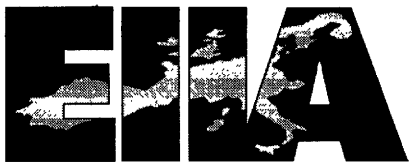
European Information  *Industry Association*

Legal Guide
for
Information Service Providers and Users

Produced by EIIA with support from the European Commission, DG XIII/E

Warning

The guide in no way replaces lawyers and it is not a legal text. If you, as a reader and information provider/information user, are in doubt about which laws, rules and regulations apply in specific cases, we strongly recommend you to seek advice from appropriate, qualified legal experts.

EIIA cannot be held responsible for any subsequent use or misuse of the information contained in this guide.

Editor: Lennart Scharff

B.P. 262 L-2012 Luxembourg. Tel.: (+352) 3498 1420 Fax: (+352) 3498 1234
Visiting address: 5, rue Höhenhof L-1736 Senningerberg

I: Definitions

I: DEFINITIONS

I.1. Definitions concerning electronic information provision and usage

For the purpose of this guide, it is necessary to compile a certain set of definitions. Considering the title: **Legal Guide for Community-wide Electronic Information Service Providers and Users,** definitions of the entities **Service Providers** and **Users** must be created.

Basically one can say that four "entities" concerning electronic information exist. These are:

- electronic information products:	i.e. information collections produced and distributed in electronic form
- electronic information producers:	i.e. the organisations/companies producing information in electronic form and responsible for the contents of the products
- electronic information distributors:	i.e. the organisations/companies distributing information in electronic form to the users. This distribution can take place using telecommunication facilities or in tangible form on optical or magnetic media.
- electronic information users:	i.e. the people/organisations/companies who make use of the information distributed in electronic form by the information distributors.

As far as we know, there are no "standardised" definitions of electronic information products and services, but within I'M-GUIDE, the inventory of the European Electronic Information Services Market, a database produced by the European Commission's DG XIII and containing data about electronic information products, their producers and distributors, a set of definitions have been made. These are:

- an electronic information product is a product containing data that are systematically collected, analysed, arranged, controlled and disseminated in electronic form by the information producer.

- an electronic information service is a service which is based on electronic information products, and which is available to all European citizens on the same conditions.

In examining these definitions, it is obvious that both electronic information producers **and** distributors are to be considered as information service providers

This definition is logical in many ways. Firstly because in many cases the producer and the distributor are one and the same organisation. Secondly because it is then possible to make a logical distinction between information production and information dissemination, a distinction that will make the descriptions of the legal aspects easier to understand.

Concerning the definition of electronic information products, the definition given in I'M-GUIDE will also be adopted in this legal guide. It should, however, be mentioned that, by using the words *systematically collected, analysed, arranged and controlled,* some electronic information services have been excluded, e.g. Electronic Mail Systems, Bulletin Boards, Chat lines etc.

These exclusions are, as we see it, pertinent with respect to legal aspects, basically because in such services there is no control concerning the contents/information provided.

Finally, it should be mentioned that the sheer provision of telecommunication facilities, i.e. a network provider, is not considered in this guide as an information service.

In summing up, the definitions used in this guide will be:

- electronic information product: consists of data that are systematically collected, analysed, arranged, controlled and disseminated in electronic form by the information producer.

- electronic information service provider: is an organisation/a company that produces and/or distributes electronic information products to the users. The distribution can take place using telecommunication facilities or in tangible form, on optical or magnetic media, e.g. CD-ROM, diskettes etc.

- electronic information user: is a person, an organisation or a company who, by being a customer of the information service provider, makes use of information distributed in electronic form.

I.2. Definitions concerning legal aspects

I.2.1 Introduction

It is obvious that, since the purpose of this guide is to help information service providers and users to identify the legal risks involved in the production and use of electronic information services, we cannot possibly deal with the entire "legal universe".

The complexity of identifying the legal aspects is enormous, due to the fact that there is no single Law or Regulation dealing with the "problems" related to information provision and usage. It is a mixture of Laws and Regulations covering a wide range of subjects, where many of them deal with a general or specific area that can also be applied to this sector.
Examples of this are: Civil and Criminal Law in general, Business and Corporation Law, Consumer protection, Contract Law etc., laws and regulations that in fact are very detailed and, of course, also applied to the world of electronic information production and usage.
Further, many of these Laws and Regulations are different in the different countries, which does not exactly make it easier for the "lay-person" to understand.

Instead we have chosen to go into more detail with the specific Laws and Regulations concerning information and the more critical items of other law areas, critical in the sense that there are risks that should be understood.

The areas specifically applicable to information services that will be dealt with are:

- Intellectual Property Rights
- Data protection and security
- Liability
- Contract Law
- Laws and Regulations concerning content of information products
- Laws and Regulations concerning marketing and the kind of information services that can be offered

These areas will be dealt with by relating them to typical functions performed in information production and distribution. This functional analysis is described in section I.3.

In addition to this, we will, wherever appropriate, make references to "general law" and other Laws and Regulations applicable to the information world.

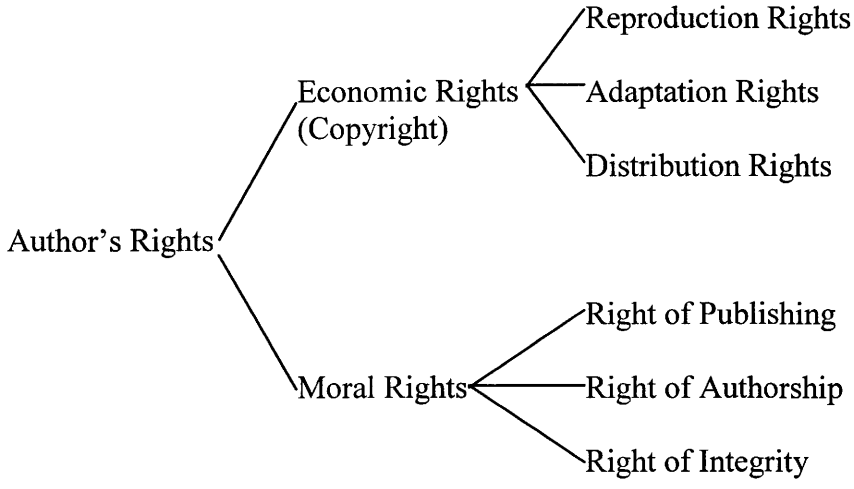
I.2.2 Intellectual Property Rights (IPR)

IPR is in fact "a generic" term referring to a conglomerate of more specific rights, such as, e.g.: Author's Rights, Copyright, Moral Rights, Design Rights, Patents, Trade Marks, Trade Secrets, Know-how, etc., all rights associated with protecting the results of "an intellectual process" performed by human beings. The aim of Intellectual Property Law is to offer protection to the individual for his/her "intellectual creation". The underlying idea is that the creation in "business terms" represents an asset, to which a value can be attributed; the rights could be expressed as "rights to stop others from using and/or 'doing things' to your works".

Hence, the legal protection given to the individual, or rather the results of his/her intellectual effort/creativity, is made up of a number of different elements, and is based on the assumption that the individual gets "something" he/she can use commercially and receive compensation for. But in addition to this commercial aspect, IPR also give the individual a certain amount of "pure" intellectual protection, or as it is often described:
control over the work and how it can be used.

In the information provision industry, there has been a tendency to focus on copyright issues. But copyright is just one element of what is referred to as Author's Rights.

The following table gives an overview of this.



In the Berne Convention for the Protection of Literary and Artistic Works, in many ways the international basis for these IPR, the difference between economic and moral rights is defined as (in article 6bis):

"Independently of the author's economic rights, and even after transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation."

This "statement" clearly indicates that, whereas the economic rights can be transferred to someone else (sold, waived, licensed), the moral rights always remain with the individual, in all legal schemes. In practice the economic rights are frequently referred to simply as Copyright, and we will do the same in this guide.

I.2.3. Copyright, Moral Rights and Neighbouring Rights

Copyright focuses on the rights of the author (of a literary or artistic work) to prevent unauthorised reproduction or copying of the work.

Copyright typically deals with the commercial aspects of IPR, and it is further typical that the mentioned rights can be "waived" or sold to someone else, e.g. an author "transfers" his copyrights to a publisher. The Moral Rights are much more on the intellectual side, aiming at giving the author control over his work, and it is characteristic that (in general and in particular in continental Europe) these rights cannot be "waived" and that they, always, belong to the individual creator, even after he/she has "sold" the copyright to someone else.

Whereas the "individual rights" of copyright are relatively easy to understand, the Moral Rights need further explanation in order to be able to apply these to the information world.

Basically, Moral rights stem from the "Latin" legal concept used e.g. in France, Italy and Spain, and in many ways the French names of these rights are very self-explanatory and often referred to.

The right of ownership (droit de paternité) is the right for the author to be recognised as the author and the right to prevent the work being attributed to someone else.

The right of integrity (droit au respect de l'oeuvre) gives the author the right to prevent alteration, distortion or mutilation of the work. It is, for example, this right that could allow the author to refuse a summary/abstract of his/her work - even in cases where he/she has waived the copyright to the database producer.

It should be mentioned that the above summary does not pretend to be exhaustive and that there are differences across Europe. Nevertheless, it gives an overview of the different regimes used, but it should be mentioned that there are differences between the "Latin Case" and the Anglo-American Legal systems. The French law is typically based on Author's Rights (droit d'auteur), where under Moral Rights, in addition to the two rights mentioned above, the right of publication (droit de divulgation) is also included, i.e. the right to release the work, which is considered by some experts as an economic right, or at least as: leading to an economic right.

