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**FOLLOW-UP TO THE GREEN PAPER ON COPYRIGHT AND RELATED RIGHTS IN
THE INFORMATION SOCIETY**

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SUMMARY

Introduction

1. The existence of a Single Market for new products and services is vital for the development of the Information Society in Europe. It will contribute towards generating new products and services that have a diversity of content, which is essential to attract users on a large scale. The Single Market must offer adequate and secure investment conditions and legal security: it must not be jeopardised by fragmented, inconsistent national responses to technological developments. Indeed almost all Member States have already launched reflections on the challenges presented by of multimedia and digitisation, particularly in the area of copyright.

2. In several fields, important legislation to build a general and flexible regulatory framework for the Information Society at European level has already been adopted (such as in the fields of telecommunication, data protection or database protection). Others are well underway in addition to copyright (Commission Green Papers on encrypted services, commercial communications, protection of minors in audiovisual services, the draft directive on a "transparency mechanism"). Copyright plays an important role in this context. With the Green Paper on Copyright and Related Rights in the Information Society¹, the Commission focused the debate on the challenges to copyright and related rights which were being brought about by the new technologies.

3. Consultation of interested parties has confirmed the need for further action in this field, action that needs to be undertaken within the Single Market framework and be consistent with existing concepts and traditions. Such action should not imply radical changes to the existing regulatory framework. In the present paper the Commission sets out its conclusions reached in the area of copyright and related rights in the Information Society, and explains the reasoning behind the approach adopted, notably with respect to the priorities and means of action chosen.

Chapter 1

4. Further harmonisation needs to adjust and/or complement the existing legal framework, where this is necessary for the proper functioning of the Single Market and needs to bring about a favourable environment which protects and stimulates creativity and innovative activities across Member States. Europe's traditionally high level of copyright protection must be maintained and further developed. At the same time, a fair balance of rights and interests between the different categories of rightholders and between rightholders and rightusers must be ensured.

Chapter 2

5. The consultation process identified a number of issues requiring immediate action in order to eliminate significant barriers to trade in copyright goods and services and/or distortions of competition between Member States. Proposals will be presented shortly in respect of:

- Reproduction right: Harmonised measures will be proposed in order to define the scope of the acts protected by the reproduction right, including the limitations to it, in so far as this has not yet been achieved in Community legislation. There will also need to be some differentiation between unlimited exclusive rights of reproduction, rights to remuneration (legal license), and certain acts of reproduction permitted without remuneration (fair use exception).

¹ COM (95) 382 final, 19.07.1995.

- Communication to the public right: Digital “on-demand” transmissions will be protected on the basis of a further harmonised right of communication to the public as outlined in the submissions made by the Community and its Member States during the present negotiations in WIPO. Harmonised measures will also set out the limitations to this right; such limitations will be similar to those for the harmonisation of the reproduction right.
- Legal protection of the integrity of technical identification and protection schemes: Legal protection of such schemes will be harmonised at Community level, defining in particular the precise scope of protection, including the infringer’s liability.
- Distribution right: The distribution right for authors as regards all categories of works will be harmonised so that only the first sale in the Community by or with the consent of the rightholder exhausts the distribution right. Harmonised legislation should also affirm that the principle of exhaustion applies to the distribution of goods only and not to the provision of services, including on-line services.

Chapter 3

6. Other issues equally fundamental to the exploitation of copyright in the Information Society necessitate further consideration and/or action before decisions can be made.

