



## In Search of Lost Rightsholders: Clearing Video-on-Demand Rights for European Audiovisual Works

Technical advances have always represented a constant challenge for the law and online exploitation of audiovisual works is no exception. The recent innovation whereby films can be disseminated via the Internet (Video-on-Demand) creates particular difficulties relating to the protection of (secondary) exploitation rights which, in Europe, belong to all rightsholders involved in film production. Should a producer wish to make a film available online before it is screened in cinemas, for example, he would have to obtain the consent of the various rightsholders. In some cases, however, there are numerous such rightsholders. It is often possible to negotiate agreements with collecting societies concerning the online exploitation of audiovisual works. However, these can only be signed if the particular group of rightsholders have formed a company to look after their collective interests, usually relating only to new productions. On the other hand, older works are rarely covered by collecting societies and producers wishing to acquire rights to them are often unable to find the rightsholders.

This conflict between consistent copyright protection and new ways of exploiting audiovisual works is investigated in the following article. The key role that collecting societies might play and the need for corresponding legal provisions are discussed in particular.

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# In Search of Lost Rightsholders: Clearing Video-on-Demand Rights for European Audiovisual Works

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## Video-on-Demand

In recent times much has been said about the opportunities that the Internet offers for the distribution of audiovisual works. In particular, it was pointed out that Internet-based Video-on-Demand (VoD)<sup>1</sup> platforms could provide easy and inexpensive public access to a vast array of cinematographic content. Now, with various VoD initiatives being launched around the globe it seems that this formerly utopian dream could really come true. The American Majors<sup>2</sup> recently launched two VoD platforms with the aim of distributing the entire catalogue of Hollywood films through the Internet. These Hollywood initiatives may lead one to believe that the Internet could finally become a real audiovisual distribution channel.

By contrast, some analysts have argued that VoD has no future because nobody will want to sit in front of a computer screen in order to watch a film. This could be true in cases where one can choose between different options for watching the same film: going to the cinema, renting the DVD or watching it on pay- or free-to-air television. Yet, if the movie you are looking for is one of those old films that are impossible to find in any video store, or one of those *films d'auteur* that some channels would not consider showing even at 3 a.m., then VoD may be a more-than-valid alternative. Besides, once PC-to-TV links are improved, films could be watched on any TV set. VoD platforms could also offer some DVD-like features, such as the choice of different linguistic versions, subtitles or other extras (documentaries, the making of the film, interviews with the cast, etc.).

From a European perspective, VoD platforms could become an ideal means of promoting the European audiovisual heritage. In particular, the availability of European audiovisual works in a choice of languages could be instrumental in promoting cultural diversity in Europe. Even if VoD might not be a substitute for traditional distribution channels, it can nevertheless be a most valuable complement.

## Clearance of Rights

Of vital importance to making use of the opportunities offered by the VoD is the issue of clearance of rights for online exhibition. From a legal point of view, Hollywood films do

have a great advantage as regards copyright clearance: they are normally made as works for hire. The US Copyright Act of 1976<sup>3</sup> defines a work made for hire as "...a work prepared by an employee within the scope of his or her employment..." or "...a work specially ordered or commissioned for use as a part of a motion picture or other audiovisual work". In such a case, the parties must "...expressly agree in a written instrument signed by them that the work shall be considered a work made for hire". In other words, if the film is considered a work for hire the producer does not need to ask anybody's permission in order to put films on the Internet for Video-on-Demand purposes because he is considered to be the author of the film and owns the copyright in it. Therefore, from a legal perspective, Hollywood films are Internet-ready.

Unlike the situation in the US, broadcasters and film producers in Europe do not own the exploitation rights for online distribution of programmes or films they have produced. Instead, these rights lie with the persons involved in the making of the work. It is only with the permission of these people that such works can be offered online. In an audiovisual production this could mean the necessity to secure authorisation from 50 or more persons, including the director, the authors of the screenplay, the adaptation, the dialogue, and the musical score, as well as all kinds of performers and other crew.