Further, the concept of "Neighbouring Rights" should be mentioned. These are the rights given to "Performers (musicians, singers, actors), Producers of Phonograms and Broadcasting Organisations", i.e. the people/organisations that "make a public performance of a work of an author". These rights are generally considered as "weaker" than the above mentioned rights, but do offer possibilities for protection and remuneration. Seen in the light of the new information technologies emerging, especially Multimedia, such rights are to-day also important to recognise and deal with, as will be seen later.

Finally, it should be mentioned that copyright is "an old concept" (the Berne Convention is more than 100 years old) that typically was assigned to literary and artistic works. As technologies emerge, there have been several re-interpretations or specific"amendments" to the scope of copyright , and to-day databases and software (under certain criteria) are being recognised as "works" and thus fall under copyright protection in EU countries and elsewhere. Hence, copyright, as well as Moral Rights, is of great importance in information service provision, basically because they deal with, on the one hand, the "rules" to be respected when producing the database itself and, on the other hand, the possibilities for "preventing" someone else from using the database in a way one as a producer would not want, i.e. "unlawful usage". The importance of this is clearly underlined by the fact that databases (and computer software) are specifically referred to in the TRIPs (Trade Related aspects of Intellectual Property rights) part of the recently ratified Uruguay round of GATT.

I.2.4 Data Protection and Privacy

Under this heading come the Laws and Regulations dealing with protecting the personal integrity of the individual against "misuse" of personal data.
Rules for this vary from country to country, but they also apply to information services in two ways:

- concerning content of databases
- concerning the "customer files" that information service providers build up and maintain.

Both of these aspects will be dealt with later.

I.2.5 Liability

Liability Law deals with responsibility for "damages incurred" as a result of the usage of an information product. In normal terms liability is limited to "economic losses", but can under certain circumstances also be applied to "moral losses". Liability law has a very strong background in Consumer Protection, and is normally associated with products, not with services as such. However, in addition to an already adopted directive on product liability, the European Commission in December 1990 also made a proposal for a directive on the liability of service providers, basically for services in the consumer area. Although this proposal was withdrawn by the Commission in June 1994 and that it is still discussed amongst experts whether information provision as such belongs to this type of services, it is an area that should not be overlooked.

The fact that the Commission has withdrawn the proposal, does not at all mean that the issue as such, consumer protection, is uninteresting, but rather that it has proven to be extremely difficult to reach a common position amongst the Member States, basically because the rules currently are very different. From a legislative point of view changes have occurred in the Member States, as well general changes in consumer protection laws as changes in relation to specific sectors and in case law. These changes tend increasingly to take account of the fact that persons injured by defective services have no specific technical knowledge, and in times where consumer oriented electronic information services are rapidly emerging in Europe, it is quite possible that also information services would fall under "consumer protection legislation" in the very near future.

It should be stressed that liability is for "physical damage", i.e. direct damage to health or physical integrity of persons, and direct damage to the physical integrity of movable or immovable property (and the financial consequences of such damage), provided that this property is normally intended for private use or consumption. Further, such damage must be caused by a fault committed by the producer or the service provider.

As stated above, the liability issues bear a strong relation to consumer protection, and one would normally think that, since electronic information services are of a more "professional character", these would fall outside the legislation. But with the emerging technologies where the borderline between consumer and professional services is beginning to "blur", liability aspects should not be overlooked and it is 100% sure that, in the future, the liability cannot simply "be written off" in a contract clause.

Liability can apply to the information product itself as well as to the way the service is provided to the user. Although there are very few specific cases on liability aspects in electronic information provision, there have been cases in traditional publishing that could be considered as "parallels" to electronic information provision, and we will refer to this later.

I.2.6 Contract Law

Contract law has special importance in electronic information provision primarily in three cases:

- contracts between "rightsholders" of copyright and similarly protected material and information producers wishing to use it

- contracts between the information producer and the information distributor

- contracts between the information distributor and the user.

I.2.7 Laws and Regulations concerning content of an information product and kinds of information services that can be offered

In general there are no specific laws and regulations specifying in detail types of information that can or cannot be included in an electronic information product. It is, however, obvious that, since a database is a "work", although electronic, it will have to respect, by analogy, the general rules stipulated in Publishing Law or in countries where this does not exist: the Constitution. A database or an information service containing detailed information about "how to assassinate the Queen" would probably be illegal to produce and definitely illegal to offer. In general one can say that products/services intended to disturb public order, undermine public morals etc. could not be considered as legal in any Member State of the European Union. For some services, however, there are special rules. This is the case for Audiotex, and in some countries also, Videotex services, where there are special "Codes of Conduct" or other primarily ethical rules. Typical for these services are that they are (primarily) aimed at the general public, i.e. the consumer, and in line with general consumer protection some countries have therefore established special rules. Although in general one can say about these, as well as for certain of the liability issues mentioned above, that they do not apply for "professional services", it is worthwhile mentioning that, since the "borderline" between categories of services is limited and often also "grey", it is advisable to consider these rules.

This will be dealt with later, in section II.2.

I.3 Definitions concerning functions in information service provision

I.3.1 Introduction

As stated in the introduction, the guide is intended to be read by the lay-person and in order to give him/her a clearer understanding of which rules and regimes to respect, we have chosen to structure the guide according to the functions typically performed in information production, information service provision and information usage. These functions are based on the definitions given in the previous section, and for the purpose of the analysis, we have treated:

- Production of electronic information products
- Distribution of electronic information products

as separate entities, although they in fact will often be one and the same "organisation". Electronic information providers therefore covers either or both producers and distributors.

I.3.2. Production of electronic information products

Functions

In order to produce an electronic information product, the following functions are performed by the information producer:

Information collection and selection:	The process of collecting the content for the product and selecting amongst the collected content and deciding what should be included in the final product.
Information arrangement:	The process of arranging the selected material in an appropriate way for the (final) information product produced. This function will involve intellectual processing as well as the use of computing facilities, both for the arrangement and for producing the final electronic information product.
Information dissemination:	The process of disseminating the electronic information product to the information service distributor.

I.3.3. Distribution of electronic information products

Functions

In order to distribute electronic information products to information users, the following functions are performed by the information service distributor:

Loading the information product:	The process of storing and packaging the product (as received from the information producer) on a computer for retrieval, either online retrieval using telecommunications facilities, or on magnetic or optical media for direct distribution to the users
Providing access possibilities:	The process of adapting the electronic information product to a specific computer retrieval software and, in the case of distribution using telecommunications, also acquiring the necessary telecommunication infrastructure
User relations and contracts:	The process of defining the relations with the users, including specifications of contracts, registering users, invoicing and billing and sub-functions related to this
Marketing of electronic information:	The process of attracting customers to the electronic information products and services

In defining these information provision services, we have excluded specific items concerning the mere acquisition of computer power, i.e. main-frames or Personal Computers on which the functions will be based. This exclusion has basically been effected because this is not really a function of information provision but more to be considered as acquisition of "work-tools", like e.g. acquiring office equipment etc. Including such functions would not really make a guide comprehensive.

II: Typical Legal Questions and Answers

II.0. Introduction

In this section, the typical legal aspects of information provision will be dealt with. The treatment is based on a number of typical questions asked by information service providers, related to the functional break-down presented in the previous section.

These questions have been collected by members of EIIA, and we tend to believe that they represent the questions typically asked by the industry, questions where the "lay-person" wants a quick, although not exhaustive answer, in order for him/her to judge whether it is pertinent to seek more detailed legal advice and/or explore what can be done independently.

As stated in the introduction to this guide, its aim is to help the information industry to identify the risks and, if possible, take the necessary precautions in order to avoid or minimise the risk. Hence, in addition to simply answering the questions, we will recommend appropriate measures to be taken.

Further, the answers to each question have been structured according to which legal aspects/areas are relevant to the question.

Warning

The guide in no way replaces lawyers and it is not a legal text. If you, as a reader and information provider/information user, are in doubt about which laws, rules and regulations apply in specific cases, we strongly recommend you to seek advice from appropriate, qualified legal experts.

EIIA cannot be held responsible for any subsequent use or misuse of the information contained in this guide.

II.1.1. Typical questions asked in relation to information collection and selection

Questions answered in this section:

II.1.1 Information collection and selection

Question:

Can I copy and abstract from already copyrighted sources and if so: how?

Answer:

As you may expect, the general answer is: MAYBE! It depends!

Copyright aspects:

It is obvious that, if we speak about simple copying of substantial parts of already copyrighted material, you will of course severely violate/infringe copyright and the copyright owner will have a good chance of "winning a legal dispute" in court.

The key-word here is: substantial!

To our knowledge, no legal regime anywhere in the world clearly defines what exactly substantial means, and for good reasons. On the one hand it is difficult to define in general terms and, on the other hand, if the "level is put too low" there is the risk that instead of protecting against "unlawful use" one would create barriers even to "lawful use". In general, one also speaks about "fair dealing rights" which means that, once a product has been published, it is intended to be used and therefore make a profit therefrom - why else publish it?

In this context, it does not really make any difference whether the copyright owner is in your country or abroad. Copyright conventions normally work on the basis of National Treatment, meaning that each nation will provide the same amount of copyright protection to "foreigners" as it does to its own citizens. This indicates that the "regime" to respect is that of your own country, according to the Berne Convention, which most countries follow to-day, especially in Europe.

