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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 Society<sup>1</sup>, 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).

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<sup>1</sup> 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"<sup>2</sup>. 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 Directive<sup>3</sup>) and in other areas directly linked to the development and application of new products and services, such as data protection (the Data Protection Directive<sup>4</sup>). Other aspects of the regulatory framework for Information Society services are currently under consultation (Green Paper on the legal protection of encrypted services<sup>5</sup>, Green Paper on commercial communications in the Internal Market<sup>6</sup>, Green Paper on

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

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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 services<sup>7</sup>). 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 level<sup>8</sup>.

## **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"<sup>9</sup>, 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 1995<sup>10</sup>. 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"<sup>11</sup> 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 rights<sup>12</sup> 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 1996<sup>13</sup>.

## **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.

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

<sup>8</sup> 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.

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

<sup>10</sup> Cf. footnote 1 above.

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

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

<sup>13</sup> "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"<sup>14</sup>. 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 30<sup>15</sup>.

Examples for growth potential are also to be found in the field of multimedia products (CD-ROM, CD-I, CD-TV,..) and software<sup>16</sup>, a market, which is forecast to grow by 16% a year over the next years<sup>17</sup>. 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").

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

<sup>15</sup> 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.

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

<sup>17</sup> 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 crucial<sup>18</sup>. 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"<sup>19</sup>.

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.

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<sup>18</sup> 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.*

<sup>19</sup> 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 directives<sup>20</sup>, 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 Commission<sup>21</sup>, 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.

<sup>20</sup> 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.

<sup>21</sup> 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 aspects<sup>22</sup>. 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 ...”<sup>23</sup>. An equivalent approach is followed in the Database Directive<sup>24</sup>. 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 right<sup>25</sup>.

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

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

<sup>23</sup> Article 4(a) of the Computer Programs Directive.

<sup>24</sup> Article 5 of the Database Directive.

<sup>25</sup> Cf. Article 5 of the Computer Programs Directive and Article 6 of the Database Directive.

covered. The situation appears less clear with respect to the treatment of temporary or ephemeral acts of reproduction.

There is a consensus that further harmonisation should also comprise legitimate exceptions / limitations to the reproduction right, although views differ with respect to the direction such harmonisation should take. A number of parties suggest the general “economic prejudice” clause in Article 9§2 of the Berne Convention as a point of reference. As regards reproductions made for private purposes, the majority of parties considers that the issue should be tackled when harmonising the reproduction right, and this with respect to “digital” and “analogue” private copying. There is a substantial difference of opinion on the exact treatment of “private copying”. The majority of rightholders, editors and parts of industry are against providing any kind of private copy exception (or any other limitation) in the digital environment, arguing that such reproductions would conflict with the normal exploitation of the work. Such an unlimited exclusive right would in their view also be enforceable, as new technology is shortly expected to allow the effective control of private copying. The need for an unlimited exclusive right is contested by other parties, most notably by user groups.

### **Proposed Action**

The Commission recognises that the new environment implies a multitude of new forms and a new quality of reproduction. These require clear predictability on what exactly is protected as well as an equivalent level of protection across the EU. The Commission intends therefore to pursue further harmonisation of the reproduction right as a matter of priority.

Any initiative will define the exact scope of the acts protected by the reproduction right with respect to all its beneficiaries - authors and related rightholders. This should be done along the lines of the *acquis communautaire*. Such an approach could clarify that the digitisation of works and other protected matter, as well as other acts such as scanning, or uploading and downloading of digitised material are, in principle, covered by the reproduction right. It would also cover, for the same reasons, transient or other ephemeral acts of reproduction. Unless, as a starting point and without prejudice to explicit limitations or exceptions, such a wide coverage is provided for at EU level, consistent protection across Member States would remain ephemeral.

Harmonising the limitations/exceptions to the reproduction right will be of utmost importance. The present differentiation in Member States’ legislation or case law, notably between unlimited exclusive rights of reproduction, cutting down the exclusive right to a right of remuneration (legal license), and permitting certain acts of reproduction without remuneration (fair use exception), has to be reassessed in the new electronic environment.

