

# Contracting and Licensing on the Net

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## INTRODUCTION

1. The immarcescible curiosity of Gunnar Karnell extends to Licensing, the topic of one among his books, and to the new technologies, to which he dedicated quite a few novel remarks and studies.

So, contracting and licensing on the Net is at the juncture of two passions of his, and this contribution will try to follow Gunnar Karnell's example in approaching the topic in an international and comparative perspective.

2. The Net and www are really known means of concluding contracts and licensing agreements since 1995 approximately. Of course, the first e-mail address dates back to 1969; of course, contracting for and downloading of software over phone lines inside the U.S. and between the U.S. and given foreign countries like Brazil become an increasing practice in the 80's. Nevertheless, even the authors of the UNCITRAL Model Law on Electronic Commerce of 1996<sup>1</sup> did not yet consider mainly the present-day practice of contracting in an open environment, with no previous agreement between the parties as to the form and binding affect of sending electronic bids and acceptance<sup>2</sup>.

Naturally enough, the first idea of a Code of Conduct, born in Scandinavia in the 80's, as well as the first ICC

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<sup>1</sup> ONU, General Assembly, 51/162.

<sup>2</sup> See the definition of article 2 (b) Model Law Assuredly Article 2 (a) mentions electronic messages, but as such no mention is made either of net or of www on which most transactions with consumers take place.

Uniform Rules of Conduct for International Trade Data by Teletransmission of 1987 addressed only the trade electronic data interchange in a closed environment, that is between partners who previously agreed to conduct business by way of electronic data interchange.

3. Now, it is obvious that parties to commercial operations are free to set up the contractual framework that will give effect to their data interchange. The legislature may enact some safeguards, but the main principle will be for them "*pacta sunt servanda*". On one point however, the freedom of the parties is rather tightly circumscribed under some national laws : the Statute of Frauds in the common law, and the Civil Code in some codifications that follow the French model do request the respect of given form requirements. Such is not the case under Swiss law and the law of some countries following the German approach, at least as far as licensing is concerned.

Nevertheless, it is manifest that even in those countries where licensing is not subject to any requirement of a given form, licence agreements tend to be executed in writing, would it be only for facilitating their administration and implementation, for tax and accounting purposes, for possible enforcement procedures, etc. As soon as the parties conclude the agreement in writing, the respect of the legal requirement about the detailed form of the parties' consent are applicable again (see e.g. Art. 16 Swiss Code of Obligations, hereafter C.O.)

4. Therefore, any observer of the Net electronic contracting and licensing has to address the making of the contract, both as to the form (sec. I hereafter) and as to the specific functions of the computer (sec. II hereafter).
5. Commercial operations and commercial licensing are not the only transactions over the Net and similar systems of electronic data interchange.

On the contrary, consumers are now drawn to an ever increasing amount of purchase of goods and services, be it under the guise of an outright sale of computers, books, records, or of the licensing of software, or of the booking of touristic accomodations, car rentals, ticketing for air travel or cruises, etc. The type of contract which is then implied in each and every of these transactions may vary from one case to the next, and from one country to its neighbour. Nonetheless, the common ground seems here to be the need for consumer protection and legislative measures in that respect, and the accompanying conflict-of-laws regulations that ensure that the law of the consumer's country of domicile or residence shall apply.

Thus a few observations shall be presented both on the licensing agreements as consumers contracts (hereafter III) and on the applicable law (hereafter IV).

## **I. FORMATION OF THE CONTRACT**

### **A. Characteristics of the Net-Contract**

6. Internet contracts are subject to a three-fold *dematerialization*.
7. a) Parties do not often deal through the real-time intervention of a physical person, be it a party or a representative. Rather, vendor's electronic agents oversee the incoming requests of would-be buyers and direct the whole procedure of concluding the agreement.
8. b) Data Interchange is no longer always confirmed by mail or fax, which was the basic assumption of protective measures as passed in France, then in the European Union for distance contracts<sup>3</sup>.

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<sup>3</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Official Journal NO. L 144, 04/06/1997 p. 0019-0027.