Clearing these rights does not pose any problem for newly produced works, since online rights can be included in the contractual arrangements between the producer and all rightsholders involved in the production. The problem arises however, when it comes to clearing online rights for older works where it is often the case that rightsholders, or their heirs or assignees, are not traceable, or traceable only by unreasonable administrative effort, which renders the cost of exploiting those works prohibitive.<sup>4</sup> At the time when these works were produced, Internet was not yet known. According to the generally accepted principle of Authors' Rights Law, that contractual clauses granting rights for modes of exploitation unknown at the time of the conclusion of the agreement are invalid, the transfer of online rights was thus impossible.

In some European countries like Germany<sup>5</sup> and Spain,<sup>6</sup> the relevant legislation concerning authors' rights even states this principle expressly. In France, contractual clauses concerning modes of exploitation "not foreseeable or foreseen" at



the time of the conclusion of the agreement are valid, but they must be expressly agreed upon by the parties and include a correlative participation in the profits from exploitation.<sup>7</sup> However, the French doctrine considers that this article applies only to modes of exploitation not included in the contract but considered possible at the time of the conclusion of the agreement.<sup>8</sup> The jurisprudence across Europe has also confirmed this principle on various occasions.<sup>9</sup>

Recent international and supranational developments have strengthened the position of rightsholders on the Internet. In 1996 the WIPO Copyright Treaty (WCT) introduced for authors of literary and artistic works a new exclusive right of making their works available on demand especially through the Internet. The WIPO Phonograms and Performances Treaty (WPPT) did the same for performers as regards their performances fixed on phonograms and for producers of phonograms in respect of their phonograms. The EU legislator, when drafting the Directive on Copyright and Related Rights in the Information Society<sup>10</sup> ("the Directive") that transposes both WIPO treaties, went even further and extended this protection also to audiovisual performers, producers of the first fixations of films, and broadcasting organisations.<sup>11</sup> Article 3 of the Directive confers upon authors and holders of neighbouring rights the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. This includes especially the on-demand offer of films and other audiovisual works on the Internet.<sup>12</sup>

This article will explore the flip side of the strong copyright protection warranted on the continent, namely practical problems in the acquisition of licences for the online exploitation of audiovisual works. It will examine existing and proposed solutions, focusing on the central role of collecting societies. The article will conclude with some thoughts on how some progress at least could be achieved.

## Practical Problems

The above-mentioned technical and legal developments have led to a major contradiction: the achievement of a higher level of copyright protection for authors and holders of neighbouring rights in the digital environment has become a major obstacle for the exploitation of their own works. Nobody benefits from this situation: rightsholders do not obtain remuneration for their works nor do their works enjoy the visibility that they could have if they were offered over the Internet. Moreover, the public does not enjoy the extra services that the Internet could provide.

This has been illustrated by Liberafilms.com, a French VoD project which was launched online in July 2000. Liberafilms.com was the first Internet platform in Europe to offer short and full-length films internationally. The founders of this initiative aimed at offering high quality films that

usually do not find distribution channels outside their countries of origin. Through this platform, films were offered via streaming or after downloading the complete film. On payment of a fee, they were available for viewing for 48 hours. However, this project did not succeed for long. After some months of continued efforts, its founders had only been able to clear rights for a small number of films. On 31 August 2001, they announced in an article published in a French newspaper that they would close the website. They explained the difficulties encountered in clearing rights for their video-on-demand project and called for a fast solution to the problem. To this end, they proposed to bring together all the collecting societies in France and across Europe in order to discuss a collective agreement. They further suggested the need to search for legislative solutions at the national and European level.<sup>13</sup>

Some other examples of this contradiction between a heightened standard of protection and decreased chances for exploiting the works protected are briefly summarised in a recent French study on the digital dissemination of cultural heritage:<sup>14</sup>

- 30% to 40% of the films held by the *Service des archives du film*, (a body that belongs to the French *Centre national de la cinématographie* – CNC), are orphans, that is, the production society has disappeared and it is not clear who holds the rights.

