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GREEN PAPER  
ON COPYRIGHT AND THE CHALLENGE OF TECHNOLOGY -  
COPYRIGHT ISSUES REQUIRING IMMEDIATE ACTION

Communication from the Commission.

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**1.1. Emergence of important copyright issues at Community Level**

- 1.1.1 The development of copyright laws in the Community and elsewhere reveals a continual re-examination of those laws to achieve an appropriate balance, in the light of conditions prevailing at the time, between important objectives that are partially in tension. Protection of the economic interests of the author and other creators, the promotion of ready access to information, and the pursuit of cultural goals have all had to be pursued and reconciled. In recent years and with increasing frequency, this challenge has been raised, in terms of copyright<sup>1</sup> law and policy, at Community level.
- 1.1.2 The directly applicable provisions of the Community Treaty concerning the free movement of goods and freedom to provide services have produced a number of leading cases on the extent to which copyright, of necessity national in scope, may be relied upon if the result is to prevent goods and services being supplied across the Community's internal frontiers. As elsewhere in the field of intellectual property rights, the European Court of Justice quickly established the principle that, where goods are lawfully placed on the market in a Member State, copyright cannot be relied upon to restrict the free circulation of those goods elsewhere in the Community. More recently, it has been called upon to define more clearly the limits of that principle, for example, as regards the continuing possibility for right holders to rely on their rights in relation to performances of imported films and sound recordings and to the rental of video recordings<sup>2</sup>.
- 1.1.3 Copyright issues have also emerged in other contexts. Reference must be made to initiatives taken to develop Community action in the cultural sector<sup>3</sup>; to possible applications of Community competition law to certain situations involving the exercise of copyright and industrial designs; to problems posed by the arrival of new technologies including television by cable and satellite<sup>4</sup>, semiconductors<sup>5</sup>, computer technologies<sup>6</sup>, and new audio-visual recording techniques<sup>7</sup>; and to the important commercial problems caused to Community right holders by lack of effective protection for their rights in many non-Member States<sup>8</sup>.

1.1.4. The emergence of all these issues at Community level within recent years is not due to pure chance. It is in large part a reflection of the profound changes which have been occurring in the world economy, involving as they do important structural adaptations not least in the industrialized countries.

**1.2. The growing importance of copyright to industry and commerce**

1.2.1. The structural adaptations that are under way can be said to be characterized by the following phenomena, all of which have served to emphasize the importance of copyright protection to industry and commerce.

1.2.2. First, a shift has continued in the economic activity of industrialized countries away from the production of goods having the character primarily of staple commodities and towards the production of goods to which considerable value has been added through the application of technology, skill and creativity. The superior performance and non-material attributes of such goods, such as their design or image, constitute their main competitive advantages. If some or all of those features can be readily appropriated by others through copying for commercial purposes at a fraction of the cost of developing a competing original, then the production and marketing of such high added-value goods is put at risk <sup>9</sup>.

1.2.3. Second, the industrialized countries' manufacturing activities have often proved less dynamic than the service sector, of which the information and entertainment industries form an important part. Those industries are also particularly vulnerable to damage through misappropriation, in particular by unauthorized copying <sup>10</sup>. Thus the very activities which offer the best hope for economic expansion, and are consequently the subject of considerable new investment, are those which are particularly exposed to losses through copying and accordingly have been seeking appropriate forms of protection, including suitably adapted copyright laws.

1.2.4. Third, technological innovation itself paradoxically generates not only the possibility for new kinds of economic activity but, at the same time, the means whereby the results of the efforts of others can be readily misappropriated. In the field of semiconductor designs, for example, it has been estimated that the original development of a sophisticated chip could involve an investment of 100 million dollars, whereas reproduction of an existing design would cost between 50,000 and 100,000 dollars <sup>11</sup>. A complex computer program representing many man hours of work and other investment besides can be copied perfectly and almost instantaneously at the touch of a button. Multiple copies of a sound or video recording can be made with equipment little more sophisticated than that used in the average home.

1.2.5. In sum, the growing economic importance of the industries needing copyright protection <sup>12</sup> against ready misappropriation of their products, particularly by copying, has naturally produced pressure for the modernization of existing copyright protection systems at both national and Community level.

### **1.3. The Community's concerns in general**

1.3.1. In the Commission's view, the Community's fundamental concerns in this field should be four-fold.

1.3.2. First, the Community must ensure the proper functioning of the common market. To the maximum extent possible, creators and providers of copyright goods and services should be able to treat the Community as a single internal market. This requires the elimination of obstacles and legal differences that substantially disrupt the functioning of the market by obstructing or distorting cross-frontier trade in those goods and services as well as distorting competition.