9. c) The subject matter of the agreement is often an intangible asset, like software, or an intangible service, like the access to servers or to the Net, or the service of a host. The particular nature of the service may entail the inapplicability of some specific rules on the performance of the contract<sup>4</sup>, but certainly not its invalidity<sup>5</sup>.

## **B. Form of the Agreement**

### *1. The Form as a Validity Requirement*

10. Switzerland and some other German-law countries, when they exceptionnally require the respect of a given form, do this as a prerequisite of the validity of the agreement. Thus, the law must define the acceptable form of the signature. Which electronic signature will suffice to comply with the requirement of writing ? Therefore, the important law passed in Germany on 22 July 1997 on the Electronic Signature<sup>6</sup> establishes a detailed regulation on authentication services, including among others rules on certification authorities ("cyber-notary public"), training duties of thoses authorities, certificates for public keys, time indications, protection of private personal data, and control and compliance procedures.

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<sup>4</sup> For example, according to a decision by the Landgericht Hamburg, 17 September 1996, the provider contract is a service agreement which is not subject to termination at will according to § 671 BGB (case n° 404 135/96, to be found on [http : //www.online-recht.de](http://www.online-recht.de) as well as all other German cases cited hereafter).

<sup>5</sup> See for a case rejecting the defense of a party who did not want to pay because of the uncertain legal nature of an agreement on videotext, App. Ct. Ludwigsburg, 8 January 1988, Case n° 4C 2763/87.

<sup>6</sup> Gesetz zur digitalen Signatur [short title : Signaturgesetz-Sig G], enacted as a part of bundle of laws known as Gesetz zur Regelung der Rahmenbedingungen für Informations- und Kommunikationsdienste. Bundesgesetzblatt 1997 I, 1870 (the same has adapted German Copyright law).

2. *The Form as a Requirement of Evidence*
11. France (Art. 1341 CCfr.) and some other countries require the respect of writing as a matter of evidence.
  12. The 1994 UNIDROIT Principles of International Commercial Contracts (Art. 1.2) depart from that approach and provide that a contract may be proved by all means, including witness testimony.
  13. The very detailed chapter II of the UNCITRAL Model Law on Electronic Commerce should be seen in the light of UNIDROIT important, albeit private restatement of contractual law - which has already been applied in more than 50 arbitration awards in two years<sup>7</sup> !
  14. It is not the way of the future to seek an international harmonization of the form requirement and to impose on every legal system the necessity of double-key electronic signature and certification through a cyber notary-public. Even if over half the states of the United States have some sort of electronic signature legislation or bill pending, which may be explained by the Statute of Frauds requirement of writing, no statutory law should make compulsory a system of encryption that is certainly state-of-the-art today, but may be obsolescent tomorrow. For example, biometric identification can be state of the art tomorrow on the Net, as they were in Nagano for the Olympic Games participants. Further, the legislation of the U.S., both Utah-style<sup>8</sup> and California-style<sup>9</sup> are default rules. Parties can opt out of the legal effects of the statutes, while under Utah-rules third parties are bound by digitally

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<sup>7</sup> M. J. Bonell, *Erste Entscheidungen zu den UNIDROIT Principles*, 15 Bull. ASA (Swiss Arb. Ass'n) 1997, 600-601. In English see same author, *An International Restatement of Contract Law, The UNIDROIT Principles of International Commercial Contract*, 2<sup>nd</sup> ed., New York 1997.

<sup>8</sup> Utah Digital Signature Act, Utah Code Ann. § 46.3 to be found e.g. on [http : //www.state.ut.us](http://www.state.ut.us).

<sup>9</sup> Cal. Government Code § 16.5; Cal. Health & Safety Code § 102875.

signed documents sent to them unless they affirmatively contracted against such binding effect<sup>10</sup>.

15. In this regard, the draft sec. 2B-113 U.C.C. in the U.S.<sup>11</sup> states the sound principle that

*"a record or authentication may not be denied legal effect, validity, or enforceability solely on the ground that it is in electronic form"*.

In effect, the same solution is proposed under Article 5 of the UNCITRAL Model Law.