- An actor living in the United States created a French language course for use on the Internet in order to help students to get acquainted with the contemporary French language. He envisaged making them repeat dialogue taken from French TV programmes and films. But because the process of acquiring rights proved to be difficult and expensive, he has not yet been able to realise his project.<sup>15</sup>

While the legal exploitation of most European films on the Internet is practically impossible due to copyright clearance obstacles, film piracy activities find no hindrances. Viant, a Boston-based consulting firm, has estimated that every day some 350,000 movies are downloaded illegally from the Internet.<sup>16</sup> Most of these activities take place in peer-to-peer networks, in which individuals exchange music and films for free. But special distribution schemes for the commercial offering of Video-on-Demand have also recently appeared on the Web. This was the case for Movie88.com, a website offering via streaming a full range of copyrighted films (including all kinds of classics) at a rate of USD 1 for a three-day viewing-period. Even though the Motion Picture Association of America (MPAA) eventually succeeded in having this website closed down, this example shows that if films are not legally offered on the Internet, there will soon be more and more illegal trading through website offerings or peer-to-peer networks.<sup>17</sup> Indeed, an inexpensive and interesting offer of films on the Internet would be the most effective means to fight piracy. As long as customers can opt for attractive legal services, they are unlikely to turn to pirates' havens.



## The Special Case of Public Broadcasters

Public broadcasters hold an enormous amount of radio and television productions, going back to the very beginning of these media. Many of these productions are not commercially significant but have an important cultural value and could therefore be offered on thematic/niche (pay) channels, be it over the air or via cable, by means of on-demand delivery and/or via CD-ROM. According to the European Broadcasting Union (EBU), a significant number of these productions could remain forever locked in archives – out of sight and hearing of the European public – because the clearing of rights is problematic.

During the drafting process of the Directive, public broadcasters had expressed their concern about this issue, and had concluded that specific legal repair work was needed. At the time, the EBU argued that without a legislative solution “a large portion of the archive material in question would simply be dead. Worse still, with no prospect for future use, such material would not even be physically preserved for posterity.”<sup>18</sup> Therefore, the EBU had proposed an amendment to the Commission’s original proposal for the Directive<sup>19</sup> that would have allowed public broadcasters to reuse their old productions in on-demand and multimedia services.<sup>20</sup>

Following word-for-word the proposal of the EBU, the European Parliament had introduced in the first reading of the draft Directive the following amendment: <sup>21</sup>

“(Amendment 48)  
Article 5(4a) (new)

Member States shall ensure, when necessary, by such legal means as a strictly limited non-voluntary licence or a legal presumption, that broadcasting organisations are entitled to use, or to authorise others to use, their own past archive productions produced or commissioned and financed by them under their own editorial control for new broadcasting or on-demand services. Such use shall be subject to payment by the TV or radio producer of equitable remuneration, as appropriate, to authors, performers or other right owners who contributed to the production.”

According to the EBU, the vagueness of the proposal would allow for flexible solutions in accordance with the specific needs in each Member State. The legislative measures, listed by way of examples in the European Parliament text, could also consist of, for instance, the possibility for extended collective licences (see *infra*). The legislators could also introduce a special formula whereby agreed remuneration would be adapted to the new (and unforeseen) circumstances. Another possibility could be the legislative determination of the equitable remuneration.

Not surprisingly, however, the Commission rejected this proposal, stating that it disturbed the balance between the parties concerned and might cause considerable damage to

rightsholders.<sup>22</sup> The Commission had already addressed the issue of identifying rightsholders in its Green Paper on Copyright and Related Rights in the Information Society,<sup>23</sup> where it concluded that difficulties in identifying rightsholders could not lead to a reduction in copyright protection. It also agreed with most of the interested parties who in their comments to the Green Paper had stated that the introduction of compulsory licences was not an acceptable solution.

Whether, and if so, what kind of legislation could be a solution for facilitating the exploitation of the archives of broadcasters for on-demand services was also discussed among the Member States of the Council of Europe. Again the discussion did not lead to a consensus. In its Declaration of 9 September 1999,<sup>24</sup> the Committee of Ministers merely invited “those Member States where the above-mentioned problems arise and for which no contractual solutions have proved to be possible, to examine and, if appropriate, develop initiatives to remedy the situation in accordance with their international obligations in the field of copyright and neighbouring rights, bearing in mind the respective rights of the rights holders and the legitimate interests of the public.”

