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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 superhigway. 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.

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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

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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"

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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.

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[7], 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[8].

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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7 *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.

8 *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.

Finaily, 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 costumer 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.[9]

[9] 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**
CD-ROM equipment	0.5	3.1
VCRs	54	68.3
Mobile telephones	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

often in immaterial form, so that the rules on the free movement of goods will probably have a less decisive role to play.

B. DIRECTIVES AND DRAFT DIRECTIVES

78. A number of directives have been adopted which will be very relevant here. There is also an important proposal for a directive which is currently being considered by the Community institutions.

a) Council Directive 91/250/EEC on the legal protection of computer programs (the "Computer Programs Directive")[10]

79. Computer programs are a fundamental component of the information superhighway: they operate all the way along any information chain. They provide the software which allows information to be converted into digital form and stored. Software is vital to the development of a program-producing industry. It is likewise to be found in networks, terminals and servers. The Computer Programs Directive has filled a vacuum in Community law, and done so very rapidly. Computer programs are now protected by copyright, as literary works. The Directive carries out a far-reaching harmonization of a number of exclusive rights conferred on the rightholder. It also defines acts which are necessary to the use of a program and which may be performed without authorization.

b) Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the "Rental Right Directive")[11]

80. This is an across-the-board measure which regulates the general rights applicable to all categories of works and other matter protected by copyright and related rights. It also harmonizes related rights at a high level.

The Directive:

- establishes exclusive rental and lending rights for all works and all matter protected by copyright;
- harmonizes related rights on a uniform basis which frequently goes beyond the Rome Convention.

This Directive has far-reaching implications in that it offers a framework which could serve as a precedent for a number of new services, such as video on demand and its variants. Video on demand and similar forms of use closely resemble the making available for a limited period of time of a cinematographic or audio-visual work, and could be considered a form of remote video rental.

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[10] Council Directive of 14 May 1991, OJ L 122/42, 17 May 1991.

[11] Council Directive of 19 Novemeber 1992, OJ L 346/61.

c) **Council Directive 93/83/EEC on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (the "Satellite and Cable Directive")**[12]

81. This Directive provides a uniform legal framework in the area of copyright and related rights for the development of satellite and cable in Europe. It thus completes the legal framework for the creation of a single audio-visual area for broadcasting, defined in Directive 89/552/CEE (Cf. the 12th recital of Directive 93/83/CEE).

One major point is the definition of "communication to the public by satellite". Under this provision a single act of broadcasting is subject to the laws of one country only, namely the country where the signals are introduced into the chain of communication. The Directive establishes the principle that satellite broadcasting rights are to be acquired by agreement. Cable retransmission is likewise to take place by agreement. But Article 9 lays down that the right to grant or refuse authorization for cable retransmission may be exercised only through a collecting society.

d) **Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights (the "Terms of Protection Directive")**[13]

82. This Directive carries out a total harmonization of the terms of protection of all works and other matter protected by copyright and related rights in the Community. It is a cornerstone of the system needed for the legal protection of the works and services to be disseminated on the information superhighway. The term of protection is harmonized at 70 years for copyright and 50 for related rights. This level of protection is particularly high.

e) **The proposal for a Directive on the legal protection of databases (the "Databases Directive")**[14]

83. The proposed directive, when it is adopted, will have fundamental importance in the information society, given the fact that most of the new products and services will be operated from databases.

84. On 10th July 1995, the Council of Ministers reached a common position: the text of that common position seeks to harmonise the copyright law applicable to database structures, in whatever form, on-line (ASCII) and off-line (CD-ROM, CD-i). It also envisages the introduction of a new economic right, *sui generis*, which would protect

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[12] Council Directive of 27 September 1993, OJ L 248/15.

[13] Council Directive of 29 October 1993, OJ L 290/9, 24 November 1993.

[14] Initial proposal: COM (92) 24 final, 13 May 1992. OJ C 156/4, 23 June 1992.
Modified proposal: COM (93) 464 final, 4 October 1993, OJ C 308/1, 15 November 1993.

the substantial investments of database makers. The function of that law is to guarantee the protection of the investment in the acquisition, verification and presentation of the contents of a database.

85. The section on copyright of the planned Directive harmonises the criteria which must be satisfied in order to qualify for protection. It also defines a category of restricted acts and the exceptions to it.

86. The main feature of the planned Directive is to create a new economic right to protect the substantial investment of by a database maker. Considering the considerable investment of human, technical and financial resources necessary to create a database, and given that those databases can be copied at a much lower cost than that of their development, such legal change is important. Unauthorised access to a database and the extraction of its contents are thus acts which can have grave technical and economic consequences.

The section upon the *sui generis* right defines two categories of restricted acts: extraction and re-utilization. The right applies to the whole or a substantial part of a database, which means that an insubstantial part is not protected by the planned right. Protection will last for 15 years, and that period may be renewed if there has been substantial new investment. The Directive defines exceptions to the right which are similar to those existing in the chapter on copyright, but, in view of the volume of information in such databases, the exceptions are generally limited to the right of extraction. The *sui generis* right is conferred in addition to the other existing rights, but it is without prejudice to possible rights over the contents. Insofar as the *sui generis* right is not covered by existing multilateral conventions upon the subject, it is not subject to the national treatment rule.

87. The future directive also envisages other provisions, aiming to maintain the balance between the interests of the database makers, users, SMEs and holders of copyrights and of other rights.

The text has a wide impact, since it will be the basis for all complementary future initiatives concerning the aspects of copyright and related rights relevant to the information society.

C. THE DANGER THAT THE INTERNAL MARKET MAY RELAPSE INTO FRAGMENTATION

88. Responses to any need for regulation that arises in this new legal environment may be attempted at national level, at Community level or indeed at international level. The Commission must keep a close eye on the nature and consequences of any regulations introduced, in order to ensure that the overall framework will be coherent in the future. Measures taken at national level are not necessarily driven by the same needs as Community measures, and consequently may take a different direction. The

Commission must make a special effort to ensure that the desire to regulate is reasonable, and that regulation does not simply respond to isolated requests for action on a one-off basis. All rule-making must be subject to rigorous evaluation in the light of the objectives of the Internal Market and the principle of proportionality. One major concern must be to prevent any new fragmentation of the Internal Market, which might be the result if national rules were to diverge from those of other Member States, or were incompatible with the requirements of the Internal Market and hampered the free movement of services in the European Union. It would be particularly useful from the point of view of transparency if national regulation of services to be offered in the information society could be brought to the attention of the other Member States, and of the Commission, in order to ensure that it was consistent with the principles of the Internal Market, and to identify any need which might emerge for Community regulation. For that reason, the Commission intends to present a communication on a mechanism to ensure regulatory transparency concerning the information society in the Internal Market.

PRELIMINARY GENERAL QUESTIONS

1. A number of areas of uncertainty are identified in point II.A. Do you know of anything which might help to clarify the questions raised there regarding the development of the market and of new services ?

2. Of the factors affecting copyright and related rights, which ones seem to you most likely to evolve, and consequently to merit special attention ?

3. Are there any committees, reports, studies or even concrete plans in your Member State concerning the national legislation which might be necessary in the field of copyright and related rights in the information society? If so, has a timetable been fixed?

4. What do you think is the most appropriate level for dealing with questions of intellectual property in the information society: national, Community or international?

5. Does the creation of multimedia products based on elements of the cultural heritage mean that specific new legislative provision, taking account of the necessity of protecting the cultural heritage, is needed? If so, what provision?

6. Most of the works and services to be supplied on the information superhighway are protected by property rights. To what extent, and according to which criteria, do you

think that it is possible to measure the overall economic value of these copyrights and related rights?

7(a) Do you have more precise statistical or economic data on the partitioning of the economy between the various economic sectors (e.g. publishing, audio-visual products, music etc) affected by activities linked to the Information Society? What percentage of the turnover of these sectors is covered by the protection of copyright and related rights?

7(b) Do you have specific economic data or predictions which would allow assessment of the contribution which activities protected by copyright or related rights make to the economic process of the creation of services to be disseminated on the information superhighway?

7(c) Do you have any statistics or analysis on the employment aspects (qualitative/quantitative) of activities protected by copyright and related rights within the context of the information superhighway ?

8. Would you say that stronger laws on copyright and related rights would be an advantage for SMEs, and, if so, in which sector in particular?

9. In what ways do you foresee employment being affected by the development of new activities protected by copyright and related rights within the context of new services to be diffused along the information highway ?

10. Have you other comments to make on questions which are not raised in this chapter ?

CHAPTER TWO

1. In the light of the remarks made in the first chapter, a more detailed study will now be carried out of the possible implications of the development of new technology for the system of copyright and related rights.