- Broadcasting right: The impact of multichannel broadcasting on the market may imply a need for harmonised action in favour of certain related rightholders, depending on the relevant market developments. The Commission intends to continue to evaluate relevant market developments in collaboration with interested parties and Member States. If the need for action is confirmed, a legislative proposal will quickly follow.
- Applicable law and law enforcement: Given the complexity of the existing legal situation, the Commission will publish a clarifying Communication which addresses questions on matters concerning the applicable law as well as questions relating to the enforcement of rights. The Commission is considering the issue of liability for copyright infringements with a view to a possible initiative at EU level.
- Management of rights: The Commission will continue to study the issue of management of rights with particular regard to the way the market evolves in response to the Information Society. The need for a comprehensive and coherent initiative at Community level which fully takes into account Single Market and competition aspects will be considered.
- Moral rights: The Single Market dimension of moral rights gains more shape than before in the traditional environment. At this point, the Commission proposes to further study market developments in particular to consider whether existing disparities in the legislation constitute significant obstacles for the exploitation of works and related subject matter in the Information Society, which could require a harmonised protection of moral rights across the EU.

Chapter 4

7. Any response to the current challenge would be incomplete if not accompanied by adequate protection at international level. Any international agreement should cover, in particular, the nature of the rights to be applied to acts of digital transmission; the scope of the reproduction right and the *sui generis* protection of databases. Negotiations currently underway in WIPO should provide the opportunity for reaching international agreement in parallel with the preparation of Community harmonisation.

INTRODUCTION

1. The building of a regulatory framework for the Information Society at Community level

The Commission's policy on the Information Society has been established in its Communication on "Europe's way to the Information Society. An Action Plan"². This action plan stresses the need for building a general and flexible regulatory framework, covering all regulatory fields directly linked to the development of the Information Society. While a number of measures have already been undertaken, notably regarding the creation of an appropriate information infrastructure, the focus of regulatory action now also comprises issues directly linked to new products and services. These will, in many cases, contain and be based on material protected by copyright and related rights such as databases, audio-visual works, musical works, or fixed performances. Copyright and related rights are therefore an essential element in this exercise as they protect the products and services necessary to make the Information Society a reality.

The existence of a Single Market for new products and services is vital for the Information Society to develop in Europe. Only a Single Market will generate new products and services on a large scale, in particular as these will often be destined for niche markets. The existence of a critical mass of demand from service providers will be necessary to ensure that the substantial investments required in network infrastructure will be forthcoming. A large range of products and services with a diversity of content is, at the same time, imperative to attract users. Rightholders will, however, only make their protected material available if the rights granted to control its exploitation offer them adequate protection. Thus, it is important that adequate and secure investment conditions as well as legal security are available across the EU and that the Single Market itself will not be jeopardised by inconsistent national responses to these technological developments. Such risks are not theoretical. Almost all Member States are already actively considering ways of meeting the challenge of multimedia and digitisation, particularly in the area of copyright. The Community must therefore act to ensure coherent responses across Member States, allowing for a level playing field, both with regard to the development and marketing of new products and services and with respect to the creation and exploitation of their creative content.

Important measures to build a general and flexible regulatory framework for the Information Society at European level have already been adopted. Examples are to be found in the area of copyright (in particular the Database Directive³) and in other areas directly linked to the development and application of new products and services, such as data protection (the Data Protection Directive⁴). Other aspects of the regulatory framework for Information Society services are currently under consultation (Green Paper on the legal protection of encrypted services⁵, Green Paper on commercial communications in the Internal Market⁶, Green Paper on

² Europe's way to the Information Society. An Action Plan. Communication from the Commission, COM (94) 347 final, 19.7.1994.

³ Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, OJ L 77/20 of 27.3.1996.

⁴ Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31 of 23.11.1995.

⁵ Legal Protection for Encrypted Services in the Internal Market - Consultation on the Need for Action, Green Paper from the Commission, COM (96) 76 final, 6.3.1996.

⁶ Commercial Communications in the Internal Market, Green Paper from the Commission, COM (96) 192 final, 8.5.1996.

the protection of minors and of human dignity in new audiovisual and information services⁷). Their aim is to further clarify the exact shape of the emerging Information Society framework, and at which level action must be taken. Thus the Commission has proposed a directive for a "transparency mechanism", which is intended to safeguard the coherence and flexibility of regulatory measures, while avoiding the risk of over-regulation at Community level⁸.