The guiding principles for a harmonisation can be derived from the *acquis communautaire*. Accordingly, the right of reproduction should be adapted to the digital environment. In more cases than at present, therefore, rightholders may enjoy, without limitation, an exclusive right to authorise or prohibit acts of reproduction. Such an approach should be taken where certain acts of reproduction would risk unreasonably prejudicing the rightholder’s legitimate interests or which would conflict with normal exploitation of his intellectual property. In cases where such a risk is less significant or where such an exclusive right is not enforceable for whatever reason, the exclusive right might be replaced by a legal licence combined with

a right to remuneration. For other cases the envisaged legislation will set out closely defined fair use exceptions / limitations to the exclusive right destined to accommodate the interests of users or the public at large. When defining such a limited number of harmonised exceptions / limitations, the guidance offered by Article 9§2 Berne Convention shall be taken fully into account.

Article 9§2 Berne Convention also indicates the direction for the harmonisation of reproductions made for private purposes. It will similarly result in a differentiated legal approach. With respect to certain acts involving the exploitation of copyright, private copying may become a fully restricted act, in other situations it may be permitted Community-wide, be it with or without remuneration. Although it may be true that digital technology will soon allow the control of most if not all uses of copyright, situations will continue to exist in which an unlimited exclusive right would not appear appropriate or enforceable, notably due to privacy reasons. In view of the economic impact which permitted acts of private uses undoubtedly have on the exploitation of copyright, certain acts should be subject to a legal license and equitable remuneration.

## 2. COMMUNICATION TO THE PUBLIC RIGHT

### The issue

Electronic transmission of texts, films, phonograms, software, or databases over the networks, such as the Internet, to a consumer's personal computer or other digital unit at a time individually chosen ("on-demand") has already become a reality in a number of countries. Such "on-demand transmissions" are characterised by the fact that a work or other subject matter stored in a digital format is made available to the public or individual members of it in such a way that they may access it and request its transmission individually with respect to time and place to a personal computer or other digital unit "on-demand". This situation is outside broadcasting<sup>26</sup> (consisting of a pre-defined programme) and goes beyond merely private communication.

The market in "on-demand" services is considered one of the main areas of growth with further technological developments to come. In view of the facility by which works can be transmitted, reproduced, stored, manipulated and retransmitted over the networks, the introduction of such works or other subject matter in digital networks and their exploitation in the context of on-demand services, however, implies also a considerable new dimension for piracy. Adequate protection of "transmissions on-demand" of intellectual property therefore constitutes one of the challenges faced by legislators.

### Coverage at present

With respect to the international framework, interpretations vary as to whether the rights of communication to the public as provided for by the Berne and Rome Convention cover transmissions of works to third parties "on-demand". Also Community law, as it stands, does not explicitly provide for a general exclusive right for "on-demand" transmissions. It may, however, be held that "on-demand" transmissions, such as video-on-demand, qualify as

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<sup>26</sup> Such as defined in Article 1(a) of Directive 89/552/EC of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ("Television without frontiers"), OJ L 298 of 17.10.89, with respect to television broadcasting.

"rental" as defined for the purposes of the Rental Right Directive. Under such an interpretation, rightholders would already avail of an exclusive right for electronic delivery of their works or related matter at Community level.

This interpretation is not shared by the vast majority of Member States, who prefer to cover "on-demand" transmissions - without prejudice to any acts of reproduction which are covered by a separate right - by a widely interpreted form of a right of communication to the public, whereas the precise conditions are still subject to discussion. One Member State protects "on-demand services" under the "publication right". Another examines the possibility and limits of applying a "right to include a work in a cable program service" to this new electronic form of exploiting intellectual property.

### **Single Market Relevance**

The transfrontier nature of communication networks and the investments involved in the development and marketing of on-demand services aim in general at a market wider than any domestic market. The Single Market will in most cases even be a pre-condition for their viability.

The present legal situation is characterised by divergent approaches between Member States and legal uncertainty with regard to the exact protection involved in "on-demand transmissions". The scope of protection of neighbouring rightholders, such as phonogram producers and performing artists, differs substantially, notably with respect to the degree of protection for neighbouring rightholders (exclusive right or legal licences ...) and the management of the right involved, and in some cases is far from being clear. This may lead to a distortion of trade, and notably the delocalisation of the provision of services to those Member States which provide, for instance, for statutory licences with respect to the exploitation of particular subject matter, whereas other Member States might apply exclusive exploitation rights.