It should be noted, however, that some countries apply the principle of reciprocity, meaning that country A will provide the same amount of protection for citizens from country B, that country B provides for citizens of country A, which in fact means the "lowest" level of protection will be applied. This aspect is probably more important when we, later, speak about obtaining copyright.

But if you simply produce an abstract - that is, convey the sense of the original work in a short synthesis - there may be some expressions from the original work, but mostly it will be your own work.

This form of abstracting from already copyrighted sources has given rise to very few problems, as long as we speak of clearly insubstantial parts, an intellectual effort is made, the source and the author are mentioned and it is not merely simple copying. But of course, if one is seriously in doubt, permission from the copyright owner should be obtained.

It should finally be mentioned that currently no pan-European rules concerning extracting/abstracting exist. Each country applies its own national rules.

Moral Rights aspects

As you may remember from the section containing the legal definitions, although you will not infringe copyright, there is a risk that you may violate Moral Rights, especially the aspects of right of authorship and right of integrity. This will be the case if the author feels, and rightly so, that the abstracting carried out by you represents a distortion of his/her work, i.e. if the abstract does not really reflect the intention and the "spirit" of the work itself.

Question:

Do I need author's permission to include abstracts?

Answer:

Normally not

This question is pertinent especially in cases where you, as the producer, have had the rights transferred to you, e.g. the full copyright to an article, and where you, for the purpose of producing a bibliographical database, want an abstract produced. There will in this case not be any copyright problems, as explained in the answer to the previous question. But if you want to be 100% sure, you should include it in the agreement signed for the "transfer of rights".

Moral Rights aspects

There is always a risk that, if the abstract is produced by a person other than the author, he/she would then feel that it does not really reflect the original work.
Although there, at a certain time, was a strong tendency towards always requiring the author's approval for an abstract, it now seems clear that this cannot be enforced, simply because it would be a serious obstacle in production of scientific, bibliographical databases in particular.

The solution adopted by most database producers is: *never accept a scientific article without having the author's own abstract; issue clear guidelines for how this abstract should be produced and what it should contain and include it in the contract/agreement.*

Question:

Is government information publicly available for inclusion in my product or are there any special rules?

Answer:

By no means is government information freely available!

Obviously, government information is a very generic term. It ranges from Law and Legal decrees, through information about companies and individuals, to such "exotic" items as road-maps and meteorology data, not to mention data with a security value.

Although the subject has been looked at, in individual countries and by the European Commission in a set of guidelines (Guidelines for improving the synergy between the public and the private sector in the information market, DG XIII, 1989), there are in reality no specific rules concerning it. Some countries do make data available for exploitation, other countries give certain information providers exclusive rights to the exploitation, and some countries do not release the information at all for (commercial) exploitation.

Lately, however, and especially in the US, there has been a tendency to provide free, although not necessarily free of charge, access to certain "public domain" government information sources. It remains to be seen whether this tendency will also spread to Europe.

On the pan-European level, the Commission's proposal for a database directive deals with this. It is stated that, in cases where the contents of a database cannot be independently created, collected or obtained from any other source, a right to extract and re-utilise, in whole or substantial parts of the contents of a database, shall be licensed on fair and non-discriminatory terms. This is normally referred to as compulsory licensing.

It is further said in the proposal that the right to extract and re-utilise the contents of a database shall also be licensed if the database is made publicly available by public authorities or public corporations or bodies which are either established or authorised to assemble or to disclose information pursuant to legislation, or are under a general duty to do so. This could mean that at least some government databases should be compulsorily licensed, but since this article (11) in the proposed directive has met some resistance in certain Member States, and since the proposal has not yet been adopted, the future will show which rules will apply.

In the meantime, and if you really want to include government information, it is a subject for negotiation with the responsible body.

It should, however, be noted that there are differences across the EU countries - the main reason for establishing the set of Commission guidelines mentioned earlier.

In the Nordic countries a general principle of access to "public acts" is applied, where

"citizens" are given certain rights to access public files, and as a consequence of this it is also possible to include such data in a database. Based on this principle of public access to official documents, in Sweden and Finland it is possible to get "contents" for e.g. legal databases free of charge and even without permission. In line with this principle, the Finnish government has declared that it will seek to guarantee as free access to official EU documents as possible and try to influence the European Union to adopt the "Nordic principle" for its official documents.

In other countries special provisions concerning "official documents" are also made. For instance in Germany and Luxembourg, it is specifically said that law, regulations etc., official documents published by the appropriate authorities can be copied, but without alterations and with acknowledgement of the source. Further, in the U.K. the Department of Trade and Industry has issued a set of guidelines concerning government-held tradeable information and in France there is even a "Circulaire du Premier Ministre" concerning this.

Competition Law aspects and Copyright aspects

In cases where the government "refuses" access to the information and in cases where it has granted exclusive rights to one party, the classical question of "the existence of a copyright and the exercise of it" with a view to free competition on the market could be considered.

The argument that "tax payers have paid for the creation of the information" and it should therefore be "freely available", although it may sound correct and logical, has so far only had little effect. We would therefore still recommend the negotiation mentioned above.

Question:

Are there any special IPR rules/regimes to observe if I want to include music, images, sound etc. in my product, e.g. if I want to make a multimedia product?

Answer:

Not really, it is just more complicated.

Copyright aspects

Normal copyright considerations should be applied here, and for each of the individual items you want to include in your multimedia product, you should obtain copyright clearance from the copyright owner.

Neighbouring Rights aspects

Where we have previously been talking about purely "literary" works, multimedia brings us into other areas, especially when talking about sound (music, songs) and images (video, film-clips). Performing artists and music producers etc. have so-called neighbouring rights to their works. They are not really copyrights since these belong to the "creator", but the rights to give clearance, to be mentioned as performers and to receive remuneration if their works are "distributed" in public places, an obvious scenario for multimedia. In practice such rights are administered by "Collection Societies", especially concerning music, and it is to those one must turn for clearance and remuneration.

Moral Rights aspects

The digital technology used for multimedia production contains almost unlimited possibilities for changing almost anything - images, pictures and photographs, sound, text etc. These possibilities have of course created a certain amount of awareness of the problems, if not to say "fear". As we see it, and with multimedia still a relatively new type of information product, the right of authorship and especially the right of integrity, ensuring the author that his/her work is not distorted, alterated or mutilated, are almost sure to be questioned. The problem is of course where to define the limits for distortion etc., and in the absence of court law or jurisprudence so far, it is difficult to give firm advice on what to do to eliminate the risk or minimise it.

The only thing we can say so far is that obtaining complete clearance for a multimedia product is extremely difficult and involves a lot of work.

What makes it extremely complicated is not only to find out who the rightsholders are, but

also exactly which rights they hold. If you e.g. want to include a song, you would need the permission from the composer, the author of the lyrics, the singer(s), the backing musicians etc. and, even though the rights of all these people are transferred to an "agency", this agency may, in fact, only have the rights for certain countries and certain purposes. Hence, you would in many cases have to get clearance from all of the above and for your purpose. Further, if you "remix" the music, you could infringe moral rights. And what about if you add "images" to the piece of music or make an accompanying (new) text?

It is not surprising that IPR issues related to multimedia are intensively investigated with a view to whether we would need specific rules or if existing rules for e.g. films could be applied.

As we see it, a solution to this is not exactly "round the corner" and it will therefore still be extremely difficult - although necessary - to get complete clearance for the different "sequences" in your multimedia product.

II.1.2 Typical questions asked in relation to Information arrangement

Questions answered in this section:

II.1.2 Information arrangement

Question:

If my employees produce the information, do I then need special permission from them to include it in my information product/database?

Answer

In general: NO!.

<u>Copyright aspects</u>

If your employees work for you, you would, so to speak, normally have the full copyrights to the works they produce. This is especially true in the UK and in countries that have similar systems. In other countries, however, the rights belong to the individual and cannot automatically be waived or transferred to the employer.

The basic difference between the "Anglo-American regime" and the "continental Europe scheme" is that in the "Anglo-American" the rights always belong to the employer - unless otherwise specified, whereas in the "continental Europe scheme" the rights belong to the employee/author - unless otherwise specified.

Therefore, in order to avoid later "surprises", we would recommend you to specify this in the employment contract you sign - of course without violating appropriate employment law.

Special consideration should be given to people who work for you, e.g. consultants/experts who provide input for your database, so-called commissioned work. In general these people do retain copyright as well as other moral rights to their work, even if the work is uniquely performed for you and under a contract. The advice here is as above: specify it in the contract!

Question:

Can I use the information produced by my employees for several purposes/in several products or do I need special permission to do this? Once for all purposes or every time?

Answer:

Good questions, which can all be answered by: YES - BUT!

Copyright aspects

In the general case one would assume a clear yes. But again here, and with the new digital technologies emerging, there have been some doubts among legal specialists. In its concept copyright is an economic right and belongs originally to the individual who creates the work.

Under a normal work contract one would assume that the salary an employee receives contains the remuneration for "his intellectual effort and creation". But since the digital technologies provide possibilities for new, alternative or complementary uses of the product, in applications/products that nobody really could foresee at the time the work was produced, it has naturally been questioned what "fair usage" of the work is. In particular, employed photographers have been worried about "digital image banks with photographs" and the possibility for new, creative reproductions and combinations. It is for them, naturally, a question of "fair remuneration", but also, as outlined below, a question of Moral Rights.

Although most legal expertise is of the opinion that the answer is YES, it is advisable to include a clause about this in the work-contract - preferably for both currently known and unknown purposes.