2. The Green Paper on Copyright and Related Rights in the Information Society

In line with the "Bangemann report" on "Europe and the Information Society"⁹, the Commission's action plan identified intellectual property protection as a key issue given the critical role creative content and innovation will play for the development of the Information Society. The report therefore called for an examination of all measures in this field, to see whether they responded to the new technological challenges and to examine if additional measures were required. To this end, a Green Paper on Intellectual Property Protection in the Information Society was announced, which was published by the Commission on 19 July 1995¹⁰. This Green Paper focused the debate with the other Community institutions, Member States, industry, rightholders, users and all other interested parties on the challenges to copyright and related rights brought about by the new technologies. The choice of issues studied in the Green Paper was based on the interest shown by interested parties in their written responses to a questionnaire on "Intellectual Property in the Information society"¹¹ and at a hearing in Brussels on July 7 and 8, 1994.

Following publication of the Green Paper interested parties provided more than 350 submissions. Specific questions relating to the exploitation of rights¹² were further discussed at a hearing in Brussels on 8 and 9 January 1996. The consultation process was concluded in the framework of a conference organised by the Commission in Florence from 2 to 4 June 1996¹³.

3. Content of this Communication

Based on the results of the consultation, this Communication sets out the Commission's Single Market policy in the area of copyright and related rights in the Information Society, and explains the reasoning behind its approach, notably with respect to the priorities and means of action chosen. Thus all issues are presented in a coherent context whilst addressing both priority items for legislative action as well as those requiring further consideration before decisions can be taken. The Communication also refers to the international negotiations which are running in parallel within the World Intellectual Property Organisation (WIPO), and which also deal with the digital agenda.

⁷ Green Paper on the Protection of Minors and of Human Dignity in New Audiovisual and Information Services, COM (96) 483, 16.10.1996.

⁸ Communication from the Commission concerning regulatory transparency in the Internal Market for Information Society services and a Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, COM (96) 392 final, 30.8.1996.

⁹ Europe and the Global Information Society - Recommendations of the High-level Group on the Information Society to the Corfu European Council, 26.5.1994.

¹⁰ Cf. footnote 1 above.

¹¹ See replies from interested parties on "Copyright and neighbouring rights in the information society", ISBN 92-827-0204-9.

¹² Chapter 2, part 3 of the Green Paper (Section VIII: Acquisition and management of rights, Section IX: technical systems of identification and protection).

¹³ "Copyright and Related Rights on the Threshold of the 21st Century", organised by the European Commission, DG XV, in co-operation with the Italian Authorities, Florence, Italy, 2.-4.6.1996.

CHAPTER 1: COPYRIGHT IN THE SINGLE MARKET

1. The economic context

The market for copyright goods and services ranges Community-wide from between 5 and 7% of the GNP. This market is comprised of a large variety of products and services, containing protected subject matter, ranging from traditional products, such as print products, films, phonograms, graphic or plastic works of art, electronic products (notably computer programs), to satellite and cable broadcasts, CD and video rental, theatres and concert performances, literature and music, art exhibitions and auctions. This enumeration is far from being exhaustive and reveals the already numerous ways of marketing intellectual property. The Information Society has added new forms of marketing intellectual property, such as through new electronic products (CD-ROM, CD-I, ...) or "on-demand services", which are provided electronically at a distance, over the networks, on specific request from the consumer. A large variety of such "on-demand services" has already emerged in the marketplace.

Growth rates can be witnessed in a large number of these fields, and this is also true for the "traditional" ones. The music market is one example: over the last decade, the volume of CD sales has almost doubled in Europe, representing 60% growth; CD retail sales still rose 14% in the first half of 1995, even though the (traditional) European music market is by now considered to be "mature"¹⁴. With the impact of new technologies which will multiply and diversify the vectors for creating, producing and distributing works and other subject matter, this copyright market will continue to grow.

In the field of broadcasting, virtually unlimited transmission capacity will substantially increase the number of programmes available to consumers. The number of TV channels is expected to increase from 117 to 500 by the year 2000 with an increase of TV broadcast hours from 650.000 to 3.250.000 over the same period. Moreover, encrypted programming hours are predicted to increase by a factor of 30¹⁵.