### **Comments submitted in the consultation**

Interested parties confirm that as far as the transmission of a protected work or related subject matter over the net involves reproductions, the reproduction right should ensure adequate protection. Both Member States and interested parties are, however, agreed that such protection would not be sufficient as the transmission of a work in a network environment "on-demand" will not necessarily imply acts of reproduction. In order to allow for interactive transborder services to be provided throughout the Single Market, it is considered necessary that rightholders should have available to them an additional right which enables them to adequately control "on-demand" transmissions of their works or other subject matter.

Interested parties agree that it would not be appropriate to propose a completely new right to protect digital transmissions of works or other subject matter. In their view, one of the traditional rights should apply - if necessary in a somewhat adapted form. Reference is made to the distribution right, including in the form of the rental right, the communication to the

public right and, by a few parties, the broadcasting right. It is stressed that the applicable right should be technology neutral, and cover transmissions "on-demand" by whatever means.

Most Member States and a large majority of parties are against the application of the "rental right by extension" or the "distribution right" of which it forms part. A clear preference emerged to protect "on-demand" transmissions on the basis of the right of "communication to the public" (or a right belonging to this family), whereas, in the view of some parties, the "making available of the work perceptible to the public at large" should be the decisive aspect. Along the same lines, some parties stress that the accessibility of the work by any member of the public should be relevant in this context, rather than re-defining the term "public" based on criteria like personal relationship between the communicating parties or the purpose of the transmission.

In view of their impact on the electronic exploitation of works or other protected matter, a large number of parties stress that exceptions to the right in relation to "on-line transmissions" would have to be limited to those which are absolutely necessary, and should not include exceptions for "private use". Rightholders particularly stress that "private use" exceptions would not be justified in an electronic environment but could instead put new services at risk. This is contested by others, most notably by user groups.

### **Proposed action**

The right applicable to "on-demand transmissions" of works and other subject matter needs to be harmonised as a matter of priority. In fact, the exploitation of works and related matter in the context of "on-demand" transmissions will, to a large extent, depend on Community wide markets and a clear and coherent level of protection of these activities across Member States.

In view of the outcome of the consultation procedure, it is proposed to protect digital "on-demand" transmissions on the basis of a further harmonised right of "communication to the public". These harmonised rules would be linked as closely as possible to the traditional concept of communication to the public. At the same time, there would be no redefinition of the term "public" for the new digital environment. As to the nature of the right an indication is given in the submissions made by the Community and its Member States during the present negotiations under the auspices of WIPO (see Chapter 4 below). This would harmonise at a Community level a general right of communication to the public, including making available to members of the public individual access to works and other subject matter. The right would in principle be of an exclusive nature and be granted to authors and to those neighbouring rightholders who enjoy an exclusive right of reproduction in the same digital environment.

In view of the impact exceptions / limitations will have on the protection of on-demand transmissions, and in order to ensure a comparable level of protection of works exploited in the context of on-demand services across Member States, it appears indispensable also to harmonise the limitations and exceptions which apply to this right. Without such harmonisation, Member States could apply divergent limitations or exceptions to this right, which could make rightholders hesitate to agree to on-demand exploitation of their property. Such action would necessarily place obstacles in the way of trade in on-demand services between Member States. In substance, the harmonisation of limitations and exceptions could follow the line taken for the harmonisation of the reproduction right (see above).

### 3. LEGAL PROTECTION OF THE INTEGRITY OF TECHNICAL IDENTIFICATION AND PROTECTION SCHEMES

#### The Issue

Digitisation not only brings about new risks for rightholders of copyright and related rights, it also makes it potentially easier to control acts of exploitation by means of access control, identification and anti-copying devices.

One of the main functions of electronic copyright management and protection systems, which are in the process of being developed, will be to allow for the automatic identification of protected material disseminated on networks, such as the Internet, and the identification of the respective rightholder. The monitoring of the access to, and the use of, works or related matter could thus be improved. The schemes concerned would also allow for more efficient combating of piracy since the protection of the integrity of subject matter could be improved and the origin of works much more easily identified. At the same time, such developments may have negative implications for the right to privacy of users and rightholders. Furthermore, new types of technical anti-copying systems or devices permitting the limitation of reproductions made for private purposes whilst taking the specific nature of each product into account are being developed. The work undertaken by ISO/IEC, DAVIC, CISAC, CITED/COPICAT and IMPRIMATUR, should be mentioned as important initiatives in this field. These initiatives, which are but examples, were presented and discussed in the context of the Commission's Hearing on 8 and 9 January 1996 on this subject matter, with a view to identifying the Commission's role in this context<sup>27</sup>.

