific set of tariffs in relation to the exploitation of multimedia works has not been developed.

The solution lies probably with the development of a European or international multimedia clearing house which would serve as a large data base search system enabling interested parties to become acquainted with right holders, licences that have already been granted, licensing conditions, royalty fees, ... This "supra" clearing house could also function as a collecting society and develop its own tariffs and payment rules.[30]

30 It must be emphasised that every society wishing to carry out activities on the Belgian territory must obtain the authorization of the competent minister.

For more details concerning:

-The new Belgian copyright and neighbouring rights Act, see "La nouvelle législation belge sur le droit d'auteur", Alain et Benoît Strowel, J.T., 1995, p. 117;

-The new Belgian Act on the legal protection of computer programmes, see
° "La nouvelle loi sur la protection des programmes d'ordinateur, dans le sillage de la loi sur le droit d'auteur", F. Brison et J.P.Triaille, J.T., 1995, p. 141;
° "Vers un droit d'auteur sui generis : La loi du 23 juin 1994 sur les programmes d'ordinateur", Alain Strowel, Ingénieur Conseil, 1994, p. 71

-Case law in relation to copyright and new technologies under the old copyright Act, see "Chronique de jurisprudence - Le droit de l'informatique" 1987-1994; Yves Poullet, V. Willems, J.P. Buyle, L. Lannoye. Article to be published in the J.T.;

-The new developments in intellectual property law in the field of information technology, see "Propriété intellectuelle et société de l'information en Belgique, Evolution législative?" Article by M. Ledger and V. Willems to be published in the D.I.T.