Examples for growth potential are also to be found in the field of multimedia products (CD-ROM, CD-I, CD-TV,..) and software¹⁶, a market, which is forecast to grow by 16% a year over the next years¹⁷. Another market segment with great potential is the emerging market in on-demand services. With further technological development in place, a large variety of "on-demand services" will allow a multitude of new means of exploiting works. This new market will offer a wide range of "on-demand" services, with a vast choice of options to use protected material. These new opportunities will also be of major relevance to electronic commerce (understood as "on-line business").

¹⁴ Cf. International Federation of the Phonographic Industry (IFPI), "Key Facts on the Music Market Industry in Europe", 1995, p. 8.

¹⁵ For further details cf. White Paper of the European Commission on "Growth, Competitiveness, Employment. The Challenges and ways forward into the 21st century", 1994, p.123.

¹⁶ Business Software Alliance (BSA), Contribution of the Packaged Business Software Industry to the European Economies, July to November 1994.

¹⁷ Cf. White Paper of the European Commission on "Growth, Competitiveness, Employment. The Challenges and ways forward into the 21st century", 1994, p. 107.

All the parties involved (rightholders and other content providers, manufacturers, service providers, network operators, professional users and private user groups) emphasise that these developments will not take place without a functioning and effective Single Market in copyright and related rights. There is a clear call for an appropriate legislative framework at Community level, a level playing field that the market forces can build upon, ensuring the adequate protection of intellectual property rights and providing the opportunity for satisfactory financial returns on investment to be made.

2. Our existing copyright legislation will form a basis for the Information Society

In view of the distortions of competition between Member States and the legal uncertainty for rightholders, as well as for rightusers, caused by substantial differences in copyright protection between Member States, the area of copyright and related rights was identified by the 1985 White Paper on the completion of the Single Market as one of those where harmonisation at Community level was crucial¹⁸. This need for harmonisation became even more evident with the emergence of new technologies, such as video tapes, digital audio tapes or compact discs, computer programs or electronic databases, satellite and cable TV, which had *de facto* led to an abolition of national borders. This was confirmed by the consultation procedure the Commission had undertaken on the basis of the 1988 Green Paper on "Copyright and the new Technologies"¹⁹.

As a result, the Community adopted harmonising legislation focusing on those issues where differences in copyright protection between Member States or situations of legal uncertainty made rightholders reluctant to consent to the exploitation of their property in particular territories. This concerned, most notably, key issues linked to the legal protection of computer programs and databases, cable and satellite broadcasting, rental rights, lending rights, certain neighbouring rights as well as the duration of protection. This harmonisation, ensuring a high and comparable level of copyright protection across Member States, has created a positive climate for innovation and creativity, which, at the same time, facilitates the exploitation in the whole of the Community.

However, harmonisation initiatives in the field of copyright and related rights have not been targeted at eliminating the possibility of restricting the exercise of rights to a particular territory. On the contrary, in line with the principles established by the Court of Justice, the Community legislation acknowledges the underlying *rationale* of intellectual property rights, which is to give rightholders effective means of exercising their property rights, while respecting the limits and exceptions set out both at Community level, most notably in the Treaty of Rome, and at national level. This implies that rightholders may legitimately limit the exercise of their property rights to particular geographical markets, which may be regional, national or Community wide, and/or to a particular time frame.

¹⁸ The Completion of the Internal Market - White Paper of the Commission to the attention of the European Council, COM(85) 310 final, 14.6.1985, p. 38 *et sequ.*

¹⁹ Green Paper on Copyright and the challenge of technology - Problems in copyright calling for immediate action, COM(88)172 final, 17.6.1988. Cf. also Follow-up to the Green Paper - Working program of the Commission in the field of copyright and neighbouring rights, COM(90) 584 final, 17.1.1991.