#### Present coverage

At the international level, the issue is currently being discussed with a view to the inclusion of specific provisions in the Berne Protocol and the New Instrument (see Chapter 4 below). Apart from the more general provisions in the TRIPs Agreement on enforcement, the international conventions do not yet deal with these aspects.

At Community level, at present only Article 7 of the Computer Programs Directive deals with "special measures of protection". It obliges Member States to provide appropriate remedies (for instance liability to seizure) against a person committing acts such as the putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.

#### Single Market Relevance

Some initiatives undertaken by the private sector or by national legislation may result in technical protection devices being installed in the equipment itself. In this context it is particularly important to avoid any difference in legislation which could hamper the free movement of goods and services inside the Single Market. Significant obstacles to trade could arise if some Member States were to impose protection devices, while forbidding the sale of non-protected materials. Finally, the continued absence in Member States of an appropriate legal protection of the integrity of the technical devices and schemes poses a serious threat of intellectual property piracy and is thus a stumbling block for a healthy development of the Information Society within the Community.

<sup>27</sup> For further details cf. Conclusions of the Hearing of 8 and 9.1.1996 on technical systems of identification and protection and acquisition and management of rights, available with DG XV/E/4.

## Comments submitted in the consultation

A large majority of interested circles, including most Member States, seem to be in favour of the development of technical access control and identification schemes as well as anti-copying devices, provided that any such initiative is entirely market-driven. They consider it desirable to rapidly achieve standardisation in order to arrive at uniform standards which would be recognised around the world. A minority of respondents are somewhat less optimistic in their assessment of the advantages of technical protection systems. They express concern that the widespread use of such devices might result in a *de facto* creation of new information monopolies and could entail serious problems in terms of the protection of the right to privacy and personal data. Others point out that the development of certain systems has already taken place and that competition and data privacy issues should be dealt with separately.

An overwhelming majority of interested circles seeks the adoption of legislative measures providing for the legal protection of the integrity of technical identification and protection schemes. Views vary as regards the precise scope of any such legislation. A minority argues for rules along the lines of Article 7 of the Computer Programs Directive. Most interested parties suggest, however, that legal protection should be more far reaching, covering also those products and services whose primary purpose or effect is to avoid, bypass, remove, deactivate or otherwise circumvent the copyright protection system. Others believe that the prohibited acts relating to the devices should also include use and import. They submit that these acts should not be restricted to those carried out for commercial purposes as such acts can cause extensive harm to rightholders.

A large consensus exists that legislative action should be undertaken at Community level in order to avoid barriers which might hamper the proper functioning of the Single Market. In so doing, the Commission should take the international minimum standards into account, which are currently being negotiated under the auspices of WIPO.

### Proposed Action

A successful large-scale introduction of electronic copyright management and protection systems or devices by the private sector, once they are developed, is dependent upon a standardised approach to interoperability amongst such systems or devices as well as the implementation of measures that provide for legal protection in relation to acts such as the circumvention, violation or manipulation of these systems.

With a view to arriving at interoperable systems, the Commission encourages interested circles to further pursue the on-going standardisation work in this field<sup>28</sup>. Furthermore, flanking measures at Community level are called for to harmonise the legal protection of the integrity of technical identification and protection schemes. Any Commission proposal would have to precisely define the scope of protection and the nature of the appropriate sanctions. Due account will have to be taken of the principle of proportionality. This proposal would cover the properties of the protecting device, the nature of the act to be covered (such as manufacture, possession in the course of business, putting into circulation, distribution, importation), the way or process of circumventing / deactivating, etc. It should also ensure

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<sup>28</sup> Cf. Communication from the Commission to the Council and the European Parliament on Standardisation and the Global Information Society: "The European Approach", COM (96) 359 final, 24.7.96.

that systems are designed in a way which respects the right to privacy with regard to the processing of personal data.