Moral Rights aspects

Here also questions about distortion, alteration and mutilation come into effect.
Only the limits of the imagination define the limits to how "literary works" can be used in the digital publishing society, and the limits to when Moral Rights are infringed still need to be defined in practice, i.e. in the courts. Hence, all we can do in this guide is to issue a warning.

Question:

Are there any ethical rules concerning content to respect?,
e.g. types of information it is forbidden to produce?

Answer:

NOT REALLY! - except in the audiovisual area.

Publishing Law aspects

In general it has to be assumed that an electronic information product in this respect will receive the same legal treatment as a traditionally published (printed) product, and will have to follow and respect the same rules as exist for these. These rules are normally stipulated in Publishing Law and/or in the constitution, but a lot of other regulations of a more general nature will also apply, e.g. laws concerning expression rights etc.
Futher, if one considers audiovisual law aspects, there exist ethical rules to apply.

The difference is, of course, that whereas printed products are tangible and can be physically "blocked" from the market, some electronic products, e.g. those distributed via telecommunications, are much more difficult to "block". Since these questions are more related to information distribution, they will be dealt with later. This makes sense, since one would normally assume that it is not illegal to produce e.g. a database on "How to assassinate the Queen". It is only when it is distributed that it becomes illegal. However, in some countries, e.g. Germany, the production itself can also be illegal.

Question:

Are there any rules concerning privacy and personal data protection to observe if I include data on persons, companies etc. in my product?

Answer:

Yes, and they are quite complicated and vary from country to country.

Data protection aspects

The protection of personal integrity, or data about individuals stored in computer systems/files is a question that has a high interest across Europe. This can be seen from the European Commission's proposal for a directive concerning this, or even more clearly in the difficulties this proposal has encountered in the Member States.

In relation to this guide, it has to be treated differently according to the kind of personal data stored. On the one hand we have data stored about individuals as part of a database and on the other hand data stored about customers as part of administration, e.g. invoicing.
The latter is clearly a subject related to information distribution, and will be dealt with there.

Rules are different across countries in Europe, but there are, however, some commonalities. We will try to describe these, but it is probably necessary in this area to study your national law in more detail.

Some of the commonalities are, of course, based on what one could call common sense.

Naturally, and especially concerning personal data, the data holder/file producer has an obligation to ensure that such data are correct and up-to-date. Further, most national systems also contain some specifications about appropriate measures the data holder should take in order to ensure this, e.g. some requirements for "quality control measures". This is extremely important concerning information products that are specifically designed to hold data about individuals, e.g. consumer information, "mailing list systems", and is further reinforced if we speak about economic/credit information. In fact, in all countries specific provisions are made for such systems, and if you have not yet studied these, they are well worth studying!

This is important, because such databases are subject to registration with a special authority and could even be subject to what is called an inspection. Further, some national regimes offer possibilities for "own access", e.g. if a person believes he or she is registered in a database, there is a right to see exactly what data the system contains about him/her, not necessarily free-of-charge, but against what is defined as "a reasonable fee".

Concerning databases that in principle are not bases about individuals, but nevertheless

contain data about these, there are also some precautions to take. An example of this is Newsdatabases, e.g. databases holding full-text of newspapers and where one, by an "intelligent search", would be able to obtain even very detailed information about an individual and "his way of life". In some countries these types of files have been subject to investigation, and there have even been proposals for bringing them in line with other databases concerning individuals, like the bases mentioned above. This would, the database producers, in our opinion rightly, claimed, jeopardise the whole future of the Information Industry.

Although the matter has not been completely resolved on a pan-European basis, it now looks as if either special rules about such "Newsdatabases" will be excluded from general data protection rules, or specific rules will be made.

In any case, it is fair to state that all database producers, producing data about individuals, have an obligation to apply appropriate measures to ensure that such data are correct.

Liability aspects

Ensuring correctness of personal data is also related to liability rules. It is in fact possible that, if data are wrong, they could result in a liability case, if the individual can prove an economic loss due to this. If e.g. a badly needed loan is refused because a credit information system contained erroneous data, and a person consequently lost a lot of money, a liability case would stand a good chance in court.

It is worthwhile noting that this liability aspect is separate from the data protection aspects outlined above and applies to what is normally referred to as Tortlaw. One may say that it is impossible to implement quality control measures that will always guarantee that personal data are 100% correct, a statement that is definitely true.

But a 100% guarantee is not needed. The law in these cases is normally based on the general principle referred to as "Bonus Pater Familias", or "The Family Father/The Good Man", meaning that what one can reasonably think about or ought to be able to think about as control measures should be implemented.

Question:

How do I get copyright on my product and what does it cover? Can I be forced to let other parties "sell" my product, e.g. compulsory licensing? In my country? Abroad?

Answer

It depends on how creative you are!

Copyright aspects

The questions raised in this section are all subject to copyright aspects.

Copyright has been defined in section I.2.3, and we will therefore in this section concentrate on the conditions for obtaining copyright to an information product, i.e. a database. Also this question has been the subject of a European Commission Directive Proposal, which at the time of writing has not yet been adopted, although it has been "in the pipeline" for more than 2 years.

Despite the lack of a pan-European approach (the Database directive), it is clear that databases can be considered as "works", and as such are subject to copyright protection. It is also clear, at least in the Commission's proposal, that this copyright belongs to the database producer, i.e. the individual or the company producing the databases.

In order to qualify for protection, the database must be the result of an intellectual process and demonstrate originality and creativity. This is normally referred to as the originality test. This means, e.g. that, if a database is produced by simple "manipulation" of the raw data performed by a computer program, it would normally not qualify for protection due to lack of "intellectual effort" and creativity. This, in certain ways, poses the question of whether a factual database can be copyright protected or not. This subject has been dealt with, but it is impossible to give a definitive answer. But it is clear that what is protected is "the selection and arrangement" and not the simple content of the database and that originality has to be demonstrated in the selection and arrangement. It should be mentioned that the originality requirements are different across Europe, with the UK having the "lowest originality requirement", Germany and France probably the highest, but in all countries a certain intellectual effort is needed.

Irrespectively of whether a database in its selection and arrangement will qualify for copyright protection, there are also mechanisms that protect the contents of the database. These are referred to as unfair extraction rights, and have been mentioned in the proposed database directive. It is here stated that Member States shall provide for a right for the maker of a database to prevent unauthorised extraction or re-utilisation, from a database, of its contents, in whole or in substantial part, for commercial purposes.

An exception to this has been proposed in the directive, an exception normally referred to as

compulsory licensing, where in cases where the content of a database cannot be independently created, collected or obtained from other sources, the database producer could be forced to license his database to other parties on fair and non-discriminatory terms. This exception is, as we see it, in line with general and EU Competition Law, and aims at preventing monopoly situations.

Copyright is an economic right, that gives the copyright owner control over the commercial exploitation of the product, in this case the database. This also indicates that, once you have obtained a copyright for your databases, it is up to you to decide how you exploit it, i.e. how you make your licence arrangements. One can therefore assume that it would be difficult to force you to give a licence to other parties for further exploitation, the concept of compulsory licensing. One exception does, however, exist, an exception that is based on "fair competition", as mentioned above.

Copyright is normally obtained in your country of residence (the country in which the database is produced) and according to the appropriate law in that country. As stated in the definition, copyright normally works on the basis of national treatment. This means that, if you produce a database in France and e.g. operate it in Denmark, then your database would have the same amount of protection that a database produced in Denmark would have in Denmark. The Commission proposal, which of course is intended for pan-European adaptation, does provide for reciprocity treatment for non-EU countries, meaning that e.g. a database produced in the US would have the same protection in the EU as a database produced in the EU would have in the US.

Finally it should be mentioned that under Portuguese law an almost similar right called "enriquecimento sem causa" (enrichment without reason) exists. This right applies in cases where the work as such is not "original" but the result of a considerable investment or hard work, typically "collective works", and has recently been applied in a database case in Portugal.

Question:

If I have used non-copyrighted material as input to my base, can I then get copyright protection?

Answer:

Yes, if you can demonstrate originality in the selection and arrangement.

Copyright aspects

It is the selection and arrangement and the originality in this that determines whether copyright can be applied or not, irrespectively of whether the input material was copyrighted or not.

Question:

How can I prevent other people/organisations from using the product I have created as input to their own information products?

Answer:

You cannot really!

Copyright aspects

All copyright regimes contain what is referred to as "fair dealing rights" for users. It is even in some cases specified, e.g. in the Commission's proposal for a directive, that it is permissible to extract and use, even for commercial purposes, what can be defined as insubstantial parts of a database. The question is really what can be considered as insubstantial and fair or unfair usage, and here, again, the texts themselves are vague and we are in most cases waiting for case-law. The proposed database directive does to a certain extent specify what fair and unfair extraction are, an additional protection, especially if the database does not qualify for copyright protection.

Question:

Can I only get copyright on the information or also in the way it is presented?

Answer:

You do not get copyright on the contents - only on selection and arrangement.

Copyright aspects

What one would normally refer to here is what is called "the look and feel" of a product, i.e. the way it is presented to the customer/the user. Whereas it is clear that copyright also applies to "artistic" work, it is not 100% clear whether a parallel can be drawn with databases. The Commission's proposal for a database directive gives some support to this thought, since it defines that thesauri, indexes and "systems for obtaining information" are integral parts of the database. The "system for obtaining information" can perhaps be referred to as "the user interface", and, if this is the case, then the presentation of the information is included in the copyright protection. This makes sense, especially for databases distributed on optical or magnetic media (CD-ROMs, diskettes), where in many cases the "retrieval software" comes as an integral part of the database.

