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# GREEN PAPER

## **Copyright and Related Rights in the Information Society**

(presented by the Commission)

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## SUMMARY

1. If the information society is to develop successfully, the many new services and products being created must be able to benefit fully from the information superhighway. Their expansion must take place in a regulatory framework which is coherent at national, Community and international levels. There is no doubt that laws will have to be adapted in order to respond to the new and varied requirements which may appear, raising unprecedented issues. One of these is the adaptation of the legal environment for intellectual property. The approach offered by the Internal Market legislation shows the way forward for information society policy. It already offers a tried and coherent framework which will allow an effective response to the challenges of the information society.
2. These new services and products, to be provided via the information superhighway, will either make use of existing works or will lead to the creation of new ones. Existing protected material will often have to be re-worked before being transmitted in a digital environment; and the creation of new works and services requires substantial investment, without which the scope of the new services being offered will remain very limited. This very range and variety of services will encourage the development of infrastructures. Without that contribution there would be little point in investing in infrastructures, at least for the range of services offered to individual consumers, oriented mainly towards leisure and education. The creative effort which provides a basis for investment in new services are only worthwhile and will only be made if works and other matter are adequately protected by copyright and related rights in the digital environment.

Once a service has been provided on a network it becomes very difficult, without adequate protection, to ensure that a work or other protected matter will not be copied, transformed or exploited without the knowledge of the rightholders and contrary to their interests. This is due to the special nature of digital technology, which allows a large volume of data to be transmitted and copied with far greater ease than was possible in the traditional analogue environment.

3. Owing to the very nature of the networks operating in the information society, a wide variation in the level of protection of works and other protected matter between Member States, or indeed even further afield will give rise to obstacles to the creation of the information society. Given the difficulty of verifying the use made of a work, and the scope for displacement of business which this opens up, there is a need, at least in some fields, for further-reaching harmonisation of the protection provided by copyright and related rights.

There is already a measure of Community-wide harmonization in the shape of four directives on copyright and related rights. There is also a Directive on the legal protection of databases which will probably be adopted shortly. This last measure puts the Community ahead of its commercial partners by providing a proper legal framework for the development of services in the information society.

The question to be addressed now is whether the existing harmonization is enough, and in what areas, if necessary, it ought to be taken further, at least in those areas particularly affected by the information society.

Copyright and related rights give the holder sole power to authorize or prohibit the use, reproduction and the like of works and other protected matter; and unless the rules governing them are aligned from one country to another, there will inevitably be obstacles in the way of the free movement of the goods and services involved. The rights conferred by domestic law are restricted in their territorial scope, and that limitation can be reduced only if the laws of the Member States are harmonized. Moreover, unless there is sufficient harmonization at Community level, the markets now opening up to new services could well remain segmented between themselves; this would prevent the development of services which will be profitable only if they can operate in a market wider than the purely domestic one.

4. Several general questions, certain questions concerning specific rights and others linked to the exploitation of rights will be examined. The general questions cover the issue of the applicable law and the exhaustion of certain rights. The questions on specific rights regard reproduction rights, the concept of "public" in the right of communication to the public and the study of certain specific rights which might be applicable to different types of digital transmission. In this respect it is proposed to distinguish a right of digital dissemination and a right of digital broadcasting. The issue of moral rights is also examined in detail. Finally, the sections upon the exploitation of rights examine the questions of the administration of rights and of systems of identification and technical protection.

5. A wide-ranging process of consultation is accordingly needed to enable the Commission to work out a programme of action on copyright and related rights. Interested parties are asked to take part in this process; it will make for greater transparency in the Commission's work, and will be guided by the principle of subsidiarity, since measures will be proposed only to the extent that they are absolutely necessary.

## INTRODUCTION

1. This Green Paper sets out the background to a number of questions of copyright and related rights which seem to need examination in order for policy choices to be made as the information society develops.
2. The term "Information Society" was used in the Commission White Paper *Growth, Competitiveness, Employment - the Challenges and Ways Forward into the Twenty-first Century*. The Commission there concluded that "We must ... combine our efforts in Europe and make greater use of synergy in order to achieve as soon as possible objectives aimed at building an efficient European information infrastructure<sup>1</sup>".
3. Following on from the conclusions of the White Paper, a working party chaired by M. Bangemann drew up a report for the European Council meeting in Corfu in June 1994.<sup>2</sup> That report said that "Technological progress now enables us to process, store, retrieve and communicate information in whatever form it may take, whether oral, written or visual, unconstrained by distance, time and volume." It saw a specific role for intellectual property rights as a fundamental part of the regulatory system needed to establish the information society: "The group believes that intellectual property protection must rise to the new challenges of globalization and multimedia and must continue to have a high priority at both European and international levels... Europe has a vested interest in ensuring that protection of intellectual property rights receives full attention and that a high level of protection is maintained."
4. The Commission subsequently adopted a Communication entitled *Europe's Way to the Information Society: an Act on Plan*.<sup>3</sup> That paper set out a framework for action by the Commission, clearing the way for more specialized discussion papers on specific subjects such as the protection of intellectual property rights. It said that measures in respect of copyright and related rights which had already been adopted or which were currently under consideration would have to be reviewed, and the possible need for additional measures examined. The Council meeting of industry and telecommunications ministers in September 1994 confirmed this approach.