The feedback from interested parties confirmed that all five directives²⁰, although not explicitly shaped according to the features of the Information Society, will have a role to play in this new environment. However, as most new services will be operated from an electronic database available over the networks (on-line) or off-line (CD-ROM, CD-i etc.), the Database Directive is a cornerstone of intellectual property protection in the new technological environment.

3. The Information Society makes further harmonisation necessary

Consultation of interested parties clearly confirmed the need for further harmonisation of copyright and related rights, stressing its place within the Single Market framework and the need to follow the *rationale* and the pragmatic structure of the harmonisation already in place. Also the Information Society Forum and the High Level Expert Group on the Social and Societal Aspects of the Information Society, in their respective reports to the European Commission²¹, identified intellectual property protection as an important policy issue, calling for adjustments and clarifications of existing rules in this area, where appropriate to ensure a favourable environment for creativity and investment across Europe.

The use of computer technology, digitisation and the convergence of communication and telecommunication networks are already having an enormous impact on the transborder-wide exploitation of literary, musical or audio-visual works and other protected subject matter such as phonograms or fixed performances. Such impact will undoubtedly greatly increase in the near future. Moreover, given the investment involved, the marketing of new products and services can only be fully viable in a genuine Single Market. Where necessary for the functioning of the Single Market and the creation of a favourable environment which protects and stimulates creativity and innovative activities across Member States, the existing legal framework will need readjustment. In so doing, the traditionally high level of copyright protection in Europe must be maintained and further developed at European and international level, reflecting that the subject matter is property and is, as such, guaranteed by the constitution in many countries. At the same time, a fair balance of rights and interests between the different categories of rightholders, as well as between rightholders and rightusers, must be safeguarded. New legislative action at Community level must meet the needs and practises of copyright markets and be consistent with, and accommodate, existing concepts and traditions. Such action should not imply radical changes to the existing Single Market regulatory framework. It is the environment in which works and other protected matter will be created and exploited which has changed - not the basic copyright concepts.

²⁰ Council Directive 91/250/EEC on the legal protection of computer programs (the "Computer Programs Directive"), OJ L 122/42 of 17.5.1991; Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the "Rental Right Directive"), OJ L 346/61 of 27.11.1992; Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (the "Satellite and Cable Directive"), OJ L 248/15 of 6.10.1993; Council Directive 93/98 harmonising the term of protection of copyright and certain related rights (the "Term of Protection Directive"), OJ L 290/9 of 24.11.1993; Council and European Parliament Directive 96/9 on the legal protection of databases (the "Database Directive"), OJ L 77/20 of 27.3.1996.

²¹ See the First Annual Report to the European Commission from the Information Society Forum "Networks for People and their Communities", June 1996; and the First Reflection Report to the European Commission from the High Level Expert Group on the Social and Societal Aspects of the Information Society, entitled "Building the European Information Society for us all", January 1996.

CHAPTER 2 : PRIORITY ISSUES FOR LEGISLATIVE ACTION AT COMMUNITY LEVEL

1. REPRODUCTION RIGHT

The Issue

In the Information Society environment, traditional forms of reproduction (making of a physical copy) coexist with a multitude of new forms of reproducing works and other protected matter, such as scanning of a printed work, or loading and/or storing of digitised material in a computer memory or other electronic system or device. Reproduction may also arise from incidental and ephemeral acts which occur from normal use of an electronic system, for instance, when transmitting material over the nets, such as the Internet. The question has arisen how far such new acts of reproduction are covered by the traditional reproduction right, which still significantly focuses on the traditional understanding of making copies on paper, tape etc. from print works, phonograms or television. Protected material, once converted into electronic form and transmitted digitally, is much more vulnerable to exploitation by copying. This is true both in qualitative terms (notably in view of the ease, speed and quality of copying material) and in quantitative terms (large scale exploitation of protected material by a broad public). The traditional reproduction right and the legitimate exceptions to it therefore need to be reassessed and adapted to the new environment, where this is found to be necessary, in order to ensure that a clear and adequate level of protection is achieved.