On the other hand, and in several places in the proposal for a directive, the Commission makes a clear distinction between the information and the software. This will, of course, make sense in cases where the retrieval is a standard piece of software.

It should finally be mentioned that in Germany a recent case concluded that a user interface is copyrightable.

It is, as can be seen, therefore difficult to give a precise answer.

Question:

With respect to any automated procedures and software I use in the production process, are there any rules/regulations to respect?

Answer:

Yes, there are!

Copyright aspects

Software is also subject to copyright protection, recognised in general and according to a Commission Directive, which is already or is about to be implemented in all EU Member States.

This means that, if you produce this software yourself, you can obtain copyright on it. But it also means that, if you use software bought from an outside company, this company holds the copyright to the software. What one normally buys when buying software is the right to use the software, which, following the general principles for copyright etc. outlined above, also restricts the rights concerning what you can actually do with it, e.g. modifications etc.

However, as a user you naturally enjoy "fair use rights", which in practice, and proven in several court cases across Europe and the world, also gives you the rights to undertake necessary measures to make the software work according to the purpose intended. Maintenance, "de-bugging" etc. are examples of what can be done, but again within reasonable limits. But it is a clear misunderstanding that, even if you order and pay for "customised" or "tailor made" software, you then have all rights to it.

II.1.3. Typical questions asked in relation to information dissemination

Questions answered in this section

NOTE: *This section aims at answering the typical legal questions related to information dissemination, i.e. the function of "handing over" the information product to an information service provider.*

It is therefore to be understood that the information service provider is then the party responsible for providing public access to the product, e.g. typically an online host. The section is therefore of particular interest to information service providers who do not themselves offer information services, and it describes the legal aspects of producer-service provider relationships.

II.1.3 Information dissemination

Question:

In making a contract or a licence agreement with an information service, are there any specific items to observe? In my country ? and abroad?

Answer:

In all cases, normal contract law will apply. In addition, if you deal internationally there are some further aspects to be taken into account.

Contract Law aspects

Like all other contracts, a producer-service provider agreement has to respect normal contract law. In many ways, contract law is slightly different from other laws in the sense that one can almost write anything into a contract and it will still be legally valid if both parties sign it, often referred to as "freedom of contract". Of course, one would have to respect General Law etc., and there are in some countries special clauses about imbalanced contractual relationships, but it is characteristic that legal disputes in this area normally have not been related to what was written in the contract, but more to what was not written into the contract, i.e. all the items that (at the time of writing/signing the contract) were implicitly understood or natural in this and similar types of business/professional relationships. Writing a comprehensive, exhaustive and legally valid contract is by no means a simple matter, and we would recommend all information producers to seek qualified legal advice in this matter. Several aspects have to be taken into account, of which the most common are exclusivity, territorial restrictions, remuneration and accounting, confidentiality, liability and marketing. Further, general competition law and especially EU Competition Law are also important, and copyright aspects should not be forgotten either. What effectively takes place in a contract/licence agreement is that the information producer transfers his distribution rights, totally or partly, to the information service provider.

Exclusivity vs. non-exclusivity and territorial restrictions

Basically it is up to the parties involved to decide whether the distribution rights granted under a contract should be exclusive or not. If the information producer gives exclusive distribution rights for his product to the information provider, this would mean that it will be impossible to make a similar agreement with another information service. This exclusivity may or may not be combined with territorial restrictions. It would, e.g. be possible, and in fact commonly practised, to grant an exclusive distribution right for an information product in a certain geographical area.

In times when telecommunications give excellent possibilities for world-wide access to an online database, such territorial restrictions will in practice have little or no value, since it, basically, will be impossible for the producer to control whether or not the restriction is infringed. Hence, territorial restrictions for online databases are becoming less frequent, and many producers to-day prefer either to give exclusive, world-wide distribution rights or simply world-wide, non-exclusive distribution rights.

For more "tangible" information products, e.g. CD-ROMs and databases on diskettes, the principle of territorial rights is still applied, although as the market for these products is expanding also into the consumer area, an area where the effectiveness of the distribution network is the critical factor for success, non-exclusive distribution rights without territorial restrictions are becoming more common.

Competition Law aspects

Competition laws are basically designed to ensure that the consumer does not suffer because a contractual agreement between the information producer and the information service provider restricts or eliminates free competition, with the effect that prices can be kept at a higher (unacceptable) level. Based on this, exclusive rights could in some cases infringe competition law. The term used for measures against this is "compulsory licensing", a term that is also mentioned in the European Commission's proposal for a database directive. It is stated that, in cases "where a database cannot be independently created, collected or obtained from any other source, the right to extract and re-utilise all or parts of a database for commercial purposes shall be licensed on fair and non-discriminatory terms", without specifying the precise nature of these terms. It is worthwhile mentioning that here we are referring to the contents of a database, not the selection and arrangement, which is copyrighted.

The general competition law aspect to be aware of in this area is the classical distinction between the existence and the exercise of copyright, where it can in general be said that, where the information service provider holds a dominant position, the implications of competition law will probably apply.

Copyright aspects

A contract between the producer and the service provider is in fact a transfer of distribution rights - not of copyright as such. It is therefore important in the contract also to specify exactly what the information service provider can do with the product. Although the copyright holder (the producer) can still exercise his copyright and prevent unauthorised adaptation etc., it is advisable to specify what is acceptable, in advance and in the contract.

Examples are: Can the database or part of it be merged with other databases? Is it acceptable (for the producer) if the information service provider adds elements to the database? Can all elements of the database be "loaded" at the provider's or should some elements be excluded, e.g. abstracts?

Liability aspects

In general, the information producer is responsible for the information in the database. This would also mean that, although the user of a database would normally claim liability for "damages" from the information service provider in the first instance, the producer could be held responsible. As in all other liability cases it is ordinarily a question about "proof and fault", but it should be underlined that the information producer can not simply "write off" the liability by contractual arrangement. If a fault can be proven on the part of the information producer, then according to common law he could be held responsible.

It should be noted that in the Commission's Unfair Contract Terms Directive it has specifically been stated that clauses purporting to exclude liability for death or personal injury will generally be void.

Finally, it should be mentioned that, whether it is specified in the contract or not, it is generally understood that a product must be able to be used for the purpose it is intended. If it is "unfit" for this purpose, the producer is liable.

II: Typical Legal Questions and Answers

II.2 Questions related to distribution of electronic information products

II.2.1 Typical questions asked in relation to loading of the information product and providing access possibilities

Questions answered in this section:

II.2. Questions related to distribution of electronic information products

II.2.1 Loading the information product and providing access

Question:

Are there types of services/information that I cannot offer? In my country? Abroad?

Answer:

Yes, there are.

Publishing Law aspects

Offering a service either via telecommunications or on tangible products like CD-ROMs and diskettes etc. can in many ways be referred to as electronic publishing. As such, it can be assumed that publishing law in general will apply. Hence, products disturbing public order or public morals, inciting racism etc. could be considered as illegal. As in many other legal areas, consumer protection in general has also been of great concern, and, as the information industry now expands into the consumer area, special consideration should be given to services directly aimed at the consumer.

Other rules and regulations

Services like Videotex, and especially Audiotex, have been examined in many countries. This is, in many ways obvious, first of all because they are definitely more consumer oriented than traditional online services, and secondly because there is no clear contractual relationship between the service provider and the user. Anybody with a telephone can use an Audiotex service, and for many Videotex services a contract is not needed either. The same will propably apply for the consumer online services that are beginning to profilerate in Europe.

Member States of the European Union as well as the European Commission have examined these services, but apart from a set of Guidelines for Transborder Audiotex and Videotex Provision compiled by a working group under the auspices of EIIA, there are no pan-European initiatives concerning the regulation of such services. In two countries, however, France and the UK, special bodies have been established to regulate and supervise the services. In France it is CST, Conseil Supérieur de la Télématique, in the UK, ICSTIS, the Independent Committee for the supervision of Standards of Telephone Information Services.

In Germany, Videotex is regulated on a regional level, i.e. in the Bundesländer, although co-operation takes place, but so far there is no responsible body for Audiotex.
In many other countries in Europe, special "rules and regulations" concerning Audiotex have been drawn up, either by the responsible government body, e.g. ministry, or in co-operation between this and the information sector.

This is typically the case in Denmark, Luxembourg, Norway, Portugal and Spain. Hence, if you operate or intend to operate an Audiotex service, we would recommend you to make contact with these. EIIA can help you to locate a contact point in your country.

Concerning offering information services abroad, there are no pan-European rules and regulations. It is an area that in many ways has been overlooked by the information industry so far, but as the information industry is now focusing more on the consumer, it needs to be considered more seriously by information services. There is in this area a clear tendency towards applying the rules of the country of the user - not those of the country of the information service provider.

Finally, it should be mentioned that, in addition to rules forbidding e.g. obscene information, information disturbing public order or morals etc., in Germany there are special provisions concerning "youth endangering works". In these provisions, "works" containing, amongst other things, violence, pornography, incitement to racism etc. cannot be provided to young people.

Question:

With respect to the software I have acquired for the service, what is my position concerning having my own staff make modifications to it?