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<sup>1</sup> ISBN 92-826-74 24-X-1994, p. 115.

<sup>2</sup> *Europe and the Global Information Society - Recommendations of the High-level Group on the Information Society to the Corfu European Council*, Brussels, 26 May 1994.

<sup>3</sup> Communication from the Commission to the Council and the European Parliament and to the Economic and Social Committee and the Committee of Regions, COM(94) 347 final, Brussels, 19 July 1994.

5. The information society is a reality as of now, in that the existing networks are already used for commercial, educational and research purposes, thanks to digital communications technology. It is also important to point out that these networks have evolved essentially in relation to open communication standards, and that the contents of the exchanges which take place on the networks are at present only partly protected by intellectual property rights.
6. Insofar as the information superhighway will in the future carry more and more works and other protected material, their technical and legal protection will become a more and more important. That should not create obstacles to the use of networks providing information. It is probable that digital communication technology will only constitute one of the methods of communication. The other existing media, such as books, will remain practical means of disseminating information, and certainly less expensive ones. In order for the potential of the information society to be realised to the full, it will be necessary to maintain a balance between the interests of the parties concerned (rightholders, manufacturers, distributors and users of services as well as network operators).
7. This Green Paper is concerned mainly with questions of the application of copyright and related rights to the content of the new products and services in the information society, including certain legal and technical aspects which are inseparably linked with the effective exercise of rights. Given the fact that in the different studies concerning the information society, the Commission has already extensively developed its thoughts on the issues affecting industry, including the role of users, it was decided to devote the present study more to the question of holders of copyrights and other related rights.

On the other hand, this Green Paper does not consider the questions of copyright arising out of interoperability of networks and the services provided upon them, including communication standards and interfaces. The Commission is aware of the importance of these aspects which are already dealt with in the regulatory provisions currently in force in the Community (such as Council Directive 91/250/EEC on the legal protection of computer programs).

This Green Paper does not cover all of the questions of intellectual property in the wider sense which could arise in the information society. Questions concerning patents, trade marks, design rights, "know-how" and business secrets are not covered.

The Commission has initiated studies on other aspects of the regulatory framework for information society services. Thus, apart from the questions of protection of privacy and of personal data which have already been or will be specifically dealt with, the Commission is going to present a Green Paper upon the legal protection of encrypted signals, a Green Paper on commercial communication in the Internal Market and a Communication on mechanisms to safeguard transparency to ensure that planned national legislation on the subject is consistent with the principles of the Internal Market. Finally, it has launched a new consultation process upon the contents of a possible Community initiative on media ownership. In addition, the encouragement of the development of new audio-visual services, the promotion of cultural identities and linguistic diversity and the implications for the protection of the public interest will be examined in a Green Paper on the development of new audio-visual services.

8. This paper is divided into two chapters. Chapter 1 sets out to describe how the information society ought to function. It shows how important the development of the information society is to the European Community, and how it fits into the Internal Market legal framework. It tries to identify the issues arising due to the emergence of the information society.

Chapter 2 picks out nine of the subjects regarding copyright and related rights which were raised in contributions from interested parties and which the Commission believes should be given priority in order to ensure that the information society can function properly. They are dealt with in three parts. The Commission asks interested parties for their views on the various technical and legislative questions raised in each section.

9. The approaches which the Commission outlines in those sections are provisional, being based on the present state of its knowledge of the workings of the information society. The questions on which comments are sought are set out at the end of each section, and listed in full once again at the end of the paper.

This Green Paper is part of a process of consultation. Interested parties, including organizations and governments, are asked for their views on the questions it raises. Answers and comments, which may only be to a limited number of questions, should reach the following address by 31 October 1995:

European Commission  
Directorate-General XV  
Internal Market and Financial Services  
Unit XV/E-4  
Rue de la Loi/Wetstraat 200  
B-1049 Brussels

**Electronic Mail address:**

E4@DG15.cec.be

## CHAPTER ONE

**I. WHY A GREEN PAPER IS NEEDED****A. COPYRIGHT AND RELATED RIGHTS: A FUNDAMENTAL CONCERN OF THE COMMUNITY**

10. The protection of copyright and related rights is vital to the Internal Market, and has cultural, economic and social implications for the Community.

**a) The Internal Market**

11. The question of the protection of intellectual property in the information society is a matter of interest to the Community primarily because of the need to ensure that goods and services can move freely. Producers and suppliers of goods and services protected by copyright and related rights must go on being able to treat the Community as one market in which to work.

Copyright and related rights give the holder sole power to authorize or prohibit the use, reproduction and the like of works and other protected matter; and unless the rules governing them are aligned from one country to another, there will inevitably be obstacles in the way of the free movement of the goods and services involved. The rights conferred by domestic law are restricted in their territorial scope, and that limitation can be reduced if the laws of the Member States are harmonized.

12. The information society will facilitate creation, access, distribution, use and similar activities, and consequently increase the number of situations in which differences between the laws of the Member States may obstruct trade in goods and services. The position is aggravated by the fact that in the information society works will increasingly be circulated in non-material form. This means that the rules which apply will very often be those on freedom to provide services.