16. One could wonder if this would not be sufficient. However, both UNCITRAL and the National Conference of Commissioners on Uniform State Laws had to provide further that a record of the transaction is needed in order for the agreement to be enforceable<sup>12</sup>. The UNCITRAL's proposal fortunately restricts that requirement to the case where an agreement has to be made in writing.

17. Nevertheless, the U.S. approach is also interesting, to the extent that it attempts to escape from the very low threshold above which an agreement has to be made in writing. Draft section 2B-201 (a) (2) (B) exempts from that requirement any agreement requiring payments of less than \$ 20'000.-<sup>13</sup> for options to renew or buy, as well as (C) licenses for an agreed duration of 90 days - a very short time span, which might be justified by the rapid obsolescence of the information that is transferred on the

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<sup>10</sup> See R. A. Horning, American Experiments in Digital Signature Legislation, Symposium Presentation, European Forum on the Law of Telecommunications, Highways and Multimedia, Monaco, April 11, 1997, p. 21.

<sup>11</sup> See e.g. 517 Practising Law Institute, [hereafter PLI] Pat. 287.

<sup>12</sup> See Article 6 UNCITRAL Model Law; draft sec. 2B-201 U.C.C. (the record shall exist at one point in time, but there is no requirement that the record be retained) (see also Art. 10 UNCITRAL on the retaining of the record).

<sup>13</sup> Current dollar figure limitations are \$ 5'000.- in Art. 1 U.C.C., \$ 500.- in Art. 2, and \$ 1'000.- in Art. 2B U.C.C. It is difficult to evaluate

Net, but could be replaced in this writer's view by a longer period of time, such as one year as under the present Statute of Frauds. It seems that the last version of the draft Article 2B (August 1998) extends to more than one year the duration for which the writing requirement is maintained. The practical inconvenience of that short delay is mitigated by the rule that a license contract that is concluded for an indefinite term and can be terminated at will would not require a writing.

**C. Timing of Contract**

18. When is an electronic agreement concluded, that is becoming a completed contract which binds both parties ?
19. If and to the extent that the Net is used as a phone (and it will be so used much more in the future), the contract is made face to face. As a consequence, the offer as formulated by one party has to be accepted immediately by the other one, otherwise there is no contract, in theory at least (see e.g. Art. 4 CO).
20. On the other hand, as soon as the Net is used to forward electronic messages that are not answered at once, the rules on the formation of contract by correspondence will apply per analogy. In that regard, the message sent back by the receiving computer is to be distinguished from an acceptance, since in many cases it is only an acknowledgment of receipt. The acceptance proper shall follow. The time of the formation of contract is then the time of actual receipt of the acceptance itself by the offeror.
21. Is the mailbox rule or its derivative in England, the U.S. and the U.N. Convention on the International Sales of Goods applicable here ? Draft section 2B.120 U.C.C. gives up the tradition that the offeror bears the burden of the loss of

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what £ 20.- (the original amount in the Statute of Frauds of 1677) would make nowadays, but it should not be inferior to \$ 15'000.- to \$ 20000.-.

the acceptance after it has been sent<sup>14</sup>. The effective receipt of the acceptance is required, even if no individual is aware of its receipt. The only exception should be the acceptance by conduct, i.e. for example the use of a data base is made possible to the offeror, even if no communication of the acceptance has taken place - which is a rather theoretical situation<sup>15</sup>.

22. Besides the issue of the burden of the risk of misplacement of the acceptance, the relinquishment of the mailbox rule should carry an important consequence for the timing of the contract. There should be no retroactivity of the timing of the contract to the time when the acceptance was sent (contrary e.g. to Art. 10 par. 1 CO).
23. A bemusing question is that of the "reasonable time" during which a offeror is bound by his or her offer on the Net, if the applicable law provides for a binding effect of the offer. Probably the same span of time as for a telecopy should be allowed for the other party to respond, but a case to case approach is necessary. As a fact, most simple contracts are instantaneously executed by "click-on".
24. As always, careful consideration will be given to the question of who is the offeror, who is the offeree, and what are the consequences of a counter-offer. In the case of most commercial sites, the "virtual window" does manifest a willingness to entertain offers, but it is an invitation to treat rather than an offer proper.