Answer:

Maintenance: OK, but real modifications: NO

Copyright aspects

With the Commission's software directive approved and Member States now incorporating the directive in their national legislation, there is now almost a pan-European legal scheme for copyright protection of software. Software has been recognised as "works" and therefore enjoys almost the same amount of protection as other "works". Case law in the area in several European countries has given a good indication of where the limits for your own modifications lie. Basically, it can be said that whatever your own staff has to do in order to get the software "to run properly" and in the way it was intended can be done without infringing copyright. But if you make real modifications, i.e. things that change the functionality of the software or "the spirit of it", it will in most cases be a clear infringement, irrespectively of whether the software is "tailor made especially for you" or a standard software package. The simplest way to express it is that what you buy when you buy a piece of software is the right to use it - not the software itself. Normally, the contract that is signed for the software will specify the rules.

II.2.2 Typical questions asked in relation to user relations and contracts

Questions answered in this section:

II.2.2 User relations and contracts

Question:

In drawing up a user contract, are there any specific items to respect? In my country? Abroad?

Answer:

Normal contract law will apply.

Contract Law aspects

In almost all countries there is "freedom of contract", meaning that one can write almost anything into a contract and it will still be legally valid as long as both parties agree to it.

Almost has been underlined, because in many countries there are some limitations. It has already been mentioned that there are specific rules concerning consumer contracts, but in addition to these, some countries also have certain rules concerning "professional" contracts. Such rules are normally concerned with imbalance provisions where one party seeks to take advantage of the "weak" position of the other party. Further, and as an example, in Luxembourg it is especially mentioned that in cases where there are clauses about: limiting liability, termination of agreement, obligatory arbitration, application of another legislation than the one normally applicable, then the general terms and conditions of a company need to be brought to the knowledge of the other parties.

As we stated in section II.1.3. concerning contracts between information producers and information service providers, contracts are difficult to write, and we would recommend you to seek qualified legal advice on this. The single most difficult items to specify in a contract are seen by many information service providers as the specifications concerning what the user can do with the information he receives from the service. Again here, it is the problem of finding the right balance between giving "free and easy access to the information" and at the same time avoiding the situation where the information can be (commercially) reutilized, which could be a danger to your business. A special problem here is the relationship with information brokers.

Copyright aspects

Although the Commission's proposal for a Copyright directive for databases has not yet been approved by the Council, it seems to be clear that in almost all countries databases are recognised as "works" and therefore have some copyright protection. What should be remembered is that what is covered by copyright is the selection and arrangement - not the contents itself.

The proposed directive does try to define "lawful and unlawful" usage and extraction rights, as a supplement to the "fair dealing rights" that exist in many countries.
It is obvious that simple copying and resale is forbidden, but as it is stated in the proposed database directive, it is permitted to copy and re-sell "insubstantial parts of a database".

In any case, since it can be quite complicated to solve a copyright dispute, we would recommend specifying the usage rights in general in the user contract and defining, as exactly as possible, what the user can do with the information.

Many information service providers seem to have specific problems with drawing up contracts for information brokers, i.e. people/organisations who use the service in order to retrieve information which they then sell to a third party - the end user.

Whether information brokers should have specific clauses in their contract or not is not only a legal decision, but also a marketing decision. Some information service providers believe that brokers are contributing to the development of the market since they reach potential users the service providers cannot easily reach themselves. They therefore even offer fee-discounts to brokers, normally on the condition that they, the providers, are acknowledged as the source of information. Others take a completely different view and levy surcharges for brokers. Clearly, these items should be regulated by contractual agreement.

Moral Rights aspects of information brokerage

Independently of what has been stipulated in a broker contract and what copyright can protect, moral rights are also pertinent to information brokerage. Considering how easy it is to "down-load" parts of a database and then, in normal text processing, "elaborate" the output before it is forwarded to the end user(s), brokers should be aware that there is a risk of infringing moral rights. The right of authorship, i.e. the author's right to be recognised as author, and the right of integrity, i.e. to prevent distortions etc., could very easily be infringed when a broker "manipulates" the output.

In a Code of Practice for Information Brokers, developed by EIIA, EIRENE and Eusidic with the support of the European Commission, it is specifically stated that: *The Broker will identify and acknowledge the original source of any data or information they use*. Many brokers feel that if this was done it would "ruin their business", since the end users could easily go to the source themselves the next time.

Although we do not believe in this - retrieving information is not only the question of knowing where to get access to the database - it is worthwhile mentioning that, by not acknowledging sources, information brokers could in fact infringe moral rights.

International aspects

It seems to be clear that, in signing a contract with a user abroad, the rules to follow are those that apply in the country of the user - unless otherwise specified. Most user contracts therefore normally contain a clause about which law and jurisdiction apply to the contract, e.g. by specifying that the contract is drawn up under Belgian Law and that Belgian courts should solve disputes. It should, however, be mentioned that such clauses are not necessarily valid in consumer relations.

Question:

How do I protect and defend my copyright? Can I make clauses in a user contract about this? In my country? Abroad?

Answer:

Try to cover yourself in a contract, and if this not is enough, you'll have to go to court!

Contract Law aspects

In general, the more specific you can be in your user contract, the better your position is, and there are very few "legal barriers" to how specific you can be in a contract. The real problem may be of a more commercial nature, since if you are too specific and restrictive, it will be difficult to get the user to sign.

Copyright aspects

Copyright covers the selection and arrangement in a database - not the contents itself. Concerning contents, you are, at least partly, covered by unfair extraction rights as we have mentioned earlier.

But of course fair dealing principles will also apply, and in general it can be said that, as long as there are no commercial aspects involved in the copying, there is really very little you can do about copying and extraction.

In order to qualify for copyright protection of your database, you need to demonstrate creativity and originality, i.e. an intellectual effort, the "foundation" of all IPRs.

To defend your database, either in terms of copyright or unfair extraction rights, it is a question of proof. It is up to you to prove in court that copyrights or extraction rights have been infringed. Court cases in this area fall into three categories:

- simple and exact copying of the whole or substantial parts
- compilations based on substantial parts of the original work
- similarities one would like to "block" for commercial reasons.

In all cases, it is up to the rightful owner to prove that an infringement has taken place and in copyright cases it must always be proved that copying has taken place. Whereas the first category is relatively simple to deal with, the other two can be quite difficult to prove, and will in most cases really depend on what the courts would consider to be substantial, and if the resemblance was a coincidence or not.

Compilations have been, and will probably also in the future be, a problematic area, especially when we consider factual information, e.g. directories. If one examines the database directive,

it is clear that if one as a database producer simply uses a computer program to arrange factual information into a directory, typically short entries without any particularly "literary or artistic" form, this will probably not be enough to qualify for copyright. The "work" would not pass the originality test, although it is the Court, in the last instance, which will determine if the directory cannot be granted copyright protection.

Question:

If I market my service abroad can I then apply the normal contract law of my own country?

Answer:

YES, if you write it into your contract

Contract Law aspect

"Freedom of contract" has already been mentioned as a general principle, and as long as you specify the law and the jurisdiction in the contract, you can follow the same rules as in your own country. The tendency in Europe is, however, especially concerning consumer services, that the rules of the country of the user should be applied.

Question:

If I have customers abroad and they don't pay, what is my situation concerning taking legal action?

Answer:

It depends on what you have specified in your contract.

As far as we know, no pan-European system exists for this and one would have to refer to General Law and contract law in the Member States in order to answer the question.

We have above recommended writing into the contract which law and jurisdiction should be applied to the contract, and any legal action will therefore depend upon what you have specified. If you have not specified anything, it is normally assumed that legal action will have to be taken in the country of the user.

Question:

When I create a customer file for invoicing, billing and accounting are there any rules concerning privacy and data protection that I have to respect? Do I need permission from any public authority and if so: which? In my country? Abroad?

Answer:

It depends on the Data protection law in the individual countries until the Draft Directive is definitively adopted.

Data security and data protection aspects

The Draft Directive common position provides that the law of the country where the controller of the processing is established applies, in this case the information provider

Most countries distinguish between "registering" and "communicating" personal data.
In general it can be said that, as long as you keep and maintain your customer files for invoicing, billing and accounting (registering), there are no real problems. This is considered part of normal business and is essential for you in order to perform your operations. Such customer files would normally not require any special permission from any authority in any country, since they basically do not contain what could be defined as sensitive data. However, there are in some countries rules regarding how such files should be kept, maintained and secured, and it is advisable to seek advice on this.

Problems can occur if you want to "communicate" your customer files, e.g. turning them into mailing lists that you, as the information provider, then pass on to other parties, typically database producers, e.g. for marketing purposes, customer analysis purposes etc. If the files contain e.g. data on how much a particular database has been used by the customers, there may also be problems.

The first case, communicating a simple mailing list, can hardly be said to be a communication of sensitive personal data since, basically, sensitive data refer to data about political beliefs, racial origin, religion convictions etc. However, when communicating a mailing list, the general rule to follow is that this can only be done with the consent of the persons registered.

The same would normally also apply for the second case, but here one could even speak of an infringement of confidentiality, and you would run the risk of having to appear in court.

Finally, it should be mentioned that in some countries, e.g. Denmark and Norway, special provisions have been made concerning "communication of mailing lists", rules that in some ways are more restrictive than for other files containing personal data. It is well known that database producers often want to know who their customers are and therefore ask hosts to supply such details. If you want to avoid breaching data protection rules - in any country - we would advise you to specify exactly what will be passed on to the producer in the user contract. Then you are legally covered.

Again here, there are even quite substantial differences among countries in the EU.
In Germany, for instance, there seem to be no problems if the data stem from publicly available sources and the data are not sensitive, e.g. about health, religion etc. Also German law has some clauses concerning communicating personal data for scientific research purposes, clauses that with some restrictions, however, make it possible to communicate data if it is in the interest of "public health".