## The Role of Collecting Societies

Collecting societies are one step further towards making the clearance of rights more feasible. A collecting society can be defined as “an institution, mostly founded by a certain category of copyright owners, which will assert collectively the rights of its members to grant the copyright authorization for certain uses of their works and which will collect and allocate the corresponding royalties”.<sup>25</sup> Under Copyright Law, the normal rule is individual management of exclusive rights. Rightsholders may voluntarily transfer the management of their exclusive rights to a collecting society. There are only a few cases in which management by collecting societies is mandatory, especially where a compulsory licence applies. Compulsory licences are envisaged only in very special situations where the individual management of rights is not desirable. In these cases, rightsholders cannot prohibit the use of their works by third parties. Instead they have a right to remuneration should such a use take place. Article 8.2 of the Rental and Lending Right Directive<sup>26</sup> is one example where rightsholders, namely performers and phonogram producers, must tolerate that their phonograms, or reproductions thereof, published for commercial purposes, may be broadcast by wireless means or otherwise communicated to the public without their consent. Article 8.2 compensates them by conferring a right of equitable remuneration.

While the very nature of audiovisual works had already made copyright clearance difficult, the acquisition of licences became even more complicated once digital technology had opened up new possibilities of creating complex works (e.g., multimedia) and new ways of using pre-existing works. Even when all rights needed for a given production were held by collecting societies (which is normally not the case), the very



number of collecting societies to be contacted could pose an insurmountable problem. This in principle speaks in favour of introducing a more centralised system for managing rights. This could be done by compelling rightsholders to exercise their rights collectively via collective societies or by simply pooling information, which collecting societies could share.

Accordingly, collecting societies could become more effective if at least one of two basic options were chosen:

- The introduction of an obligatory collective management of rights or of extended collective licences.
- The introduction of centralised rights information systems.

## Compulsory Solutions

The more constraining option would be to impose by way of legislation obligatory collective management of online rights. Under this solution, all rightsholders would be obliged to exercise their online rights through a collecting society. In contrast to a non-voluntary licence, the rightsholder retains the exclusive right to authorise or prohibit the use of his/her work, and only entrusts the exercise of this exclusive right to a collecting society in accordance with his instructions. These instructions would define under which conditions licences could be granted.

This was the approach adopted by Article 9 of the Satellite and Cable Directive<sup>27</sup> as regards the exercise of the cable retransmission right. According to this article, in cases where a rightsholder has not transferred the management of his/her rights to a collecting society, the collecting society managing the same category of rights shall be deemed to be mandated with the management of his/her rights. In such cases, the holders of copyrights in works retransmitted on cable television would join the rights and obligations resulting from the agreement between the cable operator, responsible for the retransmission, and the collecting society.<sup>28</sup> In order to achieve this result, the Directive uses the legal fiction that the rightsholder has mandated the collecting society to negotiate on his/her behalf also. The Satellite and Cable Directive thereby wishes "to ensure that the smooth operation of contractual agreements is not called into question by the intervention of outsiders holding rights in individual parts of the programme"<sup>29</sup> retransmitted by cable.

In the field of broadcasting, another option would be to apply extended collective licences for online exhibition.<sup>30</sup> These extended collective licences, a legal technique used only in the Nordic countries, are concluded between television stations and rightsholders' organisations. By law they are declared applicable even for rightsholders not represented by the collecting societies concerned, especially foreign rightsholders. This legal solution is currently used only in regard to

*petits droits*<sup>31</sup> in traditional radio and television broadcasts and for the clearing of rights for cable retransmission. This solution could be adopted for on-demand services including all categories of rightsholders in an extended collective licence.

However, these compulsory solutions go against the principle of individual management of rights. As expressed by Uma Sunthersanen, compulsory management of rights is "antithetical to the primary premise of copyright being conferred as an exclusive individual right."<sup>32</sup> Consequently, the European Commission used compulsory collective management only in few cases (like that of the Satellite and Cable Directive) to regulate an industry-specific problem where the individual management of rights impeded the proper functioning of the Internal Market.

## Centralised Information Systems

The European Commission supports the view that centralising information about rightsholders and making it available via the Internet can facilitate clearance of rights, most notably when considering the difficulties of addressing the issue by means of legislation. The voluntary establishment of alliances between collecting societies at the European level in order to concentrate information about rightsholders of works held in their repertoires could be especially useful in facilitating the task of identifying rightsholders.

