

Copyright and Multimedia Products

A Comparative Analysis

Irini A. Stamatoudi



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Copyright and Multimedia Products

A Comparative Analysis

Multimedia products have recently experienced tremendous market success. Yet too often they are given inadequate protection under existing national and international copyright schemes. Irini Stamatoudi provides one of the first comprehensive, comparative treatments of multimedia works and copyright protection in this clear and concise volume. A detailed introduction outlines the nature of multimedia works, as well as the scope of existing legislation; separate chapters consider collections and compilations, databases, audiovisual works and computer programs (video games are here treated as a 'test case'). Stamatoudi then analyses issues of qualification and regimes of protection, and offers a model for a European legislative solution.

Copyright and Multimedia Products will interest academics and students, as well as practitioners and copyright policy makers.

IRINI A. STAMATOUDI, Faculty of Law, University of Leicester

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As its economic potential has expanded rapidly, intellectual property has become a subject of front-rank legal importance. *Cambridge Studies in Intellectual Property Rights* is a series of monograph studies of major current issues in intellectual property. Each volume will contain a mix of international, European, comparative and national law, making this a highly significant series for practitioners, judges and academic researchers in many countries.

To the memory of my grandfather, Kostas

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The law is stated as at 1 April 2001.

Abbreviations

AFTEL	Association Française de la Télématicque Multimédia
AIDAA	Association Internationale des Auteurs de l'Audiovisuel
ALAI	Association Littéraire et Artistique Internationale
All ER	All England Law Reports
ASLIB	Association of Special Libraries and Information Bureaux
Ass. Plén	Assemblée Plénière
ATRIP	Association for the Advancement of Teaching and Research in Intellectual Property
BGHZ	Entscheidungen des Bundesgerichtshof in Zivilsachen
CA	Cour d'Appel
Cass. Ass. Plén.	Cassation Assemblée Plénière
Cass. Fr.	Cassation Française
Cass.	Cour de cassation (Supreme Court)
CERDI	Centre d'Etudes et de Recherche en Droit de l'Informatique de l'Université Paris Sud
cess.	cessation
CDPA 1988	Copyright, Designs and Patents Act 1988
Ch	Law Reports. Chancery (alternative title: Chancery Reports)
Cir.	Circuit
Civ.	Civil
CMLR	Common Market Law Reports
CML Rev	Common Market Law Review
Col LR	Columbia Law Review
concl.	conclusions
CR	Computer und Recht
D.	Dalloz
DA	Dalloz Analytique

DB	Der Betrieb
D.C. Cir.	District of Columbia Circuit
DEE	Dikaio Epihirisseon ke Etarion
DG	Directorate General of the European Commission
D. Mass.	District of Massachusetts
D. Neb.	District of Nebraska
D. Somm.	Recueil Dalloz Sommaires
Doc. Parl.	Document of the Parliament
Dr. Inform.	Droit de l'Informatique et des Télécoms
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	Reports of Cases before the Court of Justice and the Court of First Instance (Alternative title: European Court Reports)
EIPR	European Intellectual Property Review
EL Rev	European Law Review
Ent LR	Entertainment Law Review
EU	European Union
F	Federal Reporter
F 2d	Federal Reporter, Second Series
F Supp	Federal Supplement
FSR	Fleet Street Reports
FT	Financial Times
GATT	General Agreement on Tariffs and Trade
Gaz Pal	Gazette du Palais
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
HMSO	Her Majesty's Stationery Office
HR Rep	House of Representatives Report
ICC	International Chamber of Commerce
IIC	International Review of Industrial Property and Copyright Law
IJLIT	International Journal of Law and Information Technology
Ing. Cons.	Revue de Droit Intellectuel – L'Ingénieur-Conseil
IPQ	Intellectual Property Quarterly
IPR	Intellectual Property Reporter
IRDI	Intellectuele Rechten – Droits Intellectuels
ITR	International Trade Reporter
JCP	Juris-classeur périodique (La Semaine Juridique), édition G, parties jurisprudence