While respecting the principle of subsidiarity, therefore, the Community has an obligation to take measures in respect of copyright and related rights in order to guarantee the free movement of goods and the freedom to provide services. This will involve harmonization of legislation, and mutual recognition too, in order to avoid creating distortions of competition which would confer an advantage on firms located in particular Member States.

**b) The cultural dimension**

13. Copyright and related rights have been seen as fundamental to European Community cultural policy. The information society, and in particular multimedia products, have a cultural dimension which must be fully taken into consideration (Article 128(4) of the Treaty on European Union), above all in acting for the improvement of knowledge and dissemination of the cultures and histories of the European peoples, the promotion of cultural exchanges and of artistic creativity, and recognition of the value of the common cultural heritage. At the same time, cultural aspects can have a major part to play in the contents of the services to be provided in the information society.
14. Heavy use is made of the European cultural heritage in order to create products and services to be provided via the information superhighway. In addition to its intrinsic worth, that culture has an economic value which makes it subject to market forces. It is therefore necessary for the economic recovery to benefit the cultural sector of the Community.
15. The effective protection of this heritage and of the groups who constitute its driving force is mainly ensured by copyright and related rights. These are therefore fundamental to the development of cultural action by the European Union. At every link in the chain between the author and the public they ensure that artists and other rightholders are remunerated for the use made of their intellectual efforts. The income the rightholders derive from the use of their work helps to encourage the development of intellectual and artistic output in the Community. If it is necessary to change the law to meet the needs of the information society then authors, performers and other rightholders must still be effectively protected. It is absolutely necessary to find the right balance between protection of the European cultural heritage and intellectual property law, and its exploitation in economically workable conditions, in order to ensure that the information society and the European culture develop in harmony.

**c) The economic dimension**

16. The protection of copyright and related rights has become one of the essential components in the legislative framework which underpins the competitiveness of the cultural industries. Only if these rights are properly protected will there be the incentive to invest in the development of creative and innovative activity, which is one of the keys to added value and competitiveness in European industry. It has become clear that industry will invest in creative activity only if it knows it can prevent the results from being improperly appropriated, and can enjoy the fruits of its investment over the period of protection conferred by copyright and related rights.

Various studies of the economic importance of copyright and related rights conducted in the Member States in recent years have come to similar conclusions. Output and added value in the areas protected by these rights have both grown strongly, often at a rate higher than that of the economy as a whole. The audio-visual market, for example, has been growing by 6% a year in real terms, and that rate is being sustained.<sup>4</sup> More generally, activities covered by copyright and related rights account for an estimated 3 to 5% of Community gross domestic product.

17. The protection these rights provide reaches into a wide variety of industries, with the information and entertainment industries high on the list. There can be no doubt that creativity and competitiveness in areas such as publishing, the recording industry and the cinema are largely dependent on the system of copyright and related rights which governs them. The emergence of new technologies and of the information society brings with it the prospect of strong expansion in these areas: television, publishing, music, software etc. With the world-wide development of new forms of dissemination and reproduction, the Community needs to consider how to take better account of the importance of copyright and related rights in the new context.

**d) The social dimension**

18. The Commission's White Paper drew attention to the increasing tendency in the western economies towards high value-added services based on the use of technology, know-how and creativity. European competitiveness depends more and more upon innovative ideas capable of leading to new products and procedures, which in their turn will generate new employment. Copyright and related rights are often a vital consideration here. In a situation where a range of new services are developing and being diffused, the opportunities for employment creation, in particular those which are employment intensive, should be exploited to the full. This document underlines some of the framework conditions necessary to help facilitate the development of new activities linked to information services.

**B. A WORLD-WIDE CONCERN**

19. The emergence and establishment of a new information infrastructure - "the information superhighway" - and of new products and services have led most of the

<sup>4</sup> See note 1, ISBN 92-826-74 24-X-1994, p. 122.

European Community's main trading partners to give thought to the economic, legal and social issues that the information society raises.

20. The questions raised by the information society have a global impact in every sphere, and have provoked a wide-ranging international debate inside and outside the European Union, its Member States and in specialized international organizations. This world-wide phenomenon constitutes a world-wide challenge, calling, at least in certain fields, for world-wide responses and solutions.
21. The G7 Conference held in Brussels on 25 and 26 February 1995 confirmed the need for high standards of legal and technical protection for the creative content which will be disseminated via these infrastructures. The ministers agreed that measures will be developed through national, bilateral, regional and international efforts, including in the World Intellectual Property Organization (WIPO), which will ensure that the framework for intellectual property and technical protection guarantees that the right holders enjoy the technical and legal means to control the use of their property over the Global Information Infrastructure.
22. This process of reflection on the information society, and especially the legislative needs it may give rise to, has been taken a long way in several Member States and a number of third countries; their legislation on copyright and related rights springs from different legal traditions, but they have reacted in comparable ways to the issues these developments have raised.

As far as Member States are concerned, one notable example of this sort of thinking is the work of the Sirinelli Commission, which was set up by the French Ministry of Cultural Affairs to study the implications of the new technologies for the legal concepts currently applied in the sphere of intellectual property. Similar steps have been taken in Sweden and Finland.

23. Outside the Community, the Japanese Ministry of Trade and Industry (MITI) and the Cultural Agency have delivered two interim reports to the Government on the legal implications of the emergence of multimedia for the present systems of intellectual property. In the United States President Clinton has set up a group to design and implement administration policy on their "National Information Infrastructure". The working party with special responsibility for the intellectual property aspects submitted a Green Paper in July 1994. Its White Paper is due shortly. Various papers have been produced in Canada and Australia setting out the current thinking on the question.