Question:

What is my liability concerning the information and its usage? and can I be held responsible if the information is wrong/faulty, even if I am not the producer? In my country? Abroad?

Answer:

It is a question of proof!

Liability aspects

This very simple answer is, unfortunately, only one part of the story, a story that is extremely complicated. As in all other aspects of liability law the basic principle is that liability is closely connected to "fault", but fault is a generic term, which would also cover negligence etc.

Basically it can be said that liability exists if there is a fault, a damage and a causal link between the fault and the damage. Liability is typically applied to products, and is restricted to physical damage and the consequences thereof and does not include economic losses. This does not necessarily mean that liability for service providers can be completely excluded. As the information market expands towards the consumer sector, it seems quite likely that, in the future information provision services may also be incorporated in "general consumer protection legislation", at least in some countries

Liability issues, their definitions and limitations, are normally dealt with in the contract signed between the information provider and the user, and it is common practice for the service provider, so to speak, to "write off his liabilities" in the contract. Whether this is in fact "legal" is discussed under several national regimes. In any case, since databases are now also provided as products (CD-ROMs) and because certain types of information services are offered without a contractual relationship, the issues should be considered.

There seems to be little doubt that, if a damage occurs as the result of a defective product, then the supplier of the product, the information distributor, could be held responsible. Since such cases are not very likely to occur in information provision, it is more interesting to consider cases where we address information quality, e.g. faulty , wrong or "misleading information". In such cases, and where a damage occurs, the user would, in the first instance, hold the information provider liable.

If he/she can be held liable will depend on whether he/she committed a fault or negligence etc., and it is the information provider that has to prove that this was not the case. This is, in a way, contrary to what has normally been applied in countries following the common law system, e.g. the UK, where it was the "victim" that had to deliver the proof.

If the information provider can prove that "he was in good faith and did not commit a fault", and the damage was due to a fault committed by a third party, e.g. the information producer, then he cannot be held liable.

There have, to the best of our knowledge, not yet been any court cases concerning electronic publishing. In print publishing there have been cases in several countries. Although their outcome can best be described as "different", it seems as if there are commonalities concerning the "behaviour and knowledge" on the user side, meaning that a certain level of intelligence/knowledge is required from the user. As we see it, the principle of "should know or ought to have known" - that the information was "faulty" - has been applied for users, especially concerning professional products and services.

One interesting exception is that in some countries, e.g. Norway, there are special rules concerning credit information and credit rating information. Under Norwegian law there is strict liability (without proof of fault or negligence) where economic loss is caused by incorrect information from a credit bureau (Kredittopplysningsbyrå).

In summing up, the situation is extremely complex and the recommendations we can give are:

- it is probably not possible just "to write off" completely the liability in a contract
- if the fault causing the damage does not lie with you, you are normally not responsible.

Question:

What is my position concerning liability regarding elements of the entire service for which I am not really responsible, e.g. telecommunications, computer infrastructure etc.?

Answer:

If it is not your fault, you are not responsible.

Liability aspects

The detailed answer to the questions has been given above. It only remains to emphasise that "fault" is a broad concept, and there is, in many countries, an obligation to act in good faith.

This means e.g. that, if the damage occurs due to a fault in a computer, a fault you ought to have discovered, or which is within your sphere of control, then you could probably be held at least partly liable.

II.2.3 Typical questions related to Marketing of Electronic Information Products and Services

Questions answered in this section:

II.2.3 Marketing of electronic information products and services

Question:

In promoting the services I offer, are there any specific rules/regulations to observe? In my country? Abroad? And what about Trade Marks?

Answer:

Yes, and there are quite a number, although they normally do not give any problems!

Competition Law aspects

In all countries there is competition law, i.e. rules forbidding what can be referred to as unfair competition. There are close links between such laws and Intellectual Property Rights, especially concerning Trade Marks.

The basic principles to be respected, in all countries, are:

- you should not pretend that the service offers something it does not (misleading information). This is also known as "false trade description", which in fact would be a criminal act.

- it is (with a few exceptions) illegal to make "comparative advertising", e.g. by saying that my service provides exactly the same as service "X", but at half the price, or my service is much better than service "Y"

- you should not market your service under a name that is similar to another service name, i.e. "not lead the customer to mistake your service as a service of someone else", conduct that is referred to as "passing off". It does not really make any difference if this other service has a registered service mark or not, except that, if this is the case, you would also infringe IPR.

The best advice we can give you about this is to perform a careful check before you start marketing your service or product. Databases about Trade Marks and Service Marks exist, and there are services that are specialists in this area. Use them!

Question:

If I am not the copyright owner of a product, are there any rules to observe concerning marketing and do I need permission from the owner to do marketing?

Answer:

It depends on what is specified in the agreement between you and the copyright holder.

Copyright aspects

Copyright is basically an economic right, and what happens in most cases is that the information service provider acquires the rights to the distribution of the product. Exactly what this covers is normally specified in the contract or more correctly: the licence agreement between the information producer and the information service provider. Our advice is therefore to try to get the marketing aspects cleared when the licence agreement is made.

Moral Rights aspects

Independently of what has been stipulated in the above mentioned contract, Moral Rights should still be respected. In marketing, there is always the problem of the Right of Integrity, where one could think of distortions, alteration or mutilation. Further, the right of paternity should be respected. Hence, normally when you market a product it is advisable to include some information about who is the "author" of the product, i.e. the database producer.

Question:

Can marketing agreements be restricted to certain areas or countries? And can they be exclusive?

Answer:

In both cases: Yes, they can

Competition Law aspects

These questions have been answered in detail in section II.1.3 concerning the agreements between the information producer and the information service provider, and we will merely summarise the general rules here:

- you simply have to specify it in the contract, and as long as both parties sign this, there are no problems (freedom of contract)

- the only exception to this rule is that, if the restrictions in the agreement aim at limiting or preventing fair competition, it will not be legal.

III Reference Section

III.1 European Union Documents

1. Amended proposal for a Council Directive on the Legal Protection of Databases
   COM(93) 464 final - SYN 393, Brussels, October 1993

2. Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data
   COM(92) final - SYN 287, Brussels, October 1992

3. Council Directive on General Product Safety
   92/59/EEC, Brussels 29.06.1992

4. Proposal for a Council Directive on the liability of Suppliers of Services
   COM(90) 482 final - SYN 308, Brussels, December 1990
   (Communication from the Commission concerning new directions on the liability of suppliers of services, COM(94) 260 - final, Brussels 23.06.94)

5. Council Directive on Unfair Terms in Consumer Contracts
   93/13/EEC, Brussels, 05.04.93

6. Council Directive on the Legal Protection of Computer Programs
   (Software Directive)
   91/250/EEC, Brussels, 14.05.91

7. Council Directive on Harmonising the Protection of Copyright and certain related areas
   93/98/EEC, Brussels, 29.10.93

8. Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (Deceptive Publicity)
   450/84/EEC, Brussels, 10.09.84

III.2 Relevant documents in each country

Austria

Copyright
1. Copyright law (Urheberrechtsgesetz) no. 111 of 09.04.1936, with later amendments

Dataprotection
2. Dataprotection Law no. 565 of 18.10.1978

Competition Law
3. Law concerning Unfair Competition no. 448 of 16.11.1984

Consumer Law
4. Consumer Protection Law no. 140 of 08.03.1979

Liability
5. Product Liability Law no. 999 of 21.01.1988

Belgium

Copyright
1. Law of 30.06.94 on Copyright and Neighbouring Rights
2. Law of 30.06.94 incorporating the Software Directive

General Publishing Law/Act
3. Article 25 of the Constitution

Dataprotection
4. Law of 08.12.1992 on the protection of privacy in relation to processsing of personal data

Competition Law
5. Law of 14.07.1991 on trade pratices, consumer information and protection
6. Law of 05.08.1991 on the protection of economic competition

Consumer Law
7. Law of 14.07.91 on trade practices, consumer information and protection

Liability
8. Law of 25.02.91 implementing the product liability directive

Denmark

Copyright
1. Law no. 714 of 08.09.1993
2. Law no. 1010 of 19.12.92 amending copyright law, incorporating Software Directive

General Publishing Law/Act
3. Constitution.

Dataprotection
4. Law no. 622 of 02.10.1997, Private Registers Act
5. Law no. 430 of 10.07.94 on Information Databases held by the Mass-media

Competition Law
6. Law no. 114 of 10.03.1993, Competition Act
7. Law no. 428 of 01.06.1994, Marketing Act

Consumer Law
8. Law no. 866 of 23.12.1987, Consumer Contracts.

Liability
9. Law no. 371 of 08.06.1989, Product Liability

Finland

Copyright
1. Law no. 404/61 of 08.07.1961
(Software Directive incorporated by amendment no. 418/93 of 07.05.1993)

General Publishing Law/Act
2. Law no. 83/51 of 09.02.51 with latest amendment no. 388/94 of 27.05.1994.
(By amendment 472/87 of 30.04.1987 also "computerised official material" was brought in under the principle of free access.

Dataprotection
3. Law no. 471/87 of 30.04.1987, latest amendment no. 270/92 of 27.03.1992.