In this context, the scope of the infringer's liability has to be considered. This might possibly include legitimate defences to civil liability, and limitations to restricted acts and users' rights have to be taken into account as well. In addition, appropriate civil penalties and/or sanctions may be called for.

#### **4. DISTRIBUTION RIGHT, INCLUDING EXHAUSTION PRINCIPLE**

##### **The Issue**

The distribution right entitles the author of a work or the holder of a related right to require his consent for any distribution of copies of a work or related matter. All EU Member States recognise in principle a distribution right. However, important discrepancies exist as to the exact scope of and limitations to this right. Some Member States have integrated the act of putting into circulation of works or copies thereof into a rather broadly defined right of publication. Others grant explicitly a separate right to authorise or prohibit the distribution of tangible copies. In addition to such differing approaches (extensive or restrictive concepts of the distribution right) there are considerable differences in relation to exceptions and limitations to the right.

The main limitation to the distribution right is exhaustion: the right may be considered to be exhausted once copies are put into circulation in the market with the consent of the rightholder. At least in certain cases, some Member States provide for no exhaustion (limitation) of the distribution right at all whereas others apply exhaustion even when the first legal act of distribution has occurred in a place outside the Community ("international exhaustion"). The latter concept which allows for parallel imports originating in third countries might entail major difficulties for the operation of the Single Market.

##### **Present coverage**

At present the distribution right is not yet governed by any international instrument on intellectual property. The TRIPs agreement, whilst explicitly refraining from limiting the freedom of signatories to regulate the issue of exhaustion, contains no distribution right either. The issue is currently under discussion internationally under the auspices of WIPO with a view to including specific provisions in the Berne Protocol and the New Instrument (cf. Chapter 4 below).

The distribution right has already been partially harmonised at Community level with respect to computer programs and databases (for authors), and with respect to certain related rights subject matter (for phonogram producers, performers, broadcasters, film producers and *sui generis* database providers). There is no Community legislation regulating these issues with respect to all of the other categories of copyright protected works.

The existing Community provisions<sup>29</sup> might be a helpful point of departure for filling in such gaps in EU copyright law. They provide the relevant rightholders with an exclusive right with respect to the distribution, including rental, of the original work or other subject matter or copies thereof, whereas this right (not the rental right, however) will be exhausted in relation to copies of the protected work or the related subject matter which have been put on the market within the Community by the rightholder or with his consent (“Community exhaustion”). A recital<sup>30</sup> of the Database Directive, in addition, stipulates that the question of exhaustion does not arise in the case of the exploitation of on-line databases, which come within the field of provision of services (and thus there is no need for reconciling the material property in a tangible good with the intellectual property contained therein).

All Community Directives therefore provide for mandatory Community exhaustion of the distribution right, but do not allow for applying the principle of international exhaustion (where the right would be exhausted by authorised first distribution anywhere in the world). Thus, once copies of works have been put into circulation in one Member State, they may be distributed throughout the Single Market but if copies have been distributed only in non-EU countries, they may not be distributed within the EU without authorisation.

### **Single Market Relevance**

The absence of harmonised rules for most categories of works has a negative effect upon their distribution within the Community because there is no consistency in copyright protection across the Community and rightholders as well as rightusers are still not in a position to benefit fully from the potential of the Single Market. This is particularly true with respect to the application of the principle of international exhaustion of the distribution right by some Member States. The application of international exhaustion does not only affect the essence of the distribution right, as rightholders have no means of receiving any fair return for the sale of a copy of a work when being imported into such a Member State. The fact that Member States applying international exhaustion act as channels for cheap parallel imports also creates severe distortions in competition concerning copyright protected subject matter and provokes significant obstacles to the free movement of goods. Indeed, a rightholder in a country applying Community exhaustion would be entitled to block imports from another Member State which applies the rule of international exhaustion if in that Member State the product in question was put on the Community market by a third party without the rightholder’s consent

### **Comments submitted in the consultation**

Interested parties widely confirm the need to harmonise the distribution right for all categories of copyright protected works. Some believe that an express importation right should be implemented whereas others consider that the right of distribution necessarily encompasses the right of importation into the Community and that there is thus no need for an explicit importation right.