There has been some international consultation between private interests.

24. The question has also been considered in international organizations. The World Intellectual Property Organization (WIPO) has been monitoring the impact of new technology on copyright and related rights for some time. Several conferences and studies have been organized, especially with a view to drawing up a model law on copyright which would take account of the new technologies. In October 1989 the governing bodies of WIPO took the decision to begin work on a protocol to the Berne Convention, intended to adapt it to technical development since the Paris Act. A "new instrument" is in preparation which would do the same for the rights of performers and the producers of phonograms. These two instruments should allow the existing international regulation of copyright and related rights to be reinforced. What is more, the debate includes consideration of the impact of digital technology in these fields.
25. The United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Organization for Economic Co-operation and Development (OECD) have also been examining the technological and legal problems posed by these changes.
26. There are provisions relevant to the subject in the Agreement on Trade-related Aspects of Intellectual Property Rights (the "TRIPs" Agreement) between the members of the World Trade Organization agreed during the cycle of Uruguay Round negotiations. The Agreement lays down a core of basic rules on the protection of intellectual property. It should also be noted that Article 9 of the TRIPs Agreement links these provisions with the Berne Convention. The Members of TRIPs are obliged to comply with Articles 1 to 21 of the Convention, with the exception of Article 6 bis concerning moral rights. In addition, Article 14 of the TRIPs Agreement provides specific protection for performers, phonogram producers and broadcasting organisations. It is provided that computer programs are to be protected as literary works. Compilations of data or other material, whether in machine-readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are to be protected as such. The TRIPs Agreement also makes limited provision for a rental right.

#### C. CONTINUING EUROPEAN UNION ACTION

27. The process of consultation to be launched by this Green Paper will follow on from work already undertaken in various areas, an example being the Bangemann Report mentioned above. It is in part of a global trend, and carries on the work already done by the European Community on copyright and related rights.

28. This is not the first time that the Community has undertaken a legal and economic analysis of the problems raised by the development of new technologies. In recent decades the technological change taking place world-wide has meant that the various systems of law in force have been reviewed repeatedly in order to make structural adaptations to maintain the balance between the imperatives of the protection of authors and the dissemination of their works.
29. In 1988 the Commission, recognizing the importance of the subject, published a *Green Paper on Copyright and the Challenge of Technology*.<sup>5</sup> That paper carried out a legal and economic analysis of the most urgent problems raised by the development of new technologies, considered from the point of view of the Community's own concerns. The Community was at that time working to establish an Internal Market, and needed to ensure that the market in protected goods and services operated properly thereafter, while at the same time providing a high level of protection for rightholders. The Commission noted that "These new technologies have entailed the *de facto* abolition of national frontiers and increasingly make the territorial application of national copyright law obsolete".

The Commission took note of the importance of the developments taking place, and suggested several initiatives in order to deal with these issues. Significantly, specific legislation on databases was already envisaged by the Commission in its 1988 Green Paper. Here it was ahead of all its partners. The Green Paper served as a basis for consultations and hearings of interested parties.

This led to "*Follow-up to the Green Paper: Working Programme of the Commission in the field of Copyright and Related Rights*", which was approved in January 1991; following the Green Paper and the reactions it had elicited, the new paper set out to define a programme of priority action at Community level.<sup>6</sup> The Commission said it would be guided by two principles here: "firstly, the protection of copyright and related rights must be *strengthened*; secondly, the approach taken must as far as possible be a *comprehensive* one." The Commission said it "must try to tackle all the main aspects which might have implications for the creation of the Internal Market"

<sup>5</sup> *Green Paper on copyright and the challenge of technology - Problems in copyright calling for immediate action*, COM(88) 72 final, 17 June 1988.

<sup>6</sup> *Follow-up to the Green Paper - Working programme of the Commission in the field of copyright and neighbouring rights*, COM(90) 584 final, 17 January 1991.

and that "a response to the challenges of new technology which is limited to the Member States of the Community will deal with only part of the problem."

30. In accordance with this policy, four directives on copyright and related rights have been adopted so far. All of them are highly relevant to the present discussion, both because of the substantive rules they introduce and because of the legal environment they create.
31. The 1994 Green Paper, seeking to reinforce the European audio-visual industry<sup>7</sup>, also mentioned the challenges posed by the new technologies to the existing legislative framework and the need for an environment which was favourable for the development of services.
32. On 7 and 8 July 1994 the Commission held a hearing of interested parties on the basis of the answers given to a questionnaire on the protection of intellectual property in the information society. The answers were circulated widely<sup>8</sup>.
33. The hearing on 7 and 8 July 1994 made it possible to measure the current degree of uncertainty about the consequences of the arrival of the information society upon the protection for copyright and related rights. The majority of the participants agreed that the information society will quantitatively and qualitatively change the products and services on the market. However, they also played down its impact upon systems of intellectual property protection, considering that it was more a question of gradual change than of a revolution in existing rights. A large majority emphasized the potential of copyright and related rights to adapt to technical changes, as technological advances throughout their history (such as the appearance of phonography, photography, television, satellites and compact discs, etc) have demonstrated.
34. The participants were very interested in the question of effective protection of rightholders' interests. Nonetheless, it was recognised that a balance ought to be preserved between the rights accorded to holders, of whom certain categories could find themselves with augmented rights, and the interests of users such as public libraries, whose functions must not be hindered. During the exercise, the interested parties particularly stressed the question of the identification and management of

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<sup>7</sup> *Green Paper on the strategy options to strengthen the European programme industry in the context of the audiovisual policy of the European Union*, COM (94) 96 final, 6 April 1994.