Two different solutions were already envisaged in the Green Paper:

- "one-stop shop": a joint body set up by diverse collecting societies providing information about a vast array of rightsholders by bringing together the repertoires of all the collecting societies concerned. Individual rightsholders could also join this initiative. These one-stop shops would merely provide information about rightsholders, while only the rightsholder concerned or the collecting society mandated would be entitled to licence the use of their works.

- "clearing house": a variant of the one-stop shop; a clearing house would not only provide information about rightsholders, but would also be entitled to enter into direct negotiation of contracts and to grant licences.

According to the European Commission both systems should always operate on a voluntary basis and never exclude the possibility of individualised management by the rightsholders themselves.

Following this approach, the European Commission had invited proposals for pilot or exploratory projects for Multimedia Rights Clearance Systems (MMRCS).<sup>33</sup> This was an action line of the INFO2000 programme, a five-year programme (1995-1999) of the European Community designed to stimulate the development of a European multimedia content



industry and to encourage the use of multimedia content in the emerging Information Society. The call for proposals made it clear that these projects had to aim at contributing to the enhancement of the current multimedia rights trading environment in the European Union by increasing the effectiveness and efficiency of multimedia rights clearance processes between rightsholders and multimedia product developers.

In this context, the European Commission had defined "multimedia rights clearance" as "the process whereby multimedia producers search for relevant content, assess its legal status and seek to obtain from the rightsholders the required rights for its reuse in a multimedia product/service".<sup>34</sup> According to the European Commission, Multimedia Rights Clearance Systems (MMRCS) should have the following functions: digital storage of components descriptions, identification and searchability of components, previewing of components, provisions of reliable legal status and licensing information, support for various contractual schemes, secure delivery of components, support for multiple payment and security mechanisms, and integration with asset management, production and exploitation environments.

Ten priority projects for a total value of EUR 2.2 Million were selected by the European Commission.<sup>35</sup> These projects were undertaken over a period of 24 months starting in November 1998 and concerned text, still images, moving images, and audio. The projects selected addressed the following issues:

- the networking of existing collectively-managed multimedia rights clearance systems in six Member States (VERDI);
- the interoperability of digital content identification systems and rights metadata within multimedia e-commerce (INDECS);
- sector-specific multimedia rights clearance systems for book publishing (EFRIS), audio-visual (TVFILES, PRISAM) and music (ORS) rights;
- the integration of electronic copyright management and multimedia rights clearance systems (BONAFIDE);
- best clearance practices for educational multimedia (COMPAS) and protection of creative contributions in a collaborative networked multimedia title development environment (b<sup>©</sup>).

By its Decision of 22 December 2000<sup>36</sup> adopting the new eContent programme, the Council of the European Union stated that the integration and interoperation of distributed specialised clearance services at European level had been stimulated under the INFO2000 action line and that further support was needed to arrive at a unified European rights clearance approach. Therefore, the focus of future Community actions would lie in extending multimedia rights clearance pilot schemes, in supporting the creation of multimedia rights clearance centres in Europe and in specific measures to support candidate countries, less advanced sectors and specific public sector applications.

For the audiovisual field, special mention has to be made of HARMONY (Harmonised European Multimedia Rights Clearance System), a platform currently being created through the merger of VERDI, PRISAM and ORS. This platform will consist in the interconnection of the databases run by the collecting societies that participated in the project. These databases provide information about the works included in their repertoire, the rightsholders concerned and the nature of the rights to be acquired. Licences are granted by the societies or rightsholders concerned under the conditions set by them. The system also includes the possibility of an electronic delivery of the works concerned.

Recently, the French *Conseil supérieur de la propriété littéraire et artistique* (High Council of literary and artistic property – CSPLA) issued a recommendation<sup>37</sup> concerning the suitability of introducing a *guichet commun*, a common counter for collecting societies that would facilitate the identification of rightsholders. In this recommendation, the CSPLA concluded that the use of a platform like HARMONY should be encouraged. This report also rejected any legislative intervention, leaving the principle of freedom of contract to apply.

## Untraceable Rightsholders

Centralised information systems will clearly facilitate the task of locating rightsholders. But these systems do not work in cases where some rightsholders are untraceable. At the moment, in most cases collecting societies do not hold all relevant rights, because for many categories of rightsholders collecting societies simply do not exist or the existing collecting societies do not necessarily hold all the relevant rights. No matter how refined these systems are, one single untraceable rightsholder can block a film for the whole term of copyright protection.