JT	Journal des Tribunaux
LJOS	Law Journal Reports (old series, nineteenth century)
LQR	Law Quarterly Review
LR Eq	Law Reports – Equity
LT	Law Times
MLR	Modern Law Review
N.D.	North Dakota Supreme Court Reports (1890–1953)
OJ	Official Journal of the European Community
Pas.	Pasicrisie
Qd R	Queensland Reports
Rec. Sirey	Recueil Sirey
RIDA	Revue Internationale du Droit d'Auteur
RPC	Reports of Patent Cases
SACEM	Société des Auteurs, Compositeurs et Editeurs de Musique
S Ct	West's Supreme Court Reporter
SDNY	Southern District of New York
SI	Statutory Instrument
SO	Session ordinaire
TGI	Tribunal de Grande Instance
TRIPs	Trade Related aspects of Intellectual Property
UFITA	Archiv für Urheber-, Film-, Funk- und Theaterrecht
UNSW Law Jo	University of New South Wales Law Journal
USC	United States Code
US CAN	US Code Congressional and Administrative News
USPQ	United States Patent Quarterly
Vand LR	Vanderbilt Law Review
VARA	(United States) Visual Artists Rights' Act
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WLR	Weekly Law Reports
ZUM	Zeitschrift für Urheber- und Medienrecht

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Introduction

Mr Richard Lehrberg, executive vice-president and managing director of Interplay Productions in California, said, in an attempt to define the notion of multimedia at a conference in Cannes in 1994 on 'New technologies and their influence on international audiovisual law':

It appears that [once] there were some blind men who had never seen an elephant before, so they were taken to the circus in order to examine one. They all gathered around the elephant and they all touched it in order to get a feeling of what the elephant was like. They were then asked to describe their experience. One said that the elephant was like a rope, another said that the elephant was like a tree trunk, another said that the elephant was like a wall, another said that the elephant was like a big palm leaf, another said it was like a boa constrictor. The fact is that all of them were right because they had touched different parts of the elephant. The one who had thought it was like a rope had touched the tail; the one who had thought it was like a tree trunk had touched a leg; the one who had thought it was like a leaf had touched an ear; the one who had thought it was like a boa constrictor had touched the trunk. They were all correct but they were also all wrong because they were unaware of the totality. Certainly, an elephant is greater than the sum of its parts. Multimedia is like the elephant and we are blinded by our past.¹

Multimedia is even more a phenomenon than a product or service, although we are concerned only with the product or service here. Nowadays it is one of the most popular and widely used words, which describes many different things at the same time. However, very few people really understand what multimedia is all about. This is largely because technological developments in the area have been extremely rapid and most of the time people approach them only through the experience they already have as publishers, film directors or producers, computer manufacturers and so on. This approach is not entirely wrong if we consider that multimedia is essentially an extension of what already exists on the market, i.e.

¹ R. Lehrberg, 'Blind men and the elephant: what does multimedia really mean?', ICC Conference on *New technologies and their influence on international audiovisual law*, Cannes, 1994, Proceedings, at 9.

books, films or television. At the same time we have to bear in mind that it can also be something very different from its predecessors, in which case it will necessarily demand a very different form of protection, particularly in the field of intellectual property. It is this form of protection which constitutes the focus of this book.

Multimedia will be considered from the point of view of intellectual property and specifically of copyright.² The central question will be whether multimedia products constitute products which are different from those already in existence, and, if they do, whether these products require different legal protection. The examination will be limited to the copyright protection afforded to such products, this being considered the closest and most appropriate form of protection for them.

Before we enter into a discussion of the substantive issues of copyright protection in relation to multimedia products, we should perhaps try and describe the very complex and diverse course of production and marketing of multimedia products. At present, multimedia works are often commissioned by software houses. As soon as all the elements that make up a multimedia product are brought together by the team of authors that has been commissioned to create the image of the work, as it is presented in the interface with the consumer or user, the software house fits them in with the required operating software and, in the vast majority of cases, it also supplies the trade mark under which the multimedia product will be marketed, as well as the distribution system. However, it should be noted that although this is the customary way of producing and marketing multimedia products it is by no means the only way.