<sup>8</sup> *Replies from interested parties on copyright and neighbouring rights in the information society*, ISBN 92-827-0204-9.

rights, as much as the analysis of the existing legal environment. In this context, the group was clearly opposed to the extension of non-voluntary licence systems.

The idea of setting up a system of identification of protected works met with widespread approval. The interested circles still seem hesitant about the possible place for individual management of rights; it became clear that the new identification techniques will allow more effective individual control, but at the same time the prospect of widespread reproduction and broadcasting makes rightholders uneasy.

The class of existing rights was felt to be adequate, both to permit new exploitation and to maintain satisfactory protection for the rightholders. However, it was underlined that certain concepts were going to move into new realms and that it would be necessary to "adjust" them as a result. The rights of reproduction, communication to the public and of rental were all suggested to be likely to take on new characteristics. The participants were also interested in the question of exhaustion of rights, and deemed in particular that this principle does not apply for the services which will be distributed in the information society.

Finally, some participants stressed the need for a degree of legal certainty as far as the law applicable to this kind of exploitation is concerned. Opinion was divided upon the question of moral rights; rightholders wanted them to be reinforced, whereas potential providers of services in the information society saw them as a hindrance.

35. The views put forward there have been taken into account in this Green Paper, which is intended to carry the process of consultation further.
36. In the Commission's view, an evaluation has now to be made of the scale of the consequences of the development of services to be provided via the information superhighway, and of any implications for the systems of protection which have already been harmonized at Community level.
37. It will also have to be determined whether the differences that there are in the protection available under the legislation in force in different Member States are liable to obstruct the free movement of goods and services in the Internal Market, and should be removed in order to facilitate the development of the information society in the European Union.
38. The present exercise should also provide the Commission with a frame of reference for the conduct of discussion on these questions in various technical and legal forums with an interest in the information society in general.

It will also allow better direction to be given to research projects initiated under the Fourth Research Framework Programme.

39. It must be understood that this paper does not set out to provide definitive solutions to problems which are still unclear in many respects, but rather to ask the questions necessary for a better approach to the issues, or in some cases to suggest a number of possible courses.

## II. IDENTIFYING THE ISSUES AT STAKE

### A. A NEW CHALLENGE

40. The issues which arise out of the development of an information society and its impact on systems of copyright and related rights are still uncertain. Much of the uncertainty derives from the ongoing, dynamic character of the process taking place. And while technical developments are clearly on the way, it is not always clear what their practical impact will be.

41. Nevertheless, a number of new services are indeed appearing. Even though their ultimate shape is still unclear, an initial description can already be given, along with a rough outline of the economic and legal processes they are setting in motion. It should be borne in mind that consumers have still to make these technologies their own; acceptance is hesitant at present.

#### a) The nature of the new services

42. The new services available in the information society are located at the intersection between information technology, telecommunications and television. The common denominator is digitization.

43. These services can store a large volume of works and data, and access is easy. The content can be made up of one or more of the following:

- conventional works and other matter, some still protected, some in the public domain;
- multimedia products, that is to say combinations of data and works of different kinds, such as pictures (still or animated), text, music and software;

These services are linked together by a common factor: the concept of interactivity, which will allow the contents-themselves to be changed. The degree of interactivity necessary has still to be determined. Most of these services will be generated by means of databases. Another characteristic of the new services will be that the customer will probably be charged for its use.

44. It should be noted that the new (point-to-point) services have different characteristics to those of traditional (point-to-multipoint) television programmes; the consumer in the second case has a largely passive role, whereas the new services will be available on demand and the user will have direct control over the programme.
45. They offer a very broad range of services at long distance:
- teleworking;
  - telebanking;
  - teleshopping;
  - media (electronic newspapers);
  - entertainment, with such things as programme libraries (video on demand);
  - leisure services (such as interactive plays in which the public takes part and the plot is changed as the story proceeds, virtual museums);
  - sports transmission services, where the spectator can decide the camera angle for example, and practical services such as weather forecasts;
  - educational programmes, "tele-teaching";
  - distance tourism (with such things as visits to archaeological sites);
  - betting channels.
46. From the present state of development of the market and the trends which can be discerned, it would appear that the new services will be used in five main areas:
- at work, in both the private and the public sectors, with the appropriate applications (office automation, financial information, etc.);
  - information and education, including practical applications (teaching);
  - shopping at a distance;
  - healthcare (treatment at a distance, home monitoring);
  - entertainment and leisure, where games and television programmes will play the central role.

It is not clear how these branches will grow in future, but it does seem that workplace applications will progress faster than mass market leisure applications, at least at first.

The market in multimedia products (CD-ROM, CD-i, CD-TV, etc.) is worth an estimated ECU 1 000 billion per year today, and is expected to grow by 16% a year over the next five or six years.<sup>9</sup>

<sup>9</sup> See note 1, ISBN 92-826-74 24-X-1994, p. 107.