As regards exceptions, a large consensus exists that no exhaustion of rights occurs in respect of works and other subject matter exploited on-line, as this qualifies as a service. Parties confirmed that given that services can in principle be repeated an unlimited number of times,

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<sup>29</sup> Cf. Article 4(c) Computer Programs Directive, Article 9(1) of the Rental Right Directive, Article 5(c) of the Database Directive.

<sup>30</sup> Cf. Recital 33 of the Database Directive.

the exhaustion rule cannot apply. A large number of interested parties took the view that any legislative initiative should spell out explicitly that the right applicable to the provision of on-line services may not be subject to exhaustion:

Rightholders and most of the Member States who have made their views known believe that it should be stipulated that exhaustion takes place at Community level only. In their opinion international exhaustion should be excluded in every context, whereas consumers and a minority of Member States prefer to maintain domestic schemes providing for international exhaustion in special cases.

### **Proposed Action**

The distribution right for authors should be harmonised with respect to all categories of works. Such harmonisation should provide that only the first sale in the Community by or with the consent of the rightholder exhausts the distribution right.

Furthermore, harmonised legislation should affirm that the principle of exhaustion applies to the distribution of goods only and not to the right applicable to the provision of services, notably not of on-line services. Such a measure, which would reflect the existing case law of the Court of Justice on the non-applicability of exhaustion to the provision of services<sup>31</sup>, would enhance legal certainty across Member States.

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<sup>31</sup> See Case 62/79, *Coditel v. Ciné-Vog Films* (1980) ECR 881; Case 262/81, *Coditel v. Ciné-Vog Films* (1982) ECR 3381; Case 156/86 *Warner Brothers and Metronome Video v. Christiansen* (1988) ECR 2605.

## CHAPTER 3: ISSUES REQUIRING FURTHER EVALUATION

### 1. THE BROADCASTING RIGHT

#### The Issue

Digital technology will change broadcasting in a number of ways. Sound quality will be improved. Virtually unlimited transmission capacity will substantially increase the number of programmes available to consumers. The multiplication of broadcasting channels will imply the further emergence of highly specialised channels, which will often contain no interruptions at all, serving particular niche audiences: multichannel programmes, which have already been launched in a number of countries, will focus on specific genres, such as classical symphonic, opera, jazz, blues or folk music, or may even feature only one artist.

Certain holders of related rights (phonogram producers, performers) claim that such broadcasting, notably in its new form of "multichannel broadcasting", requires that their rights to control broadcasting must be strengthened. They argue that consumers may buy less phonograms if they can copy their favourite CD "off the air" with the help of automatic systems built into the consumer's receiver which are due to be available shortly. Another scenario is that consumers of multichannel services will no longer need to purchase new phonograms, as they will be able to listen to them 24 hours a day on highly specialised channels. Thus broadcasting, in particular in its new "multichannel form", may have ceased to be a "secondary market" of exploitation of phonograms and other subject matter.

#### Coverage at present

Broadcasting is a form of exploitation of protected material. The European tradition has been therefore to apply intellectual property rights to broadcasting. Broadcasting rights have already been harmonised at Community level, at least partially. The Satellite and Cable Directive requires Member States to grant authors an exclusive right to authorise or prohibit broadcasting by satellite of their works - compulsory licenses have been ruled out<sup>32</sup>. Performers and phonogram producers, on the other hand, do not enjoy an exclusive right at Community level. They are granted only a right to a single equitable remuneration if a phonogram published for commercial purposes or a reproduction of such phonogram is used for broadcasting by wireless means or for any communication to the public<sup>33</sup>. However, as expressly stated in the relevant Directive, Member States remain free to provide for more far-reaching protection for holders of related rights<sup>34</sup>. At present, two Member States make use of this discretion and grant phonogram producers an albeit narrowly defined exclusive right to authorise or prohibit the broadcasting of their phonograms.

#### Single Market Relevance

The potential for cross border broadcasting activities has grown significantly with the emergence of digital technology, notably in view of the virtually unlimited channel capacity.

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<sup>32</sup> Articles 2 and 3 of the Cable and Satellite Directive.

<sup>33</sup> Cf. Article 8 of the Rental Right Directive.

<sup>34</sup> Article 6 of the Cable and Satellite Directive.

