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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"¹.
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 1994.² 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*.³ 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.

¹ ISBN 92-826-74 24-X-1994, p. 115.

² *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.

³ 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:

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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.⁴ 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

⁴ 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*.⁵ 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.⁶ 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"

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

⁶ *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.