The only exception could be the "shopping arcades" on the Net, where it should be assumed that all orders by a solvent buyer are to be accepted. On the long run, advertising on commercial sites (as opposed to running advertising on a given section of the icon) should be

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<sup>14</sup> In England that rule had already been abandoned for acceptance by telex. See P.S. Atiyah, *An Introduction to the Law of Contract*, 5<sup>th</sup> ed., Oxford 1995, 71-72.

<sup>15</sup> See draft sec. 2B-120 (a) (2) U.C.C.

considered as binding offer, so that buyers could derive rights from these promises and statements.

**D. Contract and Agreement to Contract**

25. As long as the informal approach predicated in the UNIDROIT Principles of International Commercial Transactions and, to a lesser extent, in the draft Article 2B U.C.C. do not prevail around the world, the covenant that is executed on the Net may be envisioned as an agreement to contract (*precontract*) rather than a contract itself. The agreement to contract should not be seen as subject to the same form requirement as the contract itself.

Of course, the true contents of the definitive contract then depends on the documents sent along with the order and/or the bill, as well as the respect of a particular requirement of writing.

**II. SPECIFIC FUNCTION OF THE COMPUTER**

**1. Automatization**

26. Electronic commerce is automated to a large extent. The computers replace the agents of the seller as is witnessed by the fact that "Electronic agents" is the denomination of those systems that govern the reception and acknowledgement of the orders, as well as the shipment of the wares or performance of the services.
27. The legal question is new. Draft sec. 2B-202 (a) U.C.C. for example provides that a contract may be made in any manner sufficient to show agreement, "including by conduct by both parties or operations of an electronic agent which recognize the existence of a contract". The Reporter's Note duly describes the electronic agent as "achieving contract-related effects such as offer, acceptance, performance and

the like without review by a human being"<sup>16</sup>. Now, electronic banking, digital touch-phone orders and related practices have accustomed the private citizens to deal with automated systems, but the lawyers should not be at ease with the concept of a contract made "*without the review by a human being*". At the very least, it should give good arguments to those who think that an objective construction of the contract is required rather than research for the true historic intent of the parties, of course under the aegis of the *good faith* reliance on the objective meaning of the automated words and phases.

28. Naturally enough, in mass-market licenses and transactions, no prerequisite of human review or cooperation may be required. However, as only physical persons and legal entities are susceptible to be party to a contract, the whole point is to make certain that the automated system's response is *attributable* to a physical person or a legal entity. By the way, it is interesting to note that, according to the draft UNCITRAL Model Rules on Electronic Signature (Art. 6), each and every signature for a legal entity must include the key which is the signature of a physical person. Draft sec. 2B-116 (a) U.C.C. only provides for the most general test : an act is attributable to a person if it was in fact the action of that person, a person authorized by it, or the person's electronic agent, or if the other party relied on good faith or on such an attribution, "in accordance with a commercially reasonable attribution procedure".
29. Such a test is slanted in favor of the industry. How could a private consumer, dealing with an automated system that pretends to be the seller A's system, really discover that it is in fact the seller B's system ? It is not fair to require from the buyer that he should follow "commercially reasonable attribution procedure" when the buyer is a

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<sup>16</sup> 517 PLI/Pat. 363.

private person. In that regard, Art. 13 (3) (a) UNCITRAL Model Law is preferable, since it refers to a method previously accepted by the sender to attribute the message.