An analysis of CD-ROM publishing in Europe provides an indication of the subjects preferred so far (see table below).

#### THE TEN MAIN AREAS IN CD-ROM PUBLISHING IN 1994

	No of titles	% of total	% growth 93-94
General culture, entertainment	1 043	19.0	73.8
Arts, humanities	724	13.2	61.9
Education, training, careers	631	11.5	48.8
Information technology, computer programs	510	9.3	47.8
Advertising, design, marketing	429	7.8	53.2
Business, companies	426	7.7	60.7
Languages, linguistics	417	7.6	61.6
Crime, law, legislation	399	7.3	34.3
Science, technology	386	7.0	37.8
Maps, geography	322	6.0	26.7

Source: Information Market Observatory, Report 1993-94

#### b) Cross-border services

47. Economic analysis indicates that the information society and the services available in it in the Community will depend for their viability on the existence of a regulatory framework which facilitates the creation of packages of services aimed at niche markets. Given their cost, the services being carried must aim at a market wider than any one domestic market in order to be profitable. Their success will to a great extent depend on the availability of a multitude of different services offered at affordable prices. Packages of services are needed to stimulate the demand which will ensure optimum exploitation of the network.
48. These packages of services will be profitable only if the supplier can distribute them in a global fashion so as to reduce costs. They must be able to circulate throughout the Community so that they reach the niche markets in all Member States, markets which added together will allow economies of scale to be achieved. Only the prospect of distribution to, and exploitation of, all the potential markets in the Member States can provide the assurance of profitability and encourage the large and risky investment needed.
49. Service providers will be reluctant to invest in new services unless the legal systems governing them are simple and reliable. To follow the package strategy, the investor providing the package must be sure that it will be governed by one single set of easily

identifiable legal rules. It would be excessively onerous to oblige the services provider to apply the different regimes of the fifteen Member States according to the final destination of the services provided, and would also place a legal obstacle in the way of investment in the industry.

**c) New market structures**

50. The new market structures are as yet largely hypothetical: the information society is still only in its infancy. The gradual growth which has taken place has nonetheless already had discernible effects on the structure and composition of supply and demand, and we can provisionally note a few tendencies.

Considerable uncertainty nevertheless rests over the behaviour of consumers and their acceptance of this technological process and of the new services. We will be returning to this aspect.

51. As far as supply is concerned, the main feature of the developing industry seems to be the diversification of the products and services available on the market. This has produced a growing number of more and more specialized service providers targeting specific markets.

Secondly, this results in the centre of gravity in the production of goods and services shifting away from the traditional small firms to big companies already established in manufacturing, telecommunications or information technology, which are the only ones able to assume the heavy design costs and the risks of operation. This trend allows industry to produce a service and to distribute it as widely as possible. There has consequently been a significant wave of mergers between program-producing companies and network operators (cable, telephone etc.). The formation of a world economy forces these companies to improve their competitiveness continually.

52. On the demand side the main feature is growth in the number of users. The development of new types of service has led to personalized consumption: the consumer is given far wider scope to make choices and to manipulate the content of the service. Video on demand, pay-per-view and other new interactive services require an active and specific request on the part of the consumer. A user will be able to consult the works on offer, to change existing data and works, and indeed to store them himself.

53. The information society must have consumer support if it is to exist. There are still a number of question marks hanging over its very success.
54. Innovation and marketing will not be enough to ensure that consumers accept these products and change their current consumption habits. The consumer is expected to buy new receiving equipment which many people cannot afford. The industry has to mobilize now in order to offer services to the general public at an attractive price. The feasibility studies available give relatively vague answers to the question of the proportion of their income which consumers are prepared to devote to the new services.
55. The fact that household use of these services may grow more slowly, because of the costs to be borne, affects the nature and purpose of the services on offer: it may well be that "business to business" applications, which hold out prospects of more rapid profitability, because businesses already possess some of the necessary equipment, will be given preference at first over applications intended for the general public, which are likely to lean more towards education or entertainment.

The European market seems to attach a lower value than some other markets to particular new technologies. The following table relates to certain technologies only, but it will be seen that in 1992 their rate of penetration of European households was substantially lower than in the United States.

**PENETRATION OF EUROPEAN AND US HOUSEHOLDS BY  
NEW TECHNOLOGIES IN 1992**

Percentage of households equipped		
	EU	US
<b>CD-ROM equipment</b>	0.5	3.1
<b>VCRs</b>	54	68.3
<b>Mobile telephones</b>	3.2	10.7

Source: Information Market Observatory, Report 1993-94

Clearly, too, technological progress has not come to a standstill; it will continue to advance rapidly, particularly as the growth of world on-line income appears promising. The following tables will illustrate this trend.

**WORLD ON-LINE INDUSTRY REVENUE 1988-1992**

	1988 (ECU m)	1989 (ECU m)	1990 (ECU m)	1991 (ECU m)	1992 (ECU m)	% of total in 1992
Broking	2 698.2	3 055.8	3 385.3	3 580.9	3 847.7	44
Credit	1 405.2	1 468.9	1 493.8	1 521.8	1 633.6	19
Financial information and research	1 051.8	1 160.1	1 301.2	1 426.7	1 591.0	18
Legal	399.0	509.7	577.5	611.5	649.7	7
Professional	354.5	446.4	499.9	529.0	568.6	7
Final consumer	90.3	123.8	205.3	295.5	398.5	5
Marketing	8.2	12.9	19.3	26.7	34.4	>1

Source: Information Market Observatory, Report 1993.