The description of this process could lead to the suggestion that trade mark law may provide the appropriate tools to protect multimedia products. Whilst a registered trade mark may be a valuable tool of protection, it is submitted that it can by no means protect the whole product. As will be shown in more detail later, the real value of a multimedia product is often found in its content. That content is not in all circumstances protectable through the use of trade mark law. The public may be attracted to a certain content even if it is offered in a plagiarised version to which another trade mark has been affixed. Trade mark law would in those cases not be able to prevent a substantial loss being incurred by the producer of the original multimedia product. Legal protection for multimedia products must therefore go beyond the confines of trade mark law, and it is to the appropriate format for this wider protection that we now turn.

² There are, of course, other legal fields of protection for multimedia according to the national jurisdiction being considered: for example, passing-off, unfair competition law, economic and other torts, contract, criminal law, and so on.

1 Placing multimedia products within the scope of copyright

1.1 GENERAL INTRODUCTORY COMMENTS

A book dealing with multimedia can only reach a certain level of scientific accuracy in relation to new technology products. The reason is obvious. 'Multimedia' is a newly evolved term, which brings with it the imponderables every newly evolved term brings: vagueness and uncertainty.

Multimedia products have introduced new forms of expression by combining the existing ones with new technologies, thus creating a new concept. Many experts in the field state that multimedia has signified the commencement of a new era in relation to communications. Its essential ingredient is not solely interactivity, as one would expect (although interactivity still is the key feature for this kind of communication), but the amount of data multimedia products carry. Information as such has become extremely important. The more information you possess, the more power you have. The possession of information is the key to the successful creation and marketing of a multimedia product. The information contained in it is the crucial factor when consumers decide to purchase. The need for a free flow of information around the world is the ultimate reason for the financing of communication industries. The ability to distribute such information is the parameter by which financial success in the international market is measured. Information has to do with development, evolution, culture, civilisation and state power. Interactivity is valuable in so far as it facilitates the manipulation of information and responds to the needs of the user with regard to that particular information.

In the present era multimedia is bound to be at the centre of developments because the advantages of multimedia applications are so great. The public's access to information and its concept of communication will change the face of communication as a whole. There will also be an impact on inter-human relations and on social structures. Space and time will become more readily available and accurate and comprehensive information will become a possible target. Creators will be afforded more opportunities to create as a result of the great demand for creative content

in the new technology products. Communication and intellectual property industries will be given more opportunities for exploitation and thus the convergence of existing technologies will lead to the emergence of a new breed of product. This will provide a substantial push for technology. Boundaries will be pushed out. Cultures and ideas will work more closely together. It is time we started seeking solutions at an international rather than at a national level.

If we want to put the fast-growing commercial importance of multimedia products on the European market in figures, we should refer to those most recently available. In 1989 the multimedia market had a global turnover of US \$3 billion. This turnover increased fivefold in 1995 and 1996.¹ Other statistics show that the multimedia market, excluding video games, was worth US \$1.4 billion in 1989, whilst in 1997 it was expected to reach US \$23.9 billion.² Multimedia products in CD-ROMs, which is the most popular form of distribution, have increased their market turnover forty-five times between 1990 and 1995, with the USA and Europe being market leaders. The statistics show that the USA led the pace until 1993, when Europe seems to have taken over. Of course part of the reason why these statistics look impressive is that the spread of the new technology took place mainly in this period. Before then this form of computer technology was not widely available, and, even if it was, the cost was in most cases prohibitive. By now most households in the developed world will have become equipped with CD-ROM devices and will have subscribed to an on-line service, either for domestic or for professional use. After the 'big bang' of this period, increases in market figures will stop being so dramatic. However, multimedia products will still occupy a substantial part of the market. People who have already bought the relevant equipment will become regular clients of the technology industry.

Apart from the trends in technology and information culture, law is bound to play one of the most important roles in the area. The obvious regime for the protection of these works is intellectual property. Works which possess any kind of creativity, originality and intellectual effort come within the scope of the national intellectual property laws and international treaties in this area. At some time in the past the law, apart from regulating the social and technological evolutions that had already

¹ See G. Vercken, *Guide pratique du droit d'auteur pour les producteurs de multimédia*, commissioned by the European Communities, DG XIII (Translic) from AIDAA, 1994, at 16ff.

² M. Radcliffe, 'Legal issues in new media: multimedia for publishers' in D. Campbell and S. Cotter (eds.), *International intellectual property law. New developments*, J. Wiley & Sons, Chichester, 1995, at 181.