30. In any event, some misuse of electronic systems may not be ruled out. Art. 13 (3) (b) UNCITRAL Model Law correctly shifts the burden of such a risk to the sender if the message comes from a person which has had access to the method of authentication practiced by the sender, even if this party hacked into the system of sender.
31. There, the law of electronic commerce should join the old German and Swiss tradition of presumptive agency of agency by tolerance ("*Duldungsvollmacht*", "*Anscheinsvollmacht*"). The U.C.C. Draft is somewhat more restrictive, since it is based on the concept of "reasonable care" of the person to whom the message is attributed. This rings of "fault", at least to this writer's understanding. Nevertheless, reliance on the source of the message ought to be protected independently of any fault on the part of the purported sender. The Reporter's Note is not convincing when it declines the analogy with communications law rules<sup>17</sup>. Those rules usually allocate the risk to the owner of a telephone for all calls using that number. Why should the owner of an automated system not answer of misuse made through his system, even if hacked into ? On the business side, spread of loss is usual and insurance policies are available. Finally, that question does not go beyond ordinary consumer protection issues, at least when a consumer is party to the transaction.
32. On the long run, no identical rule should be applied to consumers and the industry. The consumers have to be protected through strict attribution of the industry's messages to the person or legal entity which operates the automated system. The consumers have to be protected

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<sup>17</sup> 517 PLI/Pat. 353.

against an attribution to their personal computer as long as they are not at fault<sup>18</sup>.

## 2. *Access by Relatives and Friends*

33. Minors of age are at least 10 % of the participants on the Net. Most mass market licenses seem to fall within the category of the actions which a minor can undertake under a general authorization of the parents. The use of a personal credit card with PIN is proof of the authorization. If it is not the minor's credit card, but his or her parents' card and PIN that are used, an agency is easy to construe.

### **III. LICENSING AGREEMENTS AS CONSUMER CONTRACTS**

#### **1. An American Restatement of the Law of Licensing**

34. The astounding development of a draft American legislation on licensing (Art. 2B U.C.C.) should alert European scholars to the need to restate our own laws on licensing, if not in codifications, at least in monographs, as Gunnar Karnell has done already. The impact of Art. 2B U.C.C. if and when adopted would be tremendous, because the U.S. provides most of the software and contents which are available on the Net. In the absence of written rules on licensing in most civil law countries, only the *Lex Americana* will be readily accessible and shall rule the Net transactions. Art. 2B U.C.C. will be the *Lex Americana*. This is not the place to discuss the strong opposition against draft Art. 2B U.C.C. on the side of industry; for the time being at least, contents providers appear to prefer no regulation at all to this regulation, even if this draft is more favorable to them than it should be.

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<sup>18</sup> See per analogy ATF (Decisions of the Swiss Federal Tribunal) 111 II 263 ss.

35. Information contracts will be thought of as "licenses", as is access to more conventional intellectual property such as software, movies and games.
36. In general, a property right approach has been taken by the drafters of Art. 2B, in order to ensure a maximum of protection to the licensor. This results in dyssymmetric regulations. For example, licensee's rights under a non-exclusive license are not transferable (Draft sec. 2B-502 (2)). In all licenses contractual restrictions on transfer make transfer to a sublicensee by the licensee ineffective, with the exception of a financier's interest. On the other hand, the performance of the contract may be delegated to a third party, which is still a practical solution at a time when service companies are sold as hot buns. Detailed rules bear on the priority of rights in case of successive transfers of licenses by the copyright owner (Draft sec. 2B-508). In many of these areas, it is not exaggerated to state that U.S. law is more developed than most continental laws, perhaps because these problems do not arise in Europe with the same frequency.

## 2. *For a More Consumer-Oriented Approach*

37. Licensing transactions have been typically commercial transactions between businessmen. To restate the law of licensing in order to apply it to transactions on the Net is delicate, since the specific needs of the consumers may not be heeded. Licensing is the subject matter of very little compulsory law with the exception of antitrust regulations. On the other hand, the law of distance selling as enacted in the E.U. Directive No. 97/7 on distance contracts of 20 May 1997<sup>19</sup> seems difficult to apply for Internet licenses. A minor point first : the exception for one-time only access to an information [Art. 5(2)] seems too narrowly worded, so that several transactions with the

same data bank would entail the application of the directive. But the major uncertainty concerns the right to opt out of any distance contract within seven days (Art. 6). This is wholly impracticable in the Net environment, and it was suited to the need of consumers who were solicited to deal over the phone. In fact, on the Net, consumers generally go of their own initiative to the sites where an offer to contract is made. Then there is no surprise for them if they buy some goods or contract for some services. Therefore, the main premise of the right of retraction is not present on the Net. As a consequence, even if the current trend of thought is to the contrary, it is this writer's opinion that the directive should not apply at all for the Net.