56. Without seeking to predict what may come of the situation we have just described, the Community ought to articulate any arguments which might help to shape its embryonic policy towards the information society. The success of the information society will rest in particular on the Community's capacity to provide the proper infrastructures, and to develop a strategy in respect of what is carried on those infrastructures which facilitates the creation and use of the new products and services becoming available. This Green Paper is concerned mainly with the substance of the protection of goods and services by copyright and related rights.

**B. THE PRESENT POSITION REGARDING COPYRIGHT AND RELATED RIGHTS**

57. The development of the new information infrastructure and of the services and products that will be created and carried on it is a further step in an evolutionary process.
58. The history of copyright and related rights consists of a succession of reactions in which the law was adapted to technical developments, sometimes in great bounds. The present system is the outcome of thinking and experience accumulated over years of analogue technology. It also derives from a time when national markets were partitioned off from one another, and there was relatively little in the way of cross-border distribution of certain types of works; this provided a solid foundation for the idea that the protection of copyright and related rights could be territorial in scope, as could the resulting rules and mechanisms governing exploitation.
59. There are a number of key notions and principles which are common to most systems of copyright and related rights legislation, though they are sometimes applied in quite different ways. The arrival of new technologies does not affect the nature of these notions and principles, but it does have implications for the way we interpret them. It

is reasonable to expect that in today's circumstances some of the basic principles will take a somewhat different shape, without necessarily undergoing any radical change in their nature. The following examples are intended as illustrations only.

1. The concept of "author" is central in both the continental and the common-law systems, although in the common-law jurisdictions there are exceptions to the tradition that the author will as a rule be a natural person.

The way in which works are created is being changed in some respects by the emergence of new goods and services. The traditional picture of the author as a craftsman working more or less in isolation, and using wholly original materials, is contradicted by new forms of creation. The new products and services are increasingly the outcome of a process in which a great many people have taken part - their individual contributions often being difficult to identify - and in which several different techniques have been used. The creation of multimedia works is only one example in this context. More and more often the initiative comes from a legal person, in the form of an order for the work, with the same legal person bearing the artistic and financial responsibility.

2. "Originality" is everywhere a condition of the right to protection; but the assessment of originality has hitherto been a matter of national law, except in a few areas where there has been harmonization in the Community, such as software and photographs.

The new products and services are most often the result of adaptations or interpretations of existing works. It has to be asked, therefore, to what extent the results satisfy the traditional tests of protectability, to what extent these new products and services qualify for protection at all, and what the consequences will be for the system of copyright and related rights.

3. The concept of "first publication" of a work has been used in several international conventions as the connecting factor linking the work to a particular place for purposes of protection (an example being Article 3 of the Berne Convention). The fact that creation and dissemination are both taking place on the network now makes it difficult to link the work to a specific place.
4. The principle that authors and other rightholders enjoy exclusive rights gives the rightholder the sole right to authorize or to prohibit the exploitation of his work, and is regarded as fundamental to the prerogatives conferred on the author and other rightholders in the context of the new modes of transmission and exploitation of works. Does the huge scale on which works can now be

used mean that these rights should be reduced to a straightforward right to remuneration, or should they not rather be strengthened, in view of the dangers which arise when works can so easily be copied?

5. The concept of "fair use" or "private use" exists in most systems of legislation, allowing a number of acts done in the private sphere for personal use to be exempted from copyright. Interested parties often feel that there is a need for a precise demarcation between communication to the public and private communication.

60. The law in force at present depends on a relatively strict separation between the different categories of work - musical works, literary works, visual works and so on - and of the law governing them. The forms of exploitation contemplated in the law as it stands are all based on a fairly slow rate of dissemination.

Payment most often flows to the various rightholders through a scheme whereby their rights are administered by a collecting society, and is based on the concept of a material form, as can be seen in the case of private copying. The distinction between performing rights and reproduction rights has hitherto been essential. How is the display of a programme on a computer screen to be regarded? Is it communication to the public; or is it reproduction, given that the work is being fixed materially by means of a process?

#### C. POSSIBLE CONSEQUENCES

##### a) The players in the information society

61. In terms of intellectual property, the first category of players in the information society which springs to mind is that of authors and the creative industries. Those primarily concerned here are authors of literary and artistic works of all kinds, as defined in Article 2(1) of the Berne Convention, including the authors of databases and computer programs.
62. Holders of related rights form the second category: these are performers, the producers of phonograms and cinematographic works, and broadcasting organizations. To these two categories may be added the other groups traditionally accepted, such as publishers, the producers of live performances, the distributors of cinematographic works, etc.
63. But the information society will give a decisive role to other categories of people who have not hitherto been directly or immediately concerned by the protection of copyright and related rights, particularly the manufacturers of the material to be connected to the network, and of course network operators; they all have a large measure of responsibility for transmission. Furthermore, the public at large, i.e. private users, professional users and institutional users will play an important role in the Information Society.