Present Coverage

At international level, the exclusive reproduction right is granted to authors, performers, phonogram producers, and broadcasting organisations, on the basis of the Berne Convention, the Rome Convention and the TRIPs Agreement respectively. In view of the broad formulation of this right in these instruments, its concept is wide enough to cover all methods of reproduction, even electronic ones, which may not be perceptible to the human senses. The limitations set out to these rights vary. The Berne Convention provides for a very general limitation, entitling countries of the Union to provide for limitations in "certain special cases", which do not "conflict with a normal exploitation of the work" and "unreasonably prejudice the legitimate interests of the author" (Art. 9§2). The limitations set out in the Rome Convention for related rightholders are wider to some extent. The need to adapt or clarify the scope of the reproduction right for the new electronic environment has been identified in the course of the on-going negotiations in WIPO. The Community and its Member States have made specific proposals on the reproduction right in this context (see Chapter 4).

All Member States provide for an exclusive reproduction right for all categories of rightholders, whereas their provisions differ widely as to the scope of that right and the exemptions to it. Most of the relevant legislative measures do not expressly deal with digital uses of protected works and modern forms of reproduction. Member States appear to agree that permanent electronic storage is a restricted act, but views differ with respect to the treatment of transient or ephemeral acts of reproduction. As regards the exceptions/limitations to the reproduction right, some of the national legislative measures provide for many copyright privileges, others for only minimal exceptions, and still others

for none. Almost all Member States stipulate exceptions or legal licenses for “copying for private use”. In view of the substantial impact private copying has on the exploitation of copyright and related rights, eleven out of fifteen Member States provide for levy systems, which vary widely in their scope and the way in which they function .

At Community level, the right of reproduction has been harmonised for some categories of rightholders, and only for some copyright and neighbouring right aspects²². Only the relevant provisions for the benefit of authors’ rights, where they have been harmonised, but not the neighbouring rights provisions, define the scope of and legitimate exceptions to the reproduction right . The Computer Programs Directive defines protected acts of reproductions as all “permanent or temporary reproduction ... by any means and in any form ...”²³. An equivalent approach is followed in the Database Directive²⁴. In view of the economic impact of reproductions on these categories of work, both Directives harmonise the exceptions to the right, including the treatment of “copying for private use”, which is essentially subject to an exclusive right²⁵.

Therefore, a substantial degree of uncertainty exists as regards the precise acts of reproduction which are protected by the reproduction right - notably with respect to the new electronic environment. Furthermore, the level of protection varies substantially between Member States, as it has been harmonised only to a small extent.

Single Market Relevance

The exclusive right of reproduction is one of the core rights of intellectual property (“copyright”). Effective exploitation of works and other related matter across the EU therefore requires clear predictability for rightholders and users on what exactly is protected as well as an equivalent level of protection across the EU with respect to this important right. The present situation is characterised by legal uncertainty, in particular with respect to the degree of protection of on-line exploitation of protected material, and the significant differences in protection, particularly as regards exceptions. It has a negative affect on the proper functioning of the Single Market in copyright. This is also true for the specific issue of reproductions made for private purposes.

The need for a sufficient degree of harmonisation providing for a strong and effective reproduction right has grown substantially with the emergence of the Information Society. This is particularly so given the economic consequences of electronic forms of reproduction on the exploitation of intellectual property. A level playing field for the reproduction right is, quite simply, crucial.

Comments submitted in the consultation

Virtually all of those who responded support the need for further harmonisation of the reproduction right at Community level, including its scope and limitations. A large majority of parties seeks a wide definition of the acts covered by the exclusive right, clarifying that acts in the electronic environment, such as scanning, uploading or downloading are also

²² Cf. Article 4 of the Computer Programs Directive, Article 5 of the Database Directive, Articles 7 and 10 of the Rental Right Directive.

²³ Article 4(a) of the Computer Programs Directive.

²⁴ Article 5 of the Database Directive.

²⁵ Cf. Article 5 of the Computer Programs Directive and Article 6 of the Database Directive.