38. This is not to say that other measures could not or should not be taken in favour of the consumers, annulment of a fraudulent payment by credit or debit card, for example, or protection against unilateral terms and conditions that transfer all the risk of loss or damage of a shipment to the consumer.
39. The question is especially acute for the incorporation of General Terms and Condition by reference, a topic for which deadlock has been lasting for a long time in the meetings of UNCITRAL on the electronic signature<sup>20</sup>.
40. Finally, the widely diverging view on consumer protection in the U.S. and in the E.U. entails that conflicts of laws provisions shall have to be worked out, since the substantive rules would not always lead to the same solution to a given litigation on both sides of the Atlantic Ocean.

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<sup>19</sup> Official journal NO L 144, 04/06/1997 P.0019.

<sup>20</sup> See Nations Unies, Rapport de la Commission des Nations Unies pour le droit commercial international sur les travaux de sa trente et unième session, 1<sup>er</sup>-10 juin 1998, Ass. Gén. Suppl. n° 17 (A/53117), n°s 212-221, pp. 25-27.

## IV. CONFLICTS OF LAWS

### A. Autonomy of the Parties

41. Both the draft sec. 2B-107 (a) U.C.C. and most modern European legislations<sup>21</sup> - as well as the Rome Convention of 1980 (Art. 3) spell out the principle of party autonomy without any requirement as to a reasonable relationship between the transaction and the chosen *lex causae*. For the U.S., this is a considerable improvement of the old-fashioned Sec. 1-105 U.C.C. For example, it would allow a U.S. party and a Hungarian party to select Swedish or Swiss Law to govern their contract.
42. Where consumer contracts are concerned, the party autonomy is strongly restricted by the mutual distrust of the various jurisdictions. Article 120 par. 2 Swiss LDIP e.g. excludes the choice of law for a consumer contract, which is defined as aiming to provide wares or services for the personal use of the buyer and is not in relation with his or her professional or commercial activities. Draft sec. 2B-107 U.C.C. is more liberal; of course, a special status is foreseen for consumer contracts, but quite a differentiated one :
- a. choice of law is still possible;
  - b. however, the choice will not be enforced "to the extent it varies a rule that cannot be varied by agreement under the law of the jurisdiction whose law would apply in the absence of an agreement".
43. That formulation is certainly a step in the right direction. Nonetheless, it disregards the distinction between international public policy (i.e., public policy of a given state as applies in international transactions) and national mandatory laws, statutes and regulations. Without

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<sup>21</sup> See e.g. art. 116 Swiss Law on International Private Law [hereafter LDIP] of 18 December 1987.

that distinction, the most trifling mandatory rule of one of the 200 or so States hooked to the Net might be applicable to a consumer case. In my view, it would be better to state that "the choice of law is not enforceable to the extent it varies a rule that cannot be varied by agreement *in international transactions* under the law of the jurisdiction whose law would apply in the absence of the agreement".

**B. Applicable Law in the Absence of a Choice of Law**

44. Under Art. 122 Swiss LDIP, the licensor's law is applicable to all licensing operations on the Net (and elsewhere). Such a well-founded rule had been advocated since 20 years especially in view of the multi-countries licensing operation<sup>22</sup>, and it became law in Switzerland over the opposition of a doctrine terribly attached to the territoriality principle.
45. Now, one is delighted to read in the Reporter's Notes to draft sec. 2B-107 (3) that the law of the location of the licensor (and not the location of his or her computers) will be applicable when an on-line vendor provides direct marketing to the world through Internet; "any other formulation would require the vendor to comply with the law of fifty states and 170 countries"<sup>23</sup>.
46. Generally speaking, the licensor's law is applicable because the licensor provides the characteristic performance under the license agreement. The law of the country of his main place of business applies because it is the law with which his organization has to comply, and to

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<sup>22</sup> See F. Dessemontet, Transfer of technology under UNCTAD and ECC Draft Codifications : a European View on Choice of Law in Licensing. *Journal of International Law and Economics* 12/1977, pp. 47, 49 and fn. 55.