Competition Law
4. Law number 709/88 of 29.07.1988 (Unfair competition)

Consumer Law
5. Law no. 228/29 of 13.06.1929, latest amendment no. 956/82 of 17.12.1982 (consumer contracts)
6. Law no. 38/78 of 20.01.1978, latest amendment no. 759/94 of 19.08.1994 (consumer protection)

Liability
7. Law no. 694/90 of 17.08.1990, latest amendment no. 879/93 of 22.10.1993 (product liability)

France

Copyright
1. Law no. 92-597 of 01.07.1992 (code of intellectual property)
2. Law no. 94-361 of 10.05.94 incorporating Software Directive

General Publishing Law/Act
3. Law of 29.07.1881 (freedom of the press)
4. Law no. 82-652 of 29.07.1982 (audiovisual comunication), extension to the above

Dataprotection
5. Law no. 78-17 of 06.01.1978

Competition Law
6. Clause 1382 sq. of the Civil Code

Consumer Law
7. Law no. 93-949 of 26.07.1993

Liability
8. No specific act passed, general rules governing liability and torts apply

Germany

Copyright
1. UrhG of 09.09.1965 with amendments 10.10.1976, 02.09.1994 and 25.10.1994
2. Copyright Amendment Act of 09.06.93 (incorporating Software Directive

General Publishing Law/Act
3. Constitution

Dataprotection
4. BDSG of 20.12.1990 with amendments 27.12.1993 and 14.09.1994.

Competition Law
5. UWG of 07.06.1909 with amendments of 23.09.1990,05.100.1994 and 25.10.1994

Consumer Law
6. HTürGG (house door sales) of 16.01.1986 with amendments 17.12.1990

Liability
6. ProdHafG (product liability) of 15.12.1989 with amendments 30.09.1994 and 25.10.1994

Greece

Copyright

Presidential decree No. 2121/93 of 04.03.93 incorporating Software Directive

Ministerial decision on "images of archaeological content" in electronic publishing, published in "Government Gazette" no. 564, issue 2 on 20.07.94

Iceland

Copyright
1. Act no. 73 of 29.05.1972
2. Act no. 57 of 02.06.1992 incorporating Software Directive

General Publishing Law/Act
3. Act no. 57 of 10.04.1956 about publishing of printed material

Dataprotection
4. Act. no. 121 of 28.12.1989, registration and handling of private data

Competition Law
5. Act. no. 8 of 25.02.1993 with amendments no. 24 of 25.03.1994.

Consumer Law
6. Act no. 7 of 01.02.136 (contracts) with later amendments
7. Act no. 39 of 19.06.1992 (sales)

Liability
8. Act no. 25 of 27.03.1991 (product liability)

Ireland

Copyright

1. Industrial & Commercial Property (Protection) Act) of 1927, no. 16/1927 with amendments 13/1929, 13/1957, 21/1958,

2. Copyright Preservation Act, 1929 (pretreaty), no. 25/1929

3. Copyright Act, 1963, no. 10/1963, with amendments 24/1987, and Statutory instrument No. 26, 1993 incorporating Software Directive.

Dataprotection

4. Data Protection Act, 1988, no. 25/1988 with Statutory Instruments SI 347/1988, SI 350/1988, SI 351/1988, SI 81/1989, SI 82/1989, SI 83/1989, SI 84/1989

Competition Law

5. Competition Act, 1991 No. 24/1991, with Statutory Instruments SI 76/1992, SI 293/1991, SI 249/1991, SI 229/1992, SI 250/1991

Liability

6. Liability for Defective Products Act 1991, no. 28/1991 with Statutory Instrument SI 316/1991

Italy

Copyright

1. Law no. 633 of 22.04.41
2. Decree no. 518 of 29.12.92 incorporating Software Directive

Dataprotection

3. Decree no. 39 of 12.02.93 on Public Administrations automatic information system
4. Prime Minister Decree about the Authority for computer systems in Public Administrations
5. Circular of the Authority for computer systems in Public Administrations no. AIPA/CR/5

Competition Law

6. Civil code, article 2301 and 2595 to 2601
7. Law no. 287 of 10.10.90 on competition and market protection

Consumer Law

8. Civil code, book IV "on obligations"
   (Directive 93/13/CEE on Unfair Terms in Consumer Contracts has been presented to the Chamber of Deputies on 17.01.95 for incorporation).

Liability

9. Civil code: article 2043 on Tort Law (product liability)
   (Decree no. 224 of 24.05.88 incorporates Directive 85/734/CEE on product liabiliy into Law no.183 of 15.04.87, art. 15).

Luxembourg

Copyright
1. Law of 29.03.1972 (Author's rights)
2. Law of 213.09.1975 (Neighbouring rights)

General Publishing Law/Act
3. Law of 20.07.1969 (Press law)

Dataprotection
4. Law of 31.03.1979, amended 19.11.1987 (use of nominal data for dataprocessing)

Competition Law
5. Law of 27.11.1986, amended 14.05.1992

Consumer Law
6. Law of 25.08.1983, amended 15.05.1987

Liability
7. Code Civil, art. 1142

Netherlands

Copyright

1. Authorlaw of 1912 with later amendments
   Software Copyright Amendment Act of 07.07.94, incorporating Software Directive
2. Law on neighbouring Rights of 1993

Dataprotection

3.Law on Registring of personal Data, 1988

Competition Law

4. General competition Law of 1956

Consumer Law

5.

Liability

6.

Other texts

Norway

Copyright

1. Act of 12.05.1961 with later amendments. Major amendment proposed on 16.12.1994 (Software Directive incorporated in 1991 as para. 39a, 39b, and 39c)

General Publishing Law/Act

2. Constitution

Dataprotection

3. Act no. 48 of 09.06.1978, on registering of personal data

Competition Law

4. Act no. 48 of 16.06.1972, on control with marketing and contracting

Consumer Law

5. As above, chapters II ,III and IV

Liability

6. Act no. 104 of 23.12.1988, on product liability

Portugal

Copyright
1. DL no 252/94 of 20.10.1994 incorporating Software Directive

General Publishing Law/Act
2.

Dataprotection
3. Law no. 10/91 of 29.04.1991 amended by law no. 28/94 of 29.08.1994

Competition Law
4. DL no. 330/90 of 23.10.1990 (advertising)
(Unfair competition act to be published shortly)

Consumer Law
5. DL no. 446/85 of 25.10.1985 (contracts)

Liability
6. DL no. 383/86 of 06.11.89 on product liability

Other texts

7. DL no. 109/91 on computer crime

Spain

Copyright

1. Law no. 22 of 11.11.87 (Ley de Propiedad Intelectual)
2. Law no. 16 of 23.12.93 amending previous Law, implementing C. Directive
3. Law no. 20 or 07.07.92 amending different articles of 11.11.87 Law

General Publishing Law/Act

1. Law no. 34 of 11.11.88 (Ley General de Publicidad)
   Note: We are not sure about what is required under this title. The Law referenced deals with advertising/publicity. Please, advice.

Dataprotection

1. Organic Law no. 5 of 29.10.92 (Ley Orgánica de regulación del tratamiento automatizado de los datos de carácter personal).
2. Royal Decree no 428 of 26.03.93 (Estatuto de la Agencia de Protección de Datos).

Competition Law

1. Law no. 16 of 17.07.89 (Ley de Defensa de la Competencia).

Consumer Law

1. Law no 26 of 19.07.84 (Ley General para la Defensa de los Consumidores y Usuarios).

Liability

There is a project of law under parliamentary scrutiny. No regulation at the present.

Sweden

Copyright
1. Act 1960:729
   (Software Directive incorporated by act 1992:1687)

General Publishing Law/Act
2. Freedom of the Press Act 1969
3. Constitution

Dataprotection
4. Act 1973:289

Competition Law
5. Act 1993:20

Consumer Law
6. Act 1975:1418 (marketing)
7. Act 1971:112 (unfair contract terms)

Liability
8. Act 1992:18 (product liability)

Other texts

UK

Copyright

1. Copyright, Designs and Patents Act 1988, Chapter 48
Statutory Instrument no. 3233, 1992, incorporating Software Directive

Dataprotection

2. Data Protection Act 1984 (Chapter 35)

Competition Law

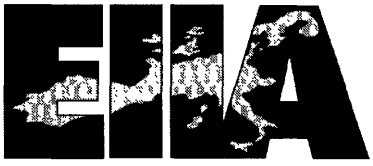
3. Competition Act 1980 (Chapter 21)

Consumer Law

4. Consumer Protection Act 1979 (Chapter 43)

Liability

5. Sale of Goods Act 1979 (Chapter 54) with amendment 1994 (Chapter 32)
6. Sale and Supply of Goods Act 1994 (Chapter 35)

European Information  *Industry Association*

Luxembourg, March 1995

Subject: Legal Guide for Information Service Providers and Users

Dear receiver of the Legal Guide,

Please find enclosed your first version of this Guide.

As is stated in the foreword to the Guide, it will be updated whenever necessary.

If you are interested in receiving new or updated pages to the Guide, we kindly ask you to complete the enclosed subscriber registration form and forward it to:

EIIA
B.P. 262
L-2012 Luxembourg
Fax: (+352) 3498 1234.

We will then enter your name, address etc. into our subscriber file and you will automatically, and free of charge, receive the updates.

Sincerely yours

Lennart Scharff
Executive Director

European Information  *Industry Association*

Legal Guide for Information Service Providers and Users

Subscriber Form

Please keep me on your mailing list for updates to the English version of the Legal Guide.

Name: _____

Company: _____

Address: _____

_____

_____

Postal Code:_____

City: _____

Signature:

_____

Please complete and return to:

EIIA, B.P. 262, L-2012 Luxembourg; Fax: (+352) 3498 1234