Lastly, the establishment of the information society will necessarily bring about a review of the place of collecting societies, whose role, organization and operation may need to be adapted. The role and functions of the collecting societies will probably have to be adapted in order to better deal with the new possibilities and ways to exploit rights offered by the information society. The pricing structures and the extent of authorisations granted could be modified, since the sound, audio-visual and text sectors, not to mention computer programmes and data, are going to become more and more linked.

64. It is important to determine whether the emergence of the information society will change the roles of these groups. The answer will to a great extent determine the changes which need to be made to the existing legal environment.

**b) The regulatory environment**

65. The possibilities offered by analogue technology are subject to a number of limitations. Digitization allows an extremely large volume of data and information to be stored in the same material form ("digital compression"), and to be transmitted very easily. This means that it has become a great deal simpler to obtain strictly identical copies, to disseminate them in immaterial form, and to manipulate works by sampling or colourization for example.
66. The development of new services made up of works and data covered by different legal provisions raises the question of the need for a separate legal status for the new work itself.
67. As far as the concept of a "work" is concerned, a measure of continuity can be expected. The works involved will be different in some respects, but a multimedia work is an extension of what went before: it is a composite, and borrows from existing works, which will often be traditional works such as books. It may be, however, that the concept of "originality" will develop in a less personal and more relative direction, owing to the special factors discussed below. The fact that a work changes its external form does not necessarily imply any change of substance. The law will as a rule be indifferent to the technology used.
68. The possibility of using different techniques in the process of creation does not appear to cast any doubt on the concepts of "author" and "work": both require us to identify the person who made the choices that directed the process of creation, and who thereby expressed his own personality. Nevertheless, there are circumstances in which it will be more difficult to identify the author as such, because the work is the fruit of collaboration between a large number of people. Here the number of rightholders can be expected to increase, though no new category of rightholder would be created.

69. It is reasonable to suppose that the main consequences will be in the manner in which these works are exploited, with the development of new ways of recording and transmitting works, and in the mechanisms of rights management.

The dissemination of works in immaterial form will grow more and more common as digital technology allows them to be marketed in that fashion. This will make the borderlines between different categories of work less clear-cut: multimedia works are most often composed of borrowings from pre-existing works. The problems and the danger lie in the difficulty of identifying the borrowings. This has implications for rights management, because most collecting societies are specialized by category of work or rightholder.

In order to be able to manage the rights of rightholders and to control copying, a society needs to be able to maintain effective supervision of the use being made of their works; the difficulty of doing so remains an unresolved problem. It is determined in particular by the numbers of operations, of works exploited, of publishers, of authors, and of cases of exploitation of each work.

70. The criterion of strictly private use is becoming more fluid and difficult to apply. Digital technology could make home copying into a fully-fledged form of exploitation. A work can be reproduced systematically and any number of times without loss of quality. The danger of piracy and improper use without payment to the rightholders will increase. There may be a growing need for arrangements at a community level to remunerate rightholders, and for the progressive introduction of techniques to limit copying of this kind.
71. At the same time, however, digital technology should also produce new mechanisms which will facilitate supervision of the use of protected works and simplify their identification, and this should improve the protection of rightholders. Rights management should be rendered easier, allowing individual negotiation on the basis of exclusive rights to continue. Scales of royalties and the extent of the authorizations granted will probably have to be reviewed, as musical and visual works will increasingly converge.
72. The participants at the hearing held in July last year gave carefully qualified replies to the question of the extent to which the technological developments currently under way might cast doubt on the present systems of legal protection of copyright and related rights.

No thoroughgoing changes would appear to be necessary: instead we should, in a proportionate and coherent fashion, be reacting to the new situation and adapting the legal framework to the needs of the new environment.

### III. A LEGAL FRAMEWORK FOR THE INFORMATION SOCIETY

73. A basic legal framework already exists at Community level. The Commission is satisfied that the fundamental freedoms of the Internal Market, and specifically the right of establishment in Article 52 of the EC Treaty and the freedom to provide services in Article 59, together with the directives already adopted, provide answers to a number of the questions which arise, and point the way for future policy on the information society.

#### A. THE INTERNAL MARKET RULES IN THE TREATY

74. Before going on to consider what need there may be for regulatory action, it is important to realize that full and effective implementation of the Internal Market rules laid down in the Treaty and secondary legislation will go a considerable way towards ensuring that the information society can develop and flourish in the Community. Article 7a of the Treaty defines the Internal Market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".

75. The right of establishment is guaranteed by Articles 52 *et seq.* of the Treaty, and the free movement of services by Articles 59 *et seq.* If these principles are effective, the activities which characterize the information society can be carried on in a legal framework which is suited to the development of a competitive European industry.

76. Nevertheless, an information society in the European Community will be fully achievable only if these rules are sufficient by themselves to allow the new activities generated by the information society to thrive in an area without borders. Those seeking to operate in the new environment must not find themselves hemmed in by legal constraints arising from a fragmented market.

The principle of mutual recognition is important here. It allows the supplier of a service to supply that service in another Member State while continuing to be subject only to the law of his own country. The application of this principle should avoid superfluous rules and regulations.

77. The rules on the free movement of goods in Articles 30 to 36 of the EC Treaty will apply where the movement of equipment is concerned, but in an information society the circulation of works and information can be expected to take place more and more