This matter is explored in greater detail in the next section of this chapter. It suffices to note here that significant differences in the protection available to particular classes of copyright works can clearly fragment the internal market in those works in an undesirable way. Similarly, if in a number of Member States, effective action is not taken to eliminate audio-visual piracy, the benefits of a Community-wide internal market will be denied to the European production industry since it will not be able to operate successfully in those parts of the market where it will be undercut by unfair competition from pirate products. Action at Community level is needed to remove differences in national laws and procedures creating problems of this kind and to prevent new and harmful divergences from arising.

- 1.3.3. Second, in framing measures to ensure the proper functioning of the internal market in copyright goods and services, the Community should develop policies that will improve the competitiveness of its economy in relation to its trading partners, particularly in areas of potential growth such as the media and information. In addition to project-oriented measures such as ESPRIT, accompanying measures are also needed, among them legislative initiatives in relation to intellectual property, so that European creators and firms can rely on legal protection for their products and activities at least as favourable to their development as that enjoyed by their principal competitors in their home markets.
- 1.3.4. The third general concern must be that intellectual property resulting from creative effort and substantial investment within the Community should not be misappropriated by others outside its external frontiers. It should enjoy a fair return when exploited in non-Member States. This is frequently not the case at present <sup>13</sup>.

1.3.5. On the other hand, copyright is an exclusive right granted by legislation to an individual. One of its effects is inevitably to limit to a certain extent the normal freedom of third parties to compete by marketing similar products. In the more traditional domains of copyright applying to literary, musical and dramatic works, this has not posed a significant problem since independent works of the same genre can in law and practice still compete with each other quite fairly. In areas which have developed more recently, however, the restrictive effects of copyright protection on legitimate competition have on occasion risked becoming excessive, for example, in respect of purely functional industrial designs and computer programs. In such contexts, copyright protection without suitable limits can in practice amount to a genuine monopoly, unduly broad in scope and lengthy in duration.

1.3.6. It follows that, in developing Community measures on copyright, due regard must be paid not only to the interests of the right holder but also to the interests of third parties and the public at large, since, particularly with regard to products of an industrial character, works are placed on the market by a decision of the right holder himself.

#### 1.4. Cultural considerations

1.4.1. The economic interests which copyright law aims at protecting are inextricably interwoven with cultural interests and cultural needs. New dissemination and reproduction techniques have developed with an ever-increasing speed and have added, at a corresponding rate of speed, to the complexity of this relationship. These new technologies have entailed the de facto abolition of national frontiers and increasingly make the territorial application of national copyright law obsolete, while, at the same time, permitting for better and for worse in every country ever more rapid, easy, cheap and high-fidelity reproduction. This has at one and the same time been a cause of satisfaction and concern.

- 1.4.2. Satisfaction has been expressed because the creator never before has enjoyed comparable possibilities of making his work known at the national, European or even global level at a speed which continues to increase. Thus, it is more and more commonplace that the audience, for a specific work or performance, consists of hundreds of millions or even billions of spectators. At the same time, it raises concern because new technologies render the control of the exploitation or use of a work difficult or even impossible, thereby reducing the value of copyright protection based on the provisions of national law and the existing framework of international conventions.
- 1.4.3. Seen in the perspective of the completion of the Internal Market, the Commission cannot but welcome the possibilities of rapid, simultaneous dissemination of intellectual creation in the Community. In any case, the trend to ever increasingly rapid dissemination cannot be reversed or repressed. The Community must meet this challenge.
- 1.4.4. Any action at the Community level is to be based on the following considerations. Intellectual and artistic creativity is a precious asset, the source of Europe's cultural identity and of that of each individual State. It is a vital source of economic wealth and of European influence throughout the world. This creativity needs to be protected; it needs to be given a higher status and it needs to be stimulated.
- 1.4.5. In general, the protection of creativity implies that creators enjoy due respect for the integrity of their work and the right to authorize the use made thereof. Remuneration must be adequate and in general correspond to the use made of the work. To give a higher status to creativity implies the search for the appropriate means of rapid and extensive dissemination; and the stimulation of creativity implies that, in addition to the protection from which the work may benefit, the creator is offered additional advantages in terms of royalties, new ways of dissemination and exploitation, and new markets.