On the one hand, it appears clear that Europe itself cannot afford to exclude European films or audiovisual productions from new distribution channels that offer huge possibilities for promoting cultural diversity. Nor is it acceptable that a film remains blocked for on-demand purposes just because some rightsholders cannot be located. This is contrary not only to the public interest, but also to the interests of those rightsholders who have already agreed to the reuse of the works in which they hold rights.

On the other hand, the generally recognised principle of exclusivity in copyright matters should be respected. Any limitation or exception to exclusive rights must be tailored in accordance with the narrow three-step test of Article 5.5 of the Directive on Copyright and Related Rights in the Information Society. According to the Directive they can "only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder".



The adoption of the Directive seemed to have ended the discussion even though no definite solution to the problem of untraceable rightsholders was found. It was therefore surprising when the Commission re-opened the debate in April 2001. In its Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works,<sup>38</sup> the Commission asked interested parties about the possibility of creating a specific mechanism in order to identify the rightsholders of audiovisual works. The Commission also enquired about possible solutions that would allow the exploitation of copyrighted content for which rightsholders cannot be identified. Among the options considered by the Commission was the introduction of a mandatory negotiation framework with collecting societies. In cases where compulsory solutions would be introduced, the Commission envisaged the setting up of a fund to remunerate untraceable rightsholders should these become known. But in the Communication following the Working Paper,<sup>39</sup> the Commission did not propose any far-reaching solution. It merely expressed its support for co-operation between all parties involved and proposed the creation of an inventory of works whose rightsholders are not traceable.

This shows more the lack of consensus on this question than unwillingness on the part of the Commission to find a solution. However, the Commission could already have used the Directive itself to introduce at least narrow solutions for certain exceptional cases and it could have done so without disturbing the balance between the parties and without causing any harm to rightsholders. For example, this is true in cases where only some rightsholders were not traceable but a sufficient percentage of qualified authors/performers (e.g. including producer, director, screenwriter and/or main actors) gave their authorisation. In such cases, it could have been envisaged to substitute the permission of non-traceable rightsholders by a decision of a court or an administrative body specially established for this purpose provided that all known rightsholders agreed. Any person interested in a licence could have been entitled to trigger the process.

This is similar in direction to a solution found in Canada. Section 77 (1) of the Canadian Copyright Act<sup>40</sup> vests the

Copyright Board<sup>41</sup> with the power to issue a non-exclusive licence for works whose rightsholders cannot be located. To this end, the applicant must prove that he/she "has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located". The Board sets the terms and conditions for the licence, including the authorised use, expiry date and amount of fees. These are usually to be paid to the collective society that would normally represent the rightsholder concerned. This collective society must reimburse any person who, within a period of 5 years after the licence expires, proves copyright ownership of the licensed work.<sup>42</sup>

## A Brief Look into the Future

Digital technologies are about to change the present model of rights management. To tackle this issue, the Commission is currently preparing a paper on the legal framework for rights management in the Internal Market.<sup>43</sup> This document will cover both individual as well as collective management of rights.

In the Green Paper on Copyright and Related Rights in the Information Society, the Commission has already announced that there will be in the near future „a more and more finely tuned and individualized form of rights management.“ Nevertheless, collecting societies will continue to have a role in the management of rights but they will have to evolve in order to match the needs of those giving them their mandate in the digital environment. In the words of Jehoram, "the present collective administration will have to give way to central administration of rights. Societies will develop into mere licensing engines which do not equalize the right owners anymore but, on the contrary, will underscore their inequality in the market place."<sup>44</sup>

Concerning the identification of rightsholders in orphan productions, there is still no consensus as to what could be an appropriate solution. Maybe somebody should commission Philip Marlowe to trace them, before their films fall into a big online sleep.

1) Internet VoD can be defined as a system allowing users to receive on their computers films or other audiovisual material via streaming or downloading at the time and place chosen by them with only a mouse click.

2) This expression is used to designate the seven major producers and distributors of motion pictures and television programs in the United States.

3) Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code. Available at: <http://www.copyright.gov/title17/>

4) In 1997, a EU-wide survey of organisations buying and selling multimedia rights identified a number of key issues regarding multimedia rights clearance. The legal complexity and the difficulty of identifying rightsholders were considered as by far the most important problems to be faced when clearing rights. See INFO2000, Pilot Projects supported by the INFO2000 programme, available at: <http://www.cordis.lu/econtent/mmrcs/home.html>

5) Art. 31 para. 4 of the *Urheberrechtsgesetz* (German Authors' Rights Law)

6) Art. 43 para. 5 of the *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia* (Spanish Intellectual Property Law)

7) Art. L131 para. 6 of the *Code de la propriété intellectuelle* (French Intellectual Property Law)

8) Xavier Linant de Bellefonds, "Droit d'auteur et droits voisins", p. 297. *Cours Dalloz, Série Droit Privé*, 2002.

9) For a detailed overview of the jurisprudence concerning the ownership of electronic rights, see Bernt Hugenholtz & Annemique de Kroon, "The Electronic Rights War: Who owns the Rights to New Digital Uses of Existing Works of Authorship?" in IRIS Focus 2000-4: 15, available at: <http://www.obs.coe.int/medium/intl.html.en>

- 10) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal of the European Communities L 167/10 of 22 June 2001.
- 11) Member States must transpose this Directive before 22 December 2002.
- 12) For a detailed description of Art. 3 see Jörg Rheinbothe, "Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft", GRUR Int 2001, p. 733 (736).
- 13) See Éric Névé and Stéphane Dottelonde, "Le cinéma européen s'interdit d'accès au Web", article published in *Libération* of 31 August 2001.
- 14) Bruno Ory-Lavollee, "La diffusion numérique du patrimoine, dimension de la politique culturelle", Report to the French Minister of Culture and Communication, Janvier 2002. Available in French at: <http://www.internet.gouv.fr/francais/textesref/rappports.htm>
- 15) This experience has made him declare that "the searching for rightsholders is more a crusade than a simple legal formality".
- 16) See Jack Valenti, Chairman & Chief Executive Officer, the Motion Picture Association, "A Clear Present and Future Danger: The potential undoing of America's greatest export trade prize : An Accounting of Movie Thievery in the Analog and Digital Format, in the U.S. and Around the World", Offered to the House Appropriations Committee, Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies, 23 April 2002. Available at: [http://www.mpa.org/jack/2002/2002\\_04\\_23b.htm](http://www.mpa.org/jack/2002/2002_04_23b.htm)
- 17) For a detailed description of recent developments concerning film piracy on the Internet see Susanne Nikoltchev & Francisco Javier Cabrera Blázquez, "Movies Online: Balancing Copyrights and Fair Use" (IRIS plus 2002-4), available at: [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus\\_4\\_2002.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus_4_2002.pdf.en)
- 18) European Broadcasting Union, "Broadcasters' Use of their Own Archive Productions", position paper of 12 May 1999. Available in English at: [http://www.ebu.ch/leg\\_archives.pdf](http://www.ebu.ch/leg_archives.pdf)
- 19) Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM(97) 628 final 97/0359 (COD), Brussels, 10 December 1997.
- 20) EBU Comments on EC Commission Proposal for a Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, April 1998. Available at: [http://www.ebu.ch/leg\\_birmingham\\_brochure.pdf](http://www.ebu.ch/leg_birmingham_brochure.pdf). For a more detailed explanation of this proposal, see Council of Europe, Steering Committee on the Mass Media (CDMM), Group of Specialists on the Protection of Rights Holders in the Media Sector (MM-S-PR), Discussion paper on the access to protected material held in the archives of broadcasting organisations. Secretariat Memorandum prepared by the Directorate of Human Rights. Strasbourg, MM-S-PR (98) 5, 24 March 1998.
- 21) Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM(97)0628 - C4-0079/98 - 97/0359(COD)).
- 22) Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM(1999) 250 final 97/0359/COD, Brussels, 21 May 1999.
- 23) Green Paper on Copyright and Related Rights in the Information Society, COM(95) 382 final, Brussels, 19 July 1995.
- 24) Council of Europe, Declaration on the exploitation of protected radio and television productions held in the archives of broadcasting organisations, adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies. Available at: <http://www.coe.fr/cm/ta/decl/1999/99dec3.htm>