   As a point of reference this paper takes a number of aspects of the law of copyright and related rights which are fundamental to the process of creation and exploitation of works. These areas have also been chosen in the light of the interest shown in them by interested parties at the hearing in July last year.

   Each area will be examined in accordance with the following plan:
   - an **introduction** explaining how new technology is affecting the concept;
   - **the present legal context** in international and Community law;
   - **an assessment of the question from the Community viewpoint**: here an attempt is made to measure the effect of new technology on the point under study, in order to assess the need for any adaptation or initiative at Community level;
   - **questions** to which interested parties are invited to reply.

2. These areas are considered not just in isolation but also in relation to one another wherever that appears necessary.

3. **The first part** deals with general questions which substantially affect the exploitation of works and other protected matter on the information superhighway.

   - **Applicable law (section I):** A work is generally considered to be exploited in a particular territory, and the law applicable is the law of the place where protection is sought. Given the special features of the services to be provided in the information society, and the need to allow them full freedom of movement in the Community, the principle of monitoring the place where works and other protected matter can be said to be consumed will cause difficulties. It therefore has to be asked whether and under what conditions the present rule should be reviewed, at least inside the Community, where a sufficient degree of harmonization has already been achieved.

- **Exhaustion of rights and parallel imports (section II):** There are a number of rules governing the exploitation of intellectual property rights. It has to be considered whether any changes will be needed here in the new legal environment. The principle of the exhaustion of rights is one such rule, a rule which has been developed in the Community by the Court of Justice. It allows one of the fundamental freedoms laid down in the Treaty, that of the free movement of goods, to be reconciled with respect for intellectual property rights. In the information society, it must be asked if the products and services available via the information superhighways are subject to the same rules, and the possible consequences must be analysed.

4. The **second part** comprises five sections. It mainly contains an analysis of the contents of certain specific rights and of the applicable legal regime. Given the views expressed at the hearing, there is a clear need for a more detailed study of the effects of new technology on certain existing rights; the possibility of creating new rights must also be examined. The goal is to define more precisely what should be the legal regime in the information society, and, as appropriate, to decide which aspects of copyright and related right need to be adjusted.

   - **The reproduction right (section III):** This right is of fundamental importance. Even if it is agreed that the digital recording of a work does constitute a reproduction, there is still uncertainty about which rights are affected in a number of situations. The section seeks to analyse those questions.

   - **Communication to the public (section IV):** To the extent that the new technologies have generated new forms of exploitation of works, it is important to examine how far they can be covered by existing concepts. The concept of "public" in respect of the right of communication to the public should now take greater account of private communication of the works over networks. There ought to be discussion of the boundary between public and private communication in order to guarantee the protection of the holders of copyright and related rights (Section VIII).

   - **Digital dissemination or transmission right (section V):** Digital technology allows a multiplicity of communications at the same time as individual manipulation of the contents of services, meaning that new services using point to point transmission may be developed. An analysis of the law applying to these new services is given.

- **Digital broadcasting right (section VI):** Digital broadcasting is a new transmission technique, and its development worries some rightholders, insofar as it involves overturning, at least to some extent, the way different parties - radio broadcasters and users - behave.

- **Moral rights (section VII):** In the laws of most Member States there are moral rights which exist alongside the economic rights of rightholders. Digitization greatly facilitates the utilization of works, and may make it more difficult for the rightholder to monitor the use being made of his work or other protected matter, despite eventual possibilities for technical protection (cf. Section IX). In considering the adaptation of copyright and related rights to the new technology, therefore, we have to ask how non-material interests should be protected in the new legal environment.

5. **The third part**, dealing with questions about the exploitation of rights, is divided into two sections. It moves away from analysis of the rights themselves and considers the issues relating to the administration of those rights, together with the possibilities which digitization offers for the identification and protection of works.

   - **Acquisition and management of rights (section VIII):** This question is just as important in respect of the creation of works as it is in respect of their exploitation. This section analyses the details of right acquisition in the information society. Those who exploit the rights must be able easily to identify those who have rights over the works and other protected matter in order to be able to negotiate fair terms for their use. That presupposes above all a rationalisation of management and compilation of the information necessary for such a task, but that could be done through new forms of organisation on the interested parties' own initiatives.

   - **Technical systems of identification and protection (section IX):** This last section sets out to explore the question of the identification of digitised works, which should offer new ways to administer rights. Digitisation opens up possibilities for identification and even "electronic tattooing", and thus for the protection of works and other protected matter travelling on the information superhighway. Identification also holds out the prospect of computerisation of the management of copyright and related rights. Systems of this kind will in the end be effective only if they are widely accepted, but these techniques make a contribution to ensuring the security of information.

PART I

GENERAL QUESTIONS

SECTION I: APPLICABLE LAW

Essential points
The question of the applicable law arises wherever a situation contains some foreign element. In a trans-frontier system like the information society the problem is especially acute, and special solutions will have to be found.

1. Introduction

Copyright and related rights have traditionally applied on a territorial basis; that is to say that the law applicable has been the law of the country in which protection is sought (covering such points as the rights granted, exceptions, and the law of contract). Protection is granted to nationals of the country and, under the rule of national treatment, extended to nationals of other countries party to international conventions which provide for national treatment. Thus the showing of a film will be subject to the law of the country where the showing takes place. Similarly, if a film is broadcast the law applicable will be the law of the country in which it is broadcast.

Satellite broadcasting has brought a complication into this simple scheme, because one act of broadcasting may lead to reception in several national territories with different sets of rules.

The Satellite and Cable Directive settles this question. It provides a definition under which broadcasting is deemed to take place in a particular territory, whose law will consequently be applicable, while reception of the signal, which is not considered an integral part of the act of broadcasting, may take place in several territories together.

In the information society the network may well be a global one, so that potentially at least communication to the public may take place anywhere in the world; practical solutions will accordingly have to be found.

It must be established which intellectual property law applies to point-to-point transmission originating in a Member State, and which law applies where the transmission originates in a third country. The level of protection given in third

countries needs to be taken into account when establishing EU policy for harmonisation.

Intellectual property rights are frequently transferred, assigned or licensed by their holders. Contracts and the law of contract accordingly play a fundamental role in copyright and related rights. It is traditionally accepted in private international law that the parties to the contract are free to determine the law applicable, apart from public order legislation, but that freedom has to be seen in the light of intellectual property law: in certain Community Member States in particular, there has been more and more precise regulation of certain forms of contract, such as publishing contracts and audio-visual production.

It also has to be determined which law is applicable to contracts. While accepting that the parties are free to choose the applicable law, we have to recognize that the law of the country where exploitation takes place will govern some of the conditions of application. The question accordingly arises how far the freedom of the parties is limited, and whether rules on this point would be necessary or useful.

2. The present legal context

2.1. The Berne and Rome Conventions do not provide direct solutions to all these questions. The Berne Convention does lay down a rule of national treatment, which is very broadly worded: it provides that authors are to enjoy "the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention" (Article 5(1)). The Rome Convention of 1961, on the protection of related rights, is less generous: it provides that national treatment is to be "subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention" (Article 2(2)).

The TRIPs Agreement lays down provisions on national treatment equivalent to these two Conventions (and Article 3).

The rule that the law applicable to acts of exploitation is the law of the country in which protection is sought is an obvious one, and is not spelt out in the Conventions, except in one case, in Article 14bis(2)(a) of the Berne Convention, where it is stated that "ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed." The clarification was needed because the Convention allows the rules on ownership of the rights in these works to vary from country to country. It was therefore necessary to answer the question what happened when protection was claimed in a country where the rules on ownership were different from those of the country of origin of the work.

Lastly, there is the European Convention relating to Questions on Copyright Law and Related Rights in the field of Transfrontier Broadcasting by Satellite, signed on 11 May 1994;[1] this is a Council of Europe convention, and defines the law applicable in the same way as the Community's Satellite and Cable Directive.

2.2. Community law affects these questions in various ways.

The Satellite and Cable Directive does not settle the question of the applicable law, which is a matter for the private international law of each Member State; it seeks to solve the problem further upstream, with the definition of the act of broadcasting against which protection is claimed. It provides in Article 1(2)(b) that "The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth."

The Directive does not distinguish between types of satellite: "'satellite' means any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case."

The Directive thus provides a single jurisdictional rule to link a satellite broadcast to a particular country. The question when this rule comes into play is made to depend on the real capacity for reception rather than on a technical distinction or a distinction laid down in the law governing telecommunications.

As regards the effect of Community law on contractual clauses there are two Directives of special relevance, the Computer Programs Directive and the Rental Right Directive.

The Computer Programs Directive sets out some principles governing what is admissible in a contract for the use of a computer program and what is not. Article 5(2), for example, provides that "The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use." Article 5(3) states that "The person having a right to use a copy of a computer program shall be entitled... to observe, study or test the functioning of the program".

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[1] Council of Europe, European Treaties Series No 153.

Article 4 of the Rental Right Directive provides that authors and performers are to enjoy a right to equitable remuneration which they are not entitled to waive: the principles of the primacy and effectiveness of Community law mean that contractual clauses cannot be invoked against this provision.

3. An assessment of the question from the Community viewpoint

If the Internal Market is to become a reality the supplier of a service must not be left in doubt as to the law which applies to cross-border business. In determining what law is to apply there are two fundamental factors which must be taken into account: the protection of rightholders must remain intact, and it must be possible to supply the service with maximum economic efficiency.

This would suggest that the applicable law ought to be the law of the Member State from which the service originates. But if that were to be made the rule, the laws of the Member States would first have to be aligned very closely in order to avoid deflections of trade and loss of protection for right holders. The country-of-origin rule, which would take account of the different relays which might intervene in the transmission chain, could then be introduced once harmonization had been achieved. It remains to be seen whether this model can be applied to the exploitation of rights by the supplier of the service. This is the approach taken in the Satellite and Cable Directive.

As far as the initial transmission is concerned the Satellite and Cable Directive deals only with satellite broadcasting; the rules on the conflict of laws in the case of terrestrial broadcasting or cable transmission are a matter for the Member States, and may well diverge, which would cause a problem for the Internal Market.

As regards digital point-to-point "dissemination", the question is much the same as in the case of satellite broadcasting. Making a service available in one Member State may have consequences in another; for example, an on-line video-on-demand service in one Member State might in practice be accessible from other Member States too.

The supply of a service of this kind ought to be governed by clear rules on the copyright and related rights aspects. Here as elsewhere the basic principle should be that the applicable law is that of the Member State in which the service originates. But in the intellectual property sphere that principle can be applied only if there is a far-reaching harmonization of the relevant rights at the same time.

At international level priority should be given to harmonizing the rules on the protection of both copyright and related rights to provide a high level of protection. The Council of Europe's Convention sets an important precedent here, because in order to allow the application of the law of the State on whose territory the broadcast originates it provides that the Berne Convention (Paris Act 1971) and the Rome Convention of 1961 are to apply.

Of course a worldwide solution would be desirable, but that will be possible only if there is an agreement on the substantive law of copyright and related rights which ensures a high level of protection and a sufficient measure of harmonization. There is certainly no such agreement at present.

A Community rule on the applicable law would seem to be indispensable. Such a rule could be along the lines of the mechanism in the Satellite and Cable Directive: the act of communication could be defined in a similar way, on the basis of transmission rather than reception. For transmissions coming into the Community from outside, other mechanisms must be considered, or at least safeguard clauses to ensure the protection of rights of authors and the holders of related rights. One method of doing this is contained in the Satellite and Cable Directive.

4. Questions

(1) Does the application of the country-of-origin rule mean that additional criteria and provisions are necessary? If so, what should they be?

(2) Do you think, considering the country-of-origin rule, that it is necessary to identify a certain number of complementary criteria for determining its application? If so, what criteria?

(3) In order to determine all parties which might be liable, do you think that it would be possible to identify each possible participant along the transmission chain? If so, please could you specify those participants.

(4) Given the differences there are in levels of protection, should the country-of-origin rule be used in the Community to define the act of transmission in respect of:

- only those transmissions which originate in a Member State;
- only those transmissions which originate in a Member State or in a third country which applies the Berne Convention (Paris Act 1971) and the Rome Convention of 1961;
- all transmissions, originating in any country?

(5) If the country-of-origin rule ought to be retained, which laws and areas of national law should be harmonized so as to avoid deflections of trade and loss of protection for rightholders, considering particularly:

- exceptions to exclusive rights;
- ownership;
- moral rights;
- other rights?

(6) How, to what extent and in which areas should the protection of rightholders be improved in countries which apply the Berne and Rome Conventions, or indeed in the Community, if the country-of-origin rule is to be applied?

(7) If in your opinion the country-of-origin rule should not be introduced, what rules would you like to see applied instead?

(8) Do you think that safeguard clauses can properly protect Community rightholders where matter is first entered into a network in a third country which does not provide sufficient protection for intellectual property?

(9) Do you think that parties should be entirely free to choose the law of the contract, or do you think that freedom of contract should be restricted:

- across the board;
- only so as to protect certain specific aspects such as moral rights, equitable remuneration, or management by collecting society;
- only where the contract is concerned with the works or other protected matter of European Union rightholders?

SECTION II: EXHAUSTION OF RIGHTS AND PARALLEL IMPORTS

Essential points
A video cassette or sound recording marketed by the rightholder or with his consent in one Member State may be resold anywhere in the Community, and the rightholder cannot object. He exhausts his distribution rights once he accepts the first marketing. However, the marketing of a product incorporating his work does not exhaust other rights such as the right of reproduction or adaptation. Every service supplied (e.g. broadcasting, rental, or lending) is also an act which must be authorized separately, without prejudice to future forms of exploitation; these rights are not subject to exhaustion.

1. Introduction

There are two dimensions to the rule of exhaustion. In the first place it is a limitation on the right of distribution. That right is exhausted once copies of the work are placed on the market with the consent of the rightholder. There is then the Community law aspect: if the rightholder places on the market of a Member State an article which exploits an intellectual property right, or if such an article is so marketed with his consent, he cannot subsequently object to the article's free movement throughout the Community. Thus he will be unable to invoke his intellectual property rights, and particularly the right of distribution in another Member State, in order to prevent the sale of that article by a parallel importer.

The concept of the exhaustion of intellectual property rights is a central one in Community law, because it provides the means whereby the Court of Justice has sought to reconcile the free movement of goods with the territorial character of intellectual and industrial property rights. This allows the Community market to be treated in exactly the same way as a domestic market as far as goods are concerned, always provided the laws of the Member States are identical or at least very similar.

On the other hand, if an article is placed on the market by a third party without the rightholder's consent, even though that act is lawful in the country in question, the exhaustion rule will not apply. In the *Patricia* case[1] , for example, the Court of Justice found that sound recordings which might be manufactured lawfully in one Member

[1] Case 342/87 *EMI Electrola v Patricia Im- und Export and Others* [1989] ECR 79.

State, because the term of protection had expired there, nevertheless could not be sold in another Member State where the term of protection had not yet expired.

The Court of Justice has consistently held that in the absence of any harmonization it is the legislation of the Member States which determines whether or not an intellectual property right exists. The result is that marketing may be possible without the consent of the rightholder in one Member State but not in others, and differences between the legislation in force in different Member States can consequently give rise to barriers to trade.

However, the question of the exhaustion of rights does not arise in the same way where services rather than goods are to be supplied. If there is an intellectual property right which makes a service subject to authorization, the act of supplying that service will be subject to authorization every time. Unlike what happens where the intellectual property is incorporated into a product, such as a video cassette of a film, therefore, the broadcasting of a film, or the showing of a film in a cinema, does not exhaust the holder's right to authorize or prohibit the broadcasting, projection or cable retransmission thereafter.

The area in which a work may be broadcast and the number of occasions on which it may be broadcast is determined only by the broadcaster's contract. A third party who by definition has no contract with the rightholder - he would not be a third party otherwise - may not supply any service making use of the works or protected matter without infringing the holder's intellectual property rights, yet if the same third party lawfully buys video cassettes on the Community market then he may sell them freely, by virtue of the exhaustion rule which applies to goods.

Of course the terms of the contract between a rightholder and a licensee may be caught by the rules on competition[2] . Clauses which prohibit sale in specified areas, or which strictly limit the area in which a service may be supplied, might possibly be found to infringe the competition rules.

2. The present legal context

2.1. The Berne and Rome Conventions do not cover the question of the exhaustion of rights. Exhaustion is an aspect which did not receive attention when these agreements were being negotiated or revised.

The TRIPs Agreement, however, makes an express reference to it. Article 6 reads as follows: "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights" (Article 3 is concerned with

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[2] See the Commission Decision *Miller International*, 1 December 1976, JO L357, 29.1.1976, p.40.

national treatment, and Article 4 with most-favoured-nation treatment). States remain free to regulate the question of exhaustion, provided they treat non-nationals in the same way.

In other words, if the question of exhaustion other than Community-wide exhaustion were to be regulated by a future convention, the treatment it provided for would have to be applied to the nationals of all countries party to the TRIPs Agreement.

2.2. It has already been pointed out that exhaustion is an important concept in primary Community law. It is an integral part of the law laid down in Articles 30 to 36 of the EC Treaty, which deal with the free movement of goods. However, the fact that a rightholder authorizes one broadcast of a film in one section of the Community territory does not exhaust his rights over later broadcasts or broadcasts in other parts of the Community[3] The Court of Justice has also held that the sale of copies of a video cassette does not exhaust the right to authorize or prohibit hiring out.[4]

The question of exhaustion has also been tackled in secondary legislation. The Computer Programs Directive provides that "The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof" (second sentence of Article 4(c)).

The Rental Right Directive also touches on the subject in several ways. Article 1(4) states that the right to authorize or prohibit the rental and lending of originals and copies of copyright works and other protected matter "shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter". Article 3 specifies that this Directive is without prejudice to the provisions on the rental of computer programs in the Computer Programs Directive.

Article 9(2) of the Rental Right Directive, speaking of related right holders, states that "The distribution right shall not be exhausted within the Community in respect of an object... except where the first sale in the Community of that object is made by the rightholder or with his consent."

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[3] See the two Coditel judgments: Case 62/79 *Coditel v Ciné-Vog Films* [1980] ECR 881 and Case 262/81 *Coditel v Ciné-Vog Films* [1982] ECR 3381.

[4] Case 156/86 *Warner Brothers and Metronome Video v Christiansen* [1988] ECR 2605.

It will be seen that this provision in the first place reflects the case-law of the Court of Justice with regard to Articles 30 *et seq.*, which has been outlined above. But it goes further, in that it also addresses the question of what has been called "international exhaustion" of rights: it prevents the Member States from invoking exhaustion of this kind. Member States, therefore, are not free to consider that the distribution right in the Community is exhausted when goods subject to an intellectual property right are placed on the market in a non-Community country. The rightholder may prohibit parallel imports into the Community even if he himself sold the goods in the non-Community country.

This provision, seen in the two Directives cited above, was adopted because leaving Member States free to provide for international exhaustion might have had a damaging effect on the operation of the Internal Market.

3. An assessment of the question from a Community viewpoint

Whether a distribution right is capable of being exhausted by an exploiting act of the rightholder, or a third party with the rightholder's consent, depends upon the form in which the protected work or related matter is exploited.

If it is incorporated in a material form it is subject to the rules on free movement of goods and, in consequence, to the principle of Community exhaustion. A different question is whether Community exhaustion is exclusive, that is to say whether Member States are free to take the view that the sale of a work or related matter in material form in a third country exhausts the distribution right world-wide, or whether it is exhausted only if the goods are marketed in the Community, as is explicitly spelled out by Article 9(2) of the Rental Right Directive with regard to the holders of related rights. Article 4 (c) of the Computer Programs Directive and the relevant Articles in the proposal for the Directive on the protection of databases lead to the same conclusion, and thus also exclude international exhaustion in their relevant fields, although the drafting of those Articles is different. As different views on this point from one Member State to another may have repercussions on the Internal Market, it will have to be examined if the principle of international exhaustion must also be ruled out with regard to the distribution right of all other subject matter.

On the other hand, if the work or related matter is not incorporated in a material form but is used in the provision of services, the situation is entirely different. The hearing in July 1994 has already made clear that the interested parties feel that it should be ensured that the rights are not exhausted by the information superhighway. In fact, given that the provision of services can in principle be repeated an unlimited number

of times, the exhaustion rule cannot apply. That has already been recognised by the Court of Justice in two decisions in cases concerning film projection and the right of public performance of a musical work[5] .

The Commission could accept this approach in respect of services, which characterise the information society. Unlike the distribution right for material items, the different rights attached to services transmitted by electronic means can hardly be made subject to exhaustion. In fact, every service supplied (e.g. broadcasting, rental, or lending) is an act which must be authorised separately, without prejudice to future forms of exploitation.

4. Questions

1) Should a rule be made excluding the international exhaustion of copyright, along the lines of Article 9(2) of the Rental Right Directive?

2) Should it be reaffirmed that there is no exhaustion of any rights (e.g. broadcasting, transmission and rental rights) in respect of the supply of services?

3) How do you see these questions against the background of on-line networks which seem destined to become world-wide?

4) Can systems providing for international exhaustion coexist with others which do not?

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5 See especially the case *Coditel* v. *Ciné-Vog Films* [1980] ECR 881; for the law on public performances, *Ministère Public* v. *Tournier* [1989] ECR 2521.

PART TWO

SPECIFIC RIGHTS

SECTION III: REPRODUCTION RIGHT

Essential points
The development and spread of analogue systems of reproduction had made it impossible to control copying, and especially private copying, but the digitization of works and other protected matter means that strict control of reproduction can now be envisaged once again. The right of reproduction, and the exceptions to it, particularly for private copying, should be reviewed accordingly.

1. Introduction

The right of reproduction is the core of copyright and related rights: it allows the rightholder to authorize or prohibit anyone from reproducing the work or other protected matter. By allowing the rightholder to prevent reproduction it gives him control over other acts of exploitation at a subsequent stage.

The reproduction right was easy to enforce when the available technology meant that reproductions necessarily took a material form, and that only professionals had access to the equipment needed. Any unauthorized reproduction by professionals constituted an act of piracy, and could easily be proven by establishing the existence of illicit copies.

The first big change to take place was that technological development made it easier to reproduce works and other protected matter. Photocopiers became common, and the quality of photocopies improved constantly, which opened up the possibility of large-scale reproduction of words and pictures to a broad public. Everyone is now also in a position to copy sound and video recordings in private homes. This facilitates access to literary and artistic works by consumers. It is a new form of exploitation of such works, and damages the interests of rightholders.

In view of the economic importance of these practices most Member States have introduced special legal arrangements for reprography (the use of photocopying or other reproduction processes to obtain a facsimile on paper, with or without a change

of format) and for private copying (the reproduction of sound and audiovisual recordings by private parties for private use).

The second big change is that as a result of the digitization of works and other protected matter, and their use in data processing systems, they are more and more often being reproduced in a form which cannot be apprehended directly by the human senses. The Computer Programs Directive considers the problem of intermediate reproduction arising along the chain of transmission. The concept of reproduction has consequently to be reviewed, in order to determine whether the reproduction right should come into play in the ordinary use (digitization, intermediate copies, downloading into main memory) of the computers and other equipment which characterize the information society.

The development of technology has a certain number of important advantages. In ordinary use a standard photocopier, cassette deck or video cassette recorder allows copies to be made, and there is no way to prevent this apart from depriving the equipment of what is an essential function, but digitization allows private digital copying of a work or other protected matter to be detected, and limited if that is considered desirable. Of course this assumes that the technical arrangements necessary can be adopted generally; but the fact remains that control of the use of works has now become possible once again (see Section IX).

This change must be taken into account when we consider the right of reproduction in a digital environment. Where the technology does not allow copying to be prevented, a valid response may continue to be that levies should be charged on the equipment and recording medium, and private copying be declared permissible. But where there is the technical means to limit or prevent private copying, there is no further justification for what amounts to a system of statutory licensing and equitable remuneration.

2. The present legal context

2.1. In the case of copyright the exclusive reproduction right is defined in Article 9 of the Berne Convention. Paragraph 1 of that Article provides that authors of literary and artistic works are to have the exclusive right of authorizing the reproduction of these works "in any manner or form". These are very broad terms, and are understood to cover all methods of reproduction, whether known - drawing, lithography, offset and other printing processes, photocopying, recording etc. - or unknown. Paragraph 3 redundantly states that "Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention".

Paragraph 2, however, considerably limits the effectiveness of the reproduction right, by stipulating that "It shall be a matter for legislation in the countries of the Union to

permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". This is one of the most controversial provisions in the Convention, and the result has been uncertainty as to its exact scope, divergent interpretation by the authorities in different countries, and very different arrangements in respect of reprography and private copying in particular, ranging for example from a straightforward ban on private copying to legalization without compensation of rightholders.

The Rome Convention entitles performers to prohibit "the reproduction, without their consent, of a fixation of their performance" (Article 7). It also states: "Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms" (Article 10). Broadcasting organizations are to enjoy the right to authorize or prohibit the reproduction "of fixations... of their broadcasts" on certain conditions (Article 13).

As far as copyright is concerned the TRIPs Agreement refers back to the obligations in the Berne Convention. It also repeats word for word the provision in Article 10 of the Rome Convention, so as to give an exclusive right of direct or indirect reproduction to the producers of phonograms (Article 14(2)). The reproduction rights of performers (Article 14(1)) and of broadcasting organizations (Article 14(3)) are more limited than in the Rome Convention.

2.2. Community law harmonizes the reproduction right of copyright holders only in respect of computer programs. There is no need for a detailed analysis of the Computer Programs Directive here; it will be enough to bear in mind that the protection of computer programs it envisages is largely based on the right of reproduction.

The Rental Right Directive introduces an exclusive right of direct or indirect reproduction for performers, the producers of phonograms and films, and broadcasting organizations. The protection provided here is more extensive than that in the Rome Convention.

3. An assessment of the question from the Community viewpoint

It will be useful to subdivide the questions which arise in the very complex study of the reproduction right.

As regards the definition of "reproduction" right in a digital environment, the fundamental importance of the reproduction right suggests that a Community response may be needed. The definition should certainly be based on the approach taken in the

Computer Programs Directive. Thus the digitization of works or other protected matter should generally fall under the reproduction right, as should such things as loading on to the central memory of a computer. Without a harmonized response to these questions there may be difficulties with the Internal Market if a rightholder from another Member State with more protective legislation refuses to allow digital works or other protected matter to be brought into his territory where they originate in other Member States where digitization does not require the consent of the rightholder.

The scope of the reproduction right is a separate question, because so many exceptions have been made by Member States under Article 9(2) of the Berne Convention. Careful consideration will be needed in order to determine which of these exceptions can continue. An example of the sort of difficulty which arises is the question of private copying of matter disseminated in digital form. There will also have to be a review of the legality of private digital copying, given that the technology allows this kind of copying to be monitored, prevented or limited (see Section IX).

A situation in which private copying is legal in some Member States and not in others will create serious difficulty. The fact that private copying is authorized in certain Member States means that some operators will be afraid to allow access to their services there. The technical arrangements needed to control private copying cannot be made compulsory in Member States which authorize private copying, but will be required in other Member States. These differences will place barriers in the way of trade in the relevant equipment.

The Commission takes the view that a degree of harmonisation will be needed to resolve these problems. The precise response will depend on the technical scope for controlling reproduction, and especially private copying.

4. Questions

1) Do you think that the digitization of works and other protected matter should be covered by a reproduction right? Would exceptions to the exclusive character of this right be justified? If so, what exceptions and why?

2) Do you think that private copying and reprography of digitized works, other protected matter, or both, other than computer programs:
   - should be fully subject to this reproduction right;
   - should be subject to this reproduction right, except that a single copy would be permitted (as with the SCMS system);
   - should be authorized, with or without a system of remuneration?

SECTION IV: COMMUNICATION TO THE PUBLIC

Essential points
This Section investigates the definition of "public" for the purposes of the right of communication to the public. The concept is of vital importance in order to determine the position of certain uses of protected matter in the information society.

1. Introduction

There is no precise definition of the concept. So far as the right of communication to the public is concerned, the concept of "public" is the key to the current discussion. The WIPO Glossary defines "communication to the public" as follows: "Making a work, performance, phonogram or broadcast perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group. This notion is broader than publication and also covers, among others, forms of use such as public performance, broadcasting, communication to the public by wire, or direct communication to the public of the reception of a broadcast".[1]

On the basis of this definition we can provisionally distinguish private use, which are in effect tolerated and so are not as a rule be caught by the right to authorize or prohibit, from those forms of use which are indeed caught by exclusive rights.

The same does not apply to private copying, which is caught by the reproduction right. Private copying is therefore prohibited in certain Member States even if it is carried out for purely personal purposes.

Private use need not necessarily be confined to cases where a person makes use of a work in his own home using equipment which is not linked up to a network. However, if it is to be accepted that a form of use may be private, and consequently unrestricted, even if more than one person takes part, the limits must be defined.

The author's moral rights can be infringed even in private. It is simply more difficult

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[1] WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights, Geneva 1980; ISBN 92-805-0016-3.

in this case, given the existence of laws on protection of privacy, to prove it and to enforce the moral rights of rightholders.

It should also be noted that Article 9(2) of the Berne Convention draws a line between private use which could be described as "normal" on the one hand, and use which might be called an "abuse" and which infringes the economic rights of rightholders on the other, which is often extremely fine. In addition, given that digital technology will lead to so-called private use on such a large scale, it must be remembered that if the new forms of private use are not properly dealt with by the law on copyright and related rights then right holders may be heavily prejudiced and there could be serious consequences.

The definition already quoted will be of assistance here, because it allows us to exclude a series of acts, including broadcasting, from the scope of private use.

Of course the ultimate definition of "communication to the public" will have a great effect on public perceptions of the information society. The public already uses the Internet, or has at least heard talk of it, and imagines that it is to be given access to all the knowledge in the world free of charge, or at any rate for the cost of the call. Thus the definition of private use can be seen as defining the scope actually offered to the public. If it is too broad, rightholders will hesitate to allow their works to be used on the networks. If it is too narrow the public may well stay away from the information superhighway in disappointment.

2. The present legal context

2.1. The international conventions have never managed to define the concept of "communication to the public" clearly.

2.2. Community law does not define it either. Article 10 of the Rental Right Directive states that Member States may provide for limitations to related rights, one case listed being that of "private use".

Member States are also free to provide for limitations on related rights which are of the same kind as those they provide for in connection with copyright.

3. An assessment of the question from the Community viewpoint

Community law has not so far settled the question of the definition of "communication to the public". As the information society advances it will be necessary to consider whether the permissible exceptions to the general Community rules will have to be tightened up, and this will involve defining "communication to the public" in a uniform fashion.

The fact that particular activities should be lawful in certain Member States and not in others could cause difficulties for the functioning of the Internal Market. Some displacement of activity must necessarily result; the technical specifications of equipment and the requirements for the digitization of works or other protected matter might be different, and this would put barriers in the way of trade - programs to prevent certain acts, for example, might be necessary in some places and not in others. How, for instance, can we guarantee that the information society will operate smoothly and without obstacle if some Member States make transmission over the network subject to an exclusive right, while others leave it entirely free?

The Commission takes the view that a Community solution should be found to the problem of communication to the public. The transmission technologies which will be used in the information society challenge the traditional understanding of the concept.

4. Questions

1) Under what conditions do you think that the following acts can be considered as forms of private use:
   - transmission over the network between two private persons;
   - transmission over the network between a number of private persons (e.g. bulletin board services);
   - transmission over the network between a private person and a firm;
   - transmission over the network within one or between several firms?

2) In the case of transmission over the network between more than two private persons, do you think that the fact that the people concerned know each other or belong to the same family should play any part in the definition of communication to the public?

3) If transmission is point-to-point, how does the nature of the persons communicating - private persons, firms, public bodies etc. - affect the classification of the act as communication to the public?

4) Do you think that copyright and Related rights apply to the act of connecting a server which holds works protected by copyright to the network? If so, which rights apply? Do you know of any legislation which takes a position on the matter?

5) What other tests or acts do you think should be looked at to determine whether or not there is communication to the public?

SECTION V: DIGITAL DISSEMINATION OR TRANSMISSION RIGHT

Essential points

In the information society it will be possible to send works and other matter protected by intellectual property rights backwards and forwards over networks. The activity made possible by the technology is new, and is not expressly covered by the existing law. Lending and rental rights may be applied by extension to these digital transmissions, but, for reasons of clarity and legal certainty, legislation may still be necessary to confirm and to define how this should work.

1. Introduction

By comparison with analogue methods the technical scope for digital transmission or dissemination is so great, and the quality is so high, that the question of the law applicable to digital dissemination or transmission is one of the central questions of intellectual property law in the information society. Some categories of rightholder, notably phonogram producers, are demanding the introduction of a new exclusive right of digital dissemination or transmission, because they are afraid that their market may escape any sort of control.

The extent of the right proposed has not been clearly defined, and we can try to delimit the concept by putting forward two extreme cases. Such a right might be understood broadly, and cover any transmission on a digital network, whether from one point to one point or from one point to many. Digital broadcasting would then be included. Particularly in order to avoid covering broadcasting, on the other hand, we might also restrict the term "digital dissemination or transmission" to point-to-point transmission only, or at least expressly exclude broadcasting. As these services transmitted from point-to-point are different from current point-to-multipoint broadcasting, since the consumer can access and interact with them, it seems justified to have a specific regime for digital transmission.

From that point of view, "digital transmission" or "dissemination" would include transmission from a personal computer, or other digital unit belonging to a private person, or from a database, to one or more personal computers or other digital units belonging to private persons or firms. Thus a video-on-demand system, whereby

consumers ask for the cinematographic works of their choice to be sent to them electronically, would be covered.

It has to be decided, therefore, how these categories of act should be classified, how they can be defined and how they should be treated - exclusive rights, equitable remuneration, or complete freedom.

2. The present legal context

2.1. This right of digital transmission or dissemination has still to be defined. The Berne Convention does indeed refer to "any communication to the public" (Article 11), but that has to mean that there is a receiving public, and not merely specific persons belonging to a private group. What is involved here is a form of initial transmission by cable. The Rome Convention covers only conventional broadcasting on the air.

2.2. There are relevant provisions in Community law. The Computer Programs Directive states that if the "transmission" of a computer program necessitates its reproduction, the act of reproduction is to be subject to authorization by the rightholder (Article 4). It is reproduction which is subject to authorization rather than transmission itself.

The provisions on broadcasting in the Directives are covered in the section dealing specifically with that subject (Section VI). Rental right and lending right are also relevant in the present context.

The Rental Right Directive defines rental right and lending right. It harmonizes both of them, declaring them to be exclusive rights, and defines their scope, their rightholders (authors, performers, producers of phonograms and films, and broadcasting organizations) and their exceptions.

The Computer Programs Directive likewise provides for an exclusive rental right for computer programs (Article 4(c)).

Both these Directives define the rental right in very broad terms. In the Computer Programs Directive "rental" means "the making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof". Legislation currently in force, including the Computer programs Directive, should also be taken into account when dealing with the questions posed by certain specific types of commercial activity involving digital transmission.

The Rental Right Directive defines "rental" as "making available for use, for a limited period of time and for direct or indirect economic or commercial advantage" (Article 1(2)). The very broad character of this definition is underscored in a recital

which states that it is desirable to exclude from "rental" certain forms of making available "as for instance making available phonograms or films... for the purpose of public performance or broadcasting". The extension of the rental right to the digital environment means that certain characteristics of the new services must be taken into consideration, and that there must be detailed reflection upon what constitutes legitimate use of transmitted elements.

"Rental" of works or other protected matter as defined here, especially by opposition to public performance and broadcasting, clearly includes activities such as video on demand and other electronic forms based on point-to-point transmission.

In contrast to rental, which is carried out with a view to gain, the Directive defines "lending" as "making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public" (Article 1(3)). "Lending", then, requires an "establishment which is accessible to the public", and transmission between private persons is not covered; the definition does, however, cover digital lending by establishments accessible to the public.

In practical economic terms electronic rental of works or other protected matter is a competing activity which is essentially the same thing as rental from a shop, so that it seems reasonable to apply the same rights in both cases. That argument would indicate that the on-line consultation of a work from a public library comes to the same thing as borrowing a copy of the work.

3. **An assessment of the question from the Community viewpoint**

It is clear that the intellectual property law applying to digital dissemination or transmission will have to be harmonized. Without far-reaching harmonization, freedom to supply services cannot become a reality, because differences of treatment will necessarily place obstacles in the way of trade between Member States.

We have just seen that rental and lending rights might well be applicable by extension to digital transmission. It would nonetheless seem desirable for the sake of clarity and legal certainty that this should be confirmed in legislation, and that such application should be spelled out in detail where necessary.

Of course, the cultural and educational functions of bodies such as public libraries and universities, which have the aim of ensuring the widest possible dissemination of works and data, must be reconciled with the legitimate protection of rightholders.

These entities play an important role in society. They are a link in the chain running from the author to the public. They permit knowledge to be disseminated and provide the widest possible access to the culture and to information. It is therefore essential that they be able to continue to meet their responsibilities in this new digital environment, with as few restrictions as possible. However, digital technology has led to a range of new techniques such electronic storage and transmission of documents, which will take on growing importance, especially regarding inter-library loans. These forms of use and new interactive possibilities could prejudice rightholders if they were not subject to an appropriate legal regime. It may well be that it will be necessary to reinforce the rights accorded to rightholders, especially regarding public loans. It is important to recognise the interests of the different parties concerned: authors must be able to control the use of their works, libraries must ensure the transmission of available documents and users should have the widest possible access to those documents while respecting the rights or legitimate interests of everyone. This problem will be generally considered in the Commission report which is due under Article 5(4) of the "rental" Directive (92/100/CEE).

A separate question arises because the information superhighway will be transporting from point-to-point all sorts of works and other matter protected by intellectual property. Whatever the work - film, music, play etc. - it can be transported along the information superhighway only through the use of computer programs, and a part of these programs will always travel with the work being transported and will be downloaded along with it at the receiving end; but the legal arrangements governing these various works will not necessarily be the same. The differences between the law of computer programs and copyright law in general are particularly notable in the case of the right of reproduction.

At this stage the Commission takes the view that the rental right could be applicable by extension to digital transmissions undertaken in the course of commercial activities. It must still be examined how the characteristics of certain commercial operations could be taken into account as regards the application of this right. The application of the lending right to electronic transmission should also be reviewed with a view to maintaining a balance between the interests of public libraries and those of rightholders.

4. Questions

1) The Computer Programs Directive (91/250/CEE) and the Rental Right Directive (91/250/CEE) could be applicable by extension to electronic transmission from point-to-point. Given that possibility, do you think that certain elements should be adapted? If so, which ones?

2) Would you be able to state the extent of the economic impact of the application of the rental and lending regime on rightholders and other parties?

3) What would you say was the effect upon SMEs?

SECTION VI: DIGITAL BROADCASTING RIGHT

Essential points
Broadcasting has already been regulated, but there is a view that the digitization of signals has such far-reaching implications for copying by consumers that holders of related rights ought to have an exclusive right to broadcasting, rather than merely receiving equitable remuneration.

1. Introduction

For the purposes of copyright and related rights, there is a difference between communicating with a single person and communicating with a large number. From that viewpoint, communication with a single person or point-to-point does not constitute broadcasting.

Nonetheless, it should be pointed out straight away that although broadcasting is a long-established activity, it is nevertheless closely bound up with the subject of the information society. Digital broadcasting allows broadcasts to be made which may compete with on-line services. The practical consequences of digital broadcasting for both rightholders and consumers will be different depending on whether the broadcast consists of a programme divided into sections or a programme consisting solely of music and not interrupted by advertising or other announcements. Consideration must also be given to the quality of broadcasting permitted by digital technology and, therefore, the quality of the copies which the consumer could make of the broadcast works.

The recording industry fears that consumers will be able to make copies of such good quality that the CD market will suffer. It is therefore calling for a right to authorize or prohibit the digital broadcasting of recordings. At present producers of phonograms and performers have only a right to equitable remuneration. The question of a broadcasting right is equally acute for film producers and performers in the sector.

It has also been argued that broadcasting, which in the past was considered a secondary use of a work, has now acquired primary importance as a form of exploitation, and that its treatment in law should change in consequence.

2. The present legal context

2.1. The Berne Convention does not define broadcasting. It gives the authors of literary and artistic works rights specific to certain types of work. In principle these rights are exclusive rights, but under Article 11bis(2) compulsory licences can be imposed on authors. The Rome Convention does not provide for an exclusive broadcasting right for performers and the producers of phonograms. They are entitled only to an equitable remuneration, under Article 12.

2.2. Community law refers to broadcasting in several places. "Broadcasting" in the Directives means "the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of... programmes intended for reception by the public". Communication services providing pieces of information or other services point-to-point and on demand such as photocopying, electronic databases and other similar services are not covered.

The concept of broadcasting in the Satellite and Cable Directive matches this definition: it refers to "an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public" (Article 1(3)). It also states that "If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent" (Article 1(2)(c)).

In order to include all broadcasts actually received by the public, the same Directive covers all satellites where "the circumstances in which individual reception of the signals takes place" are "comparable" to those which apply in the case of a direct broadcasting satellite. In other words it is not the technical features of the satellite which are decisive, but the outcome of the act of broadcasting: it must be possible for the public to receive the broadcast.

Consequently, Community law at present considers a broadcast to be any transmission to the public other than individualized services on demand, whatever the technology used: wire, radio, satellite, analogue or digital.

There has also been at least partial harmonization of authors' and rightholders' broadcasting rights in the Community.

The Satellite and Cable Directive requires Member States to make provision for an exclusive right to authorize the communication to the public by satellite of copyright works (Article 2). The principle is that the right may be acquired only by agreement, but there are exceptions (Article 3).

The Rental Right Directive gives performers and phonogram producers a right to an equitable remuneration "if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public" (Article 8(1)). The harmonization required by this Article 8 is expressly stated to be a minimum only. Member States remain free to provide for more far-reaching protection.

Broadcasting organizations are also to be given a number of exclusive rights over their broadcasts: a fixation right (Article 6), a right of reproduction of fixations (Article 7), a rebroadcasting right (Article 8), and a right over the distribution of fixations (Article 9).

3. An assessment of the question from the Community viewpoint

The question falls within the competence of the Community provided the broadcast is a cross-border one. The introduction of exclusive broadcasting rights in some Member States and not in others only would seriously distort competition in cross-border broadcasting, and would at once provoke a displacement of broadcasting activities. The reasoning is the same as that which led to the enactment of the Satellite and Cable Directive.

The problem is aggravated by compression techniques which allow far more programmes to be broadcast. The limited number of frequencies available will now no longer be a valid argument for restricting broadcasting activities. But the extent of the problem can vary depending on the way in which the broadcast is made. The question is especially relevant to related right holders, because their rights are not exclusive.

In the case of conventional programmes - for example in the field of music where a presenter plays records and supplies comment between numbers, with interruptions for advertising - it is unlikely that the related rightholders fear is justified. There will be too much interruption for even the less critical consumer to consider this an alternative to purchase.

Continuous music and other audio-visual programmes, on the other hand, may pose a problem. This might become really serious if broadcasters were to broadcast whole records or films in succession, following a timetable worked out beforehand and circulated among consumers. The consumer would only have to check at what time the

material of his choice was to be broadcast; he could then copy it in full free of charge. Indeed systems for numbering works and recordings could be employed, using automatic systems built into the consumer's receiver to enable him to program his copying. There are also plans to run the same programme on different channels at different times, which increases the danger.

Thus two types of broadcasting which are covered by the same definition for purposes of copyright law would in fact produce very different consequences.

At this stage the Commission takes the view that further thought should be given to the need for a review of the present balance of rights in this area. Interested parties are accordingly asked to submit observations and arguments.

4. Questions

1) In your opinion, will digital broadcasting, which allows a larger number of channels, increase the volume of cross-border broadcasting? Do you think this possibility justifies Community intervention, or is it still only theoretical?

2) Do you think that digital broadcasting is a real threat to the holders of related rights, who do not currently have an exclusive broadcasting right? Is the introduction of exclusive digital broadcasting rights for phonogram and film producers and performers in these sectors necessary, or possible on certain conditions, or to be ruled out altogether?

3) Do you think that distinctions between methods of dissemination can facilitate a solution (for example by including only certain forms of digital broadcasting, such as cable transmission)?

4) Do you think that a tightening up of the reproduction right in the private sphere, which could be strictly enforced by means of technical arrangements preventing copying by receivers, would be sufficient to avoid problems of large-scale copying?

SECTION VII: MORAL RIGHTS

Essential points

In an interactive environment such as that of the information society, where it will be very easy to modify and adapt existing works, one vital consideration will be the author's moral rights, including the right to object to any unauthorized modification of is work and to claim the right of author's paternity. These rights are handled very differently in different legal systems, and give rise to serious controversy.

1. Introduction

The author's moral rights principally protect his entitlement to object to any unauthorized modification of his work, and to claim authorship of it. The work must not be modified without the author's consent, at any rate in a way prejudicial to his honour or reputation. The right to claim authorship prevents anyone else from claiming to be the author of the work.

The right to object to modification is similar to the right of adaptation; the right of adaptation is also an exclusive right, but is an "economic" right rather than a "moral" one.

Moral rights are thus a powerful component in copyright, and to a lesser extent in the rights of performers. One aspect of the information society is that total digitization of works and other protected matter combined with interactivity over networks means that it is becoming easier and easier to transform works, to colourize them, to reduce them and so on. The time is coming when anyone will be able to change the colours in a film, or replace the faces of the actors, and return the modified film to the network. This capacity to amend works in whatever way and to whatever extent one likes is regarded in some quarters as one of the great advantages of digitization. The creators of works, however, are greatly concerned that this technical capacity will be used to mutilate their works, and are asking for moral rights to be strengthened.

2. The present legal context

2.1. Moral rights fall under Article 6^{bis} of the Berne Convention, which states that "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation".

Thus the author continues to enjoy his moral rights even after he has transferred his economic rights.

2.2. The Community secondary legislation in force does not affect moral rights. The Computer Programs Directive, for example, provides that "the employer exclusively shall be entitled to exercise all *economic* rights in [a computer program], unless otherwise provided in the contract" (Article 2(3)), but makes no rule regarding moral rights.

The Terms of Protection Directive states that "This Directive shall be without prejudice to the provisions of the Member States regulating moral rights" (Article 9).

In its judgment in *Phil Collins* (Joined Cases C-92/92 and C-326/92, 20 October 1993) the Court of Justice defined the specific subject-matter of copyright and performers' rights. "The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation" (paragraph 20).

3. An assessment of the question from the Community point of view

In the *Phil Collins* judgment just referred to the Court said that "the exclusive rights conferred by literary and artistic property are by their nature such as to affect trade in goods and services and also competitive relationships within the Community. For that reason, and as the Court has consistently held, those rights, although governed by national legislation, are subject to the requirements of the Treaty and therefore fall within its scope of application" (paragraph 22).

It is worth pointing out at the outset that moral rights were among the points needing study which were listed in the Commission's work programme for 1991. A hearing of parties with an interest in moral rights was held on 30 November and 1 December 1992.

The hearing clearly showed the sensitive character of the question of moral rights. The opinions expressed diverged widely. The representatives of authors and performers generally wanted strong moral rights, while the representatives of publishers and the press, producers, broadcasters and employers were hostile.

The latter groups argued that moral rights, being an expression of the thinking which saw copyright in terms of personal rights, and being untransferable, inalienable and perpetual, were a major source of uncertainty in the exploitation of works, and consequently discouraged investment.

Authors and performers rejected this argument. A large majority of their representatives also claimed that disparities in the legislation on moral rights were becoming particularly acute with the development of new technologies: these permitted ever-greater manipulation of works and other protected matter, which could then be transmitted electronically throughout the Internal Market, especially by means of electronic publishing, data banks or telecommunications networks.[1]

An important point which emerged in the course of the hearing was that moral rights were in fact rarely invoked in order to prevent the exploitation of a work. The reason was that in areas where the point was a sensitive one the parties came to an arrangement which avoided such situations. In other areas, such as the cinema, the principal director had to reach agreement with the producer before the film was made, which avoided most of the problems that might otherwise have arisen at a later stage. To put it another way, the hearing showed that at the present time moral rights did not pose any real problems as far as the Internal Market was concerned.

With the arrival of the information society the question of moral rights is becoming more urgent than it was. Digital technology is making it easier to modify works. The Commission believes there is a need for an examination of the question whether the present lack of harmonization will continue to be acceptable in the new digital environment.

4. Questions

1) Do you think that the differences between the laws of the Member States are such that the rules on moral rights should be harmonized? Would harmonization be justified in the present situation?

2) Could it be decided that problems of moral rights are to be resolved by contract? When material is placed on the network, for example, or even when it is digitized, the author might agree to certain types of modification such as dubbing, subtitling, reformatting etc.

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[1] Report on the hearing.

3) Could the very fact that the author has agreed to digitization be taken to give rise to a presumption that he has agreed to certain modifications?

4) Do you think that the acceptability of modifications could be defined in collective agreements between authors and performers on the one hand and producers and publishers on the other?

5) Do you think that solutions should be negotiated globally or sector by sector (cinema, newspaper publishing, libraries, museums, etc.)?

PART THREE

QUESTIONS ON THE EXPLOITATION OF RIGHTS

SECTION VIII: ACQUISITION AND MANAGEMENT OF RIGHTS

Essential points
The information society will offer new opportunities to exploit and to enjoy protected works and other protected matter. The management of rights will have to evolve, however, and to adapt to the new environment, to ensure for example that the creation of multimedia works using music, words, photographs, films etc. is not obstructed by long and costly procedures for the acquisition of rights. Rightholders and rights managers are asked to set up "one stop shops" to facilitate access to works and other protected matter.

1. Introduction

a) Nature of rights

Copyright and related rights are exclusive rights, which means that the first holder of the right - the author, the performer, the producer of a phonogram or film or the broadcasting organization - has power to authorize or to prohibit the use of the work or other protected matter. These rights take many different forms, and an authorization given for one type of use does not mean that any other use is authorized too. An author who authorizes a public performance of his play does not thereby prejudice his entitlement to authorize or prohibit the reproduction of the text of the play. These are two different rights, which the author is free to exercise independently. Rightholders are free to exploit their works and other protected matter in whatever way they believe will be in their best interests.

There is an exception to the general rule in some cases, where the rights of the author or other rightholder are limited to a right to remuneration: the rightholder cannot then object to a particular use of his work or of other protected matter, but the law provides for the payment of equitable remuneration. There is an example in Article 8(2) of the Rental Right Directive: equitable remuneration is to be paid where a recording published for commercial purposes is used for broadcasting - "or for any communication to the public".

The usual reason for the grant of a right to remuneration, rather than an exclusive right, is that individual management would not be possible in any event, given the number and type of uses involved, and that in the interests of users the legislature wanted to facilitate utilization.

b) Methods of rights management

It may be useful to summarize the ways in which intellectual property rights are administered now. The methods used are different from one branch to another, and from one type of rightholder to another. The account which follows is intended only by way of indication.

- The most straightforward method for managing intellectual property rights is that whereby the first rightholder, that is to say the author, performer or producer, keeps control of the rights, and grants licenses to interested parties who apply to him. Obviously the holder must have an exclusive right. The producers of cinematographic works, for example, generally manage their rights themselves, without going through intermediaries.

  The first holder, however, is not always the person who manages the rights. In some areas rights are managed by publishers, even though they are not designated by law as the holders of copyright or a related right. The authors of literary works generally assign their rights to be managed by their publishers. Similarly, a distributor or producer may be assigned the rights for a particular geographic area by a producer in another country or an area where a different language is spoken.

- In some cases the producer's position is rendered stronger by the fact that the law presumes that certain rights are assigned to the producer. There may be a presumption, for example, that an author or performer who signs a contract with a producer has assigned his rights. The presumption may be rebuttable, meaning that a party is entitled to show that he did not wish to assign a particular right; or it may be irrebuttable, meaning that proof to the contrary is of no avail. This mechanism constitutes a more or less automatic method for assigning rights.

- Another major option for the administration of copyright and related rights is management by a collecting society. This arrangement has grown steadily in importance. For a large proportion of creative work it can be regarded as the traditional form of management, and it is mandatory in some cases. It applies for example where compulsory licences are imposed on rightholders or where the rightholders have only a right to remuneration. Producers have entrusted

the administration of cable retransmission rights to AGICOA, the Association for the International Collective Management of Audiovisual Works; it was felt that individual management would be too difficult to operate in this case. Management by collecting societies plays a particularly important role in the music industry, where it would be hopeless for an author or performer to try to control and manage rights in a musical work or recorded performance on an individual basis. Traditions of management by collecting societies nevertheless vary from one sector to another, from one class of rightholders to another and from one Member State to another.

c) Consequences of the present system in the information society

It will be gathered from the preceding that the author of a multimedia work who wishes to make use of existing works will have to obtain the authorization of each of the authors or related right holders. This is not a radically new situation when one considers that collecting societies have already had to rise to the management of so-called complex or composite works. However, digital technology, by multiplying the possibilities of creating such works, and of multimedia works in general, probably means that a rationalisation of the copyright administration is increasingly necessary. A great many existing works or other protected matter may be used in the creation of one CD-ROM or CD-i, so that the organizer will have to secure a great many authorizations. The absence of just one of them may prevent publication of the whole multimedia work.

The question of the protection of the rights in literary and artistic property is thrown into a new light by the number of authorizations needed for the creation of a multimedia work. It may also be that the total price of rights negotiated by mechanisms different from one work or one performance to another may ultimately be judged too high. It is fair to ask whether rights managers have already taken account of the special case of the creators of multimedia works when they set the financial terms of licenses, and whether the present scales are compatible with the utilization of works and other protected matter to be expected in the information society.

Copyright and related rights must not be considered as an obstacle to the creation of multimedia products. It must be ensured that it is impossible for producers and editors to use the management of multimedia works as a pretext for not obtaining the

necessary rights, which would place the fruits of investment at risk and would in the long term destroy all creativity.

Some users are openly arguing for the introduction of compulsory licenses, which they say is the only way to resolve what they see as the "problem" of licensing.

It should be pointed out at this stage that authors, performers, and the producers of phonograms and films have a great interest in seeing their works and other protected matter used as much as possible, since their own income and the return on their investments depend on it. Generally speaking, therefore, it is to their advantage that potential users should not encounter unreasonable difficulty in identifying the source which can grant or refuse them a license. In any event difficulty in identifying a rightholder cannot be invoked to justify a reduction in protection.

Given all the replies of the interested parties in respect of the hearing in July 1994, the difficulty of obtaining the authorizations needed to include works and other protected matter in a database should not be considered a justification for the extension of compulsory licences, or any other weakening of intellectual property rights. Other forms of rights acquisition ought to be envisaged.

2. The present legal context

2.1. The international conventions give very few clear indications regarding the management and acquisition of copyright and related rights. Such provisions as do exist are of a piecemeal nature. Article 2(6) of the Berne Convention provides that "protection shall operate for the benefit of the author and his successors in title", which clearly shows that assignments or licenses are not to reduce the protection established by the Convention.

There are two other provisions of the Berne Convention which are worth mentioning; they concern particular cases. Article 14^{bis}(2)(b) provides for a presumption that the rights to exploit a cinematographic work have been assigned to the producer. Article 15(3) provides that the publisher of an anonymous work is deemed to represent the author. Throughout the countries of the Berne Union, therefore, the publisher of an anonymous work may invoke the rights of the author without having to provide any further proof that he represents him.

2.2. Community law has several things to say about the acquisition and management of rights.

The rights harmonized at Community level are as a general rule exclusive rights. Community law expressly provides that they may be transferred, assigned or subject to the granting of contractual licenses. The rule is laid down in the Rental Right Directive, and applies to the rental and lending right (Article 2(4)), the reproduction right for holders of related rights (Article 7(2)), and the distribution right for the same rightholders (Article 9(4)). This allows management to be entrusted as far as possible to collecting societies, publishers and producers. It makes it possible for the rights to be exploited properly in all areas of intellectual creation.

The Community legislature has nevertheless sought to protect the weaker party to such a contract against complete dispossession, by providing that where an author or performer has transferred or assigned his rental right he is to "retain the right to obtain an equitable remuneration for the rental... The right to obtain an equitable remuneration for rental cannot be waived by authors or performers" (Article 4(1) and (2)).

As well as this broad scope for the transfer or assignment of exclusive rights, the Community legislature has made provision for the introduction of a presumption that rights have been assigned, so as to facilitate the exploitation of works. The Rental Right Directive establishes a rebuttable presumption that a performer has assigned his rental right to a film producer (Article 2(5)), and allows a similar presumption in the case of authors (Article 2(6)). It allows Member States to establish stronger presumptions of assignment of performers' rights to their producers, on condition that an equitable remuneration is provided for (Article 2(7)).

The Community legislation refers to management by collecting societies in several places. There is a definition of a "collecting society" in the Satellite and Cable Directive (Article 1(4)): "For the purposes of this Directive 'collecting society' means any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes." The definition is here stated to be for the purposes of the particular directive only, but it can be taken as a point of departure in a general examination of the role of collecting societies.

The legislature has approached the question of management by collecting societies on a case-by-case basis - Article 13 of the Satellite and Cable Directive, for example, makes express provision for it, while other Directives are silent - and has left it to the

law of the Member States to regulate the activities of collecting societies as such. But the Directives do provide indications of the desirability of collecting societies.

As a general rule the legislation does not make management by collecting societies a requirement; this is a question for the authorities in the Member States. Under the Rental Right Directive the right to an equitable remuneration may not be waived (Article 4), but "The administration of this right... may be entrusted to collecting societies representing authors or performers" (paragraph 3). Member States may impose this form of management (paragraph 4). Member States are accordingly free in two respects. They may provide for administration by collecting societies, and if they do so they are free to make it compulsory or voluntary.

There is an exception to this rule in the case of cable retransmission. Article 9(1) of the Satellite and Cable Directive states that "Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society." Recital 28 makes it clear that this is indeed an exception to the general rule; the aim is "to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme".

Special mention should be made here of the Computer Programs Directive, which provides that "Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract" (Article 2(3)). This clause too is an exceptional one, because it gives the employer a monopoly in the management of the rights in the computer program. It must be said that in this area direct management of rights is the rule. All companies which write computer programs administer their products themselves. Collecting societies are unknown.

3. An assessment of the question from the Community viewpoint

There are several aspects of the acquisition and management of rights which have important implications for the Internal Market. This is the case especially where particular arrangements have been made mandatory in particular Member States. Barriers may arise if other Member States reject the same obligations: an example

might be an irrebuttable presumption of assignment or compulsory administration by a collecting society.

In terms of copyright and related rights