- 1.4.6. It is evident that the three objectives are at the one and same time interactive and contradictory. They are interactive since the purpose of protection can only be the search for higher status and stimulation. They are contradictory because undue protection may hamper the possibilities of dissemination as well as constitute the basis of unduly high remuneration. On the other hand, uncontrolled dissemination may make protection inoperative and thereby prejudice the possibilities of generating adequate income.
- 1.4.7. The Copyright Green Paper is intended to constitute the basis of a broad consultation of interested circles. For this purpose, the paper contains an analysis, legal and economic, of the various priority issues in respect of which new technologies have raised questions.
- 1.4.8. In each chapter a number of legislative or technical solutions have been suggested so that future political decisions can establish the delicate balance which needs to be struck between the conflicting objectives, thereby promoting at the Community level the protection, the increased status and the stimulation of intellectual and artistic creativity.
- 1.4.9. However, Community legislation should be restricted to what is needed to carry out the tasks of the Community. Many issues of copyright law, do not need to be subject of action at Community level. Since all Member States adhere to the Berne Convention for the Protection of Literary and Artistic Works and to the Universal Copyright Convention, a certain fundamental convergence of their laws has already been achieved. Many of the differences that remain have no significant impact on the functioning of the internal market or the Community's economic competitiveness. Differences in national approaches to authors' moral rights, for example, do not in general produce situations which need to be addressed by Community legislation. For this reason, the matter can for the most part be left to be regulated by national laws within the framework of Article 6 bis of the Berne Convention<sup>14</sup>. The same applies to many other matters including, for example, the introduction of a public domain subject to payment and artists' resale rights.

1.4.10. The Community approach should therefore be marked by a need to address Community problems. Any temptation to engage in law reform for its own sake should be resisted.

**1.5. The EEC Treaty and the Community's powers in relation to copyright goods and services**

1.5.1. In law, the Community's objectives in the copyright field as in others are defined by the Treaty, which also specifies the means by which they are to be achieved.

1.5.2. The rights of authors, performers and others under national laws of copyright are not abstractions but are in practice exercised in respect of specific goods or services. Many provisions of the EEC Treaty govern the movement of goods and the provision of services; and in the absence of any explicit exception concerning goods and services subject to copyright protection, these are covered like all others by the provisions in question. An examination of the most important of these provisions shows that the general concerns set out above correspond to the Community's competence as defined by the EEC Treaty and that it disposes of the powers necessary to provide solutions.

1.5.3. The objectives of the Community as specified by Article 2 of the EEC Treaty (hereafter EEC) are to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the Member States. These objectives are to be realized by establishing a common market and progressively approximating the economic policies of the Member States.

1.5.4. For these purposes, the Community must carry out a number of activities listed in Article 3 EEC. These can be grouped under the following headings : first, the elimination as between Member States of quantitative restrictions on the import and export of goods and on all measures having equivalent effect; second, the establishment of a common commercial policy towards non-Member States; third, the abolition as between Member States of obstacles to freedom of movement for persons, services and capital; fourth, the institution of a system ensuring that competition in the common market is not distorted; and fifth, the approximation of the laws of Member States to the extent required for the proper functioning of the common market. In addition, Member States are under an obligation to facilitate the achievement of the Community's tasks and to abstain from any measures which could jeopardize the attainment of the objectives of the Treaty. Also, within the scope of application of the Treaty, and without prejudice to any other special provisions, any discrimination on grounds of nationality is prohibited.

1.5.5. Many of the Community's tasks are further elaborated in subsequent provisions of the Treaty and the application, actual and potential, of all those provisions in the copyright field would occupy many pages. For present purposes, it suffices to concentrate on the elimination of all measures having equivalent effect to quantitative restrictions; on the approximation of the laws of the Member States to the extent required for the proper functioning of the common market; on the removal of obstacles to the free provision of services and, finally, on the establishment of a common commercial policy towards non-Member States and to other possible bases for common action as regards the Community's external relations.

- 1.5.6. Under the Treaty, quantitative restrictions on imports and exports and on measures having equivalent effect are prohibited between Member States (Articles 30 to 34 EEC). These provisions are widely interpreted by the Court of Justice. They are one of the most effective instruments of the Treaty for ensuring the free circulation of goods. They are, however, subject to certain qualifications. They do not, for example, preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of protection of industrial and commercial property, although such prohibitions or restrictions may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States (Article 36 EEC).
- 1.5.7. As already mentioned, cases concerning the free movement of goods subject to copyright or to similar rights have already reached the Court of Justice. Although the number of cases is not yet as great, nor the range of conflicts as wide, as those which have caused litigation in other areas of intellectual property rights such as patents and trademarks, it is already clear that, as regards copyright goods, the principles which forbid a partitioning of the market are applicable in copyright cases just as they are in cases where the industrial property right in question is a patent or a trade mark. However, those principles do not exclude the application of copyright to imported products where exploitation is through a performance of the work, unless reliance on the right constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States<sup>15</sup>.
- 1.5.8. Accordingly, the effect of the provisions of the Treaty on free circulation of goods may be said to apply broadly, mutatis mutandis, to goods subject to copyright; and, in particular, recourse to copyright law as a means of artificially partitioning the market is as effectively prohibited, being equivalent in effect to a quantitative restriction, as recourse to patent or trade mark law. In addition, it follows that conditions may well arise in which harmonization of national copyright rules might be necessary. Such could be the case in particular where Article 36, and notably its exemption of restrictions justified on grounds of protection of industrial and commercial property, applies to national rules which would otherwise be contrary to Articles 30 or 34 EEC.