- 25) Cohen Jehoram, "Gestão colectiva do direito de autor e direitos conexos no ambiente digital : riscos e desafios", in *colóquio sobre gestão colectiva do direito de autor e direitos conexos no ambiente digital* - Évora, 23-24 March 2000. Available in English at: <http://www.gda.pt/novidades/colóquio/cohen.html>
- 26) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. Official Journal L 346, 27 November 1992 p. 0061 - 0066
- 27) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applica-  
 ble to satellite broadcasting and cable retransmission. Official Journal L 248, 6 October 1993, p. 0015 - 0021.
- 28) The rightsholders can claim these rights within a period, to be fixed by the Member State concerned, but not less than three years from the date of the cable retransmission that includes his/her work. Article 11 of the same Directive calls for the intervention of independent mediators in cases of disagreement between the negotiating parties. Proposals submitted by mediators are deemed to be accepted by all parties if none of them expresses his opposition within a period of three months. In order to prevent the abuse of negotiating positions, Member States must also ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorisation for cable retransmission in good faith and do not prevent or hinder negotiation without valid justification (Article 12).
- 29) See Consideration 28 of the Directive.
- 30) This was one of the possible solutions proposed by the EBU in its position paper.
- 31) The expression *petit droits* refers to "non-dramatic performing rights in musical works with or without a corresponding text." See WIPO Glossary of terms of the law of copyright and neighbouring rights. WIPO Publication No. 816 (EFS), Geneva, 1980.
- 32) Uma Sunthersanen, "a experiência legislativa nos Estados Membros da União Europeia," in *colóquio sobre gestão colectiva do direito de autor e direitos conexos no ambiente digital* - Évora, 23-24 March 2000. Available in English at: <http://www.gda.pt/novidades/colóquio/uma.html>
- 33) INFO 2000 Programme, Call for proposals for strategic projects to stimulate the development and use of multimedia information content - exploiting content resources in the public sector, 97/C 381/13, Official Journal C 381 of 16 December 1997.
- 34) See European Commission, Multimedia Rights Clearance Systems, Report on Project Final Reviews, January 2001. Available at: <ftp://ftp.cordis.lu/pub/econtent/docs/mmrcs/finalrev.doc>
- 35) For more information about the selected projects see: <http://www.cordis.lu/econtent/mmrcs/home.html>
- 36) Council Decision of 22 December 2000 adopting a multiannual Community programme to stimulate the development and use of European digital content on the global networks and to promote linguistic diversity in the information society, 2001/48/EC, Official Journal of the European Communities L 14/32, 18 January 2001. Available at: [ftp://ftp.cordis.lu/pub/econtent/docs/council\\_decision\\_en.pdf](ftp://ftp.cordis.lu/pub/econtent/docs/council_decision_en.pdf)
- 37) *Avis 2002-2 et rapport du Conseil supérieur de la propriété littéraire et artistique relatif à la mise en place d'un guichet commun et Rapport de la commission sur la mise en place d'un guichet commun*, available in French at: <http://www.culture.gouv.fr/culture/cspla/comguiccom.htm>
- 38) Commission Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works, SEC(2001) 619, Brussels, 11 April 2001.
- 39) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works Brussels, COM(2001) 534 final, 26 September 2001.
- 40) Canadian Copyright Act, available at: <http://www.cb-cda.gc.ca/info/indexe.html>
- 41) The Copyright Board is an economic regulatory body created by the Copyright Act. It determines, either mandatorily or at the request of an interested party, the royalties to be paid for the use of works administered by collecting societies. It also supervises agreements between users of copyrighted works and licensing bodies and issues licences if rightsholders cannot be located.
- 42) More information about this system is available at the website of the Canadian Copyright Board: <http://www.cb-cda.gc.ca/unlocatable/brochure-e.html>
- 43) See "A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union", speech by Jörg Reinbothe, available at: [http://europa.eu.int/comm/internal\\_market/en/intprop/news/reinbothe04-04-02.htm](http://europa.eu.int/comm/internal_market/en/intprop/news/reinbothe04-04-02.htm)
- 44) Cohem Jehoram, *op. cit.*