See also *id.*, Les contrats de licence en droit international privé, in *Mélanges Guy Flattet*, Lausanne 1985, p. 444.

<sup>23</sup> 517 PLI/Pat. 337.

the requirements of which it is therefore mainly geared in its daily business. Further, it is also the law that shall be applied to his liability, i.e. where the assets are seized to enforce a judgement or an arbitral award.

47. For the Internet commerce, the licensor's law has two decisive advantages :
- 1) Where the conclusion and performance of contract are dematerialized, it is welcome to have a test which no longer relies on the place of performance;
  - 2) The licensor's law is known to the licensor, or should be understandable for him or her without great ado and expensive legal research abroad. Thus, that test furthers *trust* in international dealings, especially to the extent that contents providers are not only huge corporations that may finance extensive comparative law studies to formulate their terms and conditions, but small-size software and game producers that cannot.
48. As has been intimated above<sup>24</sup> the licensor's law will oftentimes be the *Lex Americana*, because for the time being, contents providers have to a large extent their main place of business in the U.S. An interesting German decision states for example that Compuserve in Ohio is the party using General Terms and Conditions with the German subscribers who have access to the Net through Compuserve, and not the German subsidiary of Compuserve<sup>25</sup>. Frankly, is that such a drawback for European, Latin American, Asian, Australian and African licensees that U.S. law should be applicable on the Net absent a choice of law by the parties ? Their own law is rather sketchy, scattered in sparse precedents and commented by too few authors who preceded or followed Gunnar Karnell's book on licensing.

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<sup>24</sup> See n° 34 hereabove.

<sup>25</sup> See Landgericht München I, 19 September 1996, 21 0 5002/96.

49. As that juncture, it may be recalled that Eugen Langen proposed in the 70's to see in the law governing the licensing operations the best example for a transnational body of law, that is a law that would be aiming at uniform answers through convergence of the national traditions and precedents, as well as the prevalent influence of international arbitral awards that state general principles of law without stopping at the particular formulation that a given Civil Code on precedent has given to them<sup>26</sup>. Some awards give the example of that free research of substantive law solutions premised on the similar provisions or precedents of the countries that are involved in the licensing transactions<sup>27</sup>. The Net revolution leads on to think that the transnational law of licensing is about to be born.

## CONCLUSION

50. What can be the basis for a transnational body of licensing law ? Obviously, some important sources are already available, among which the UNIDROIT Principles of International Commercial Contracts, the U.S. Antitrust Division Guidelines for Licensing Operations and the E.U. Regulation 240/96 of 31 January 1996 on Licensing.
51. A most gallant effort to restate the law of licensing on the Net has been undertaken by Professor R. Nimmer in the draft Article 2B U.C.C. It is now the most urging task of non-American scholars and practitioners to comment on those proposals. Even if it is likely to be shelved in the U.S.

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<sup>26</sup> E. Langen, *Transnational Commercial Law*, 1979, esp. 33 et seq. E. Langen also published *Internationale Lizenzverträge*, 2<sup>nd</sup> ed. 1958 (in English G. Pollzien and E. Langen, *International Licensing Agreements* [2<sup>nd</sup> ed. 1973]).

<sup>27</sup> See e.g. ICC Award N° 4496, as reported by S. Jarvin in *XXIII Les Nouvelles* (1988), *Arbitrating International Disputes*, 23 (on termination for cause, here deemed not to be possible because no warning had been previously issued and no period fixed within which changes had to be carried through).

because of the opposition of contents providers, it would warrant further action, probably as a basis for some transnational Code of Licensing on the Net. A less developed version, stating principles rather than minute details, trying to synthesize most Western-countries approaches to licensing is called for. No final harmonization may be hoped for the protective measures concerning consumers. But American contents providers should realize that a restated law is better than none when they have to convince courts abroad that their business practices are not horrendous nor deceptive. They should therefore accompany the works leading to such a restatement rather than try to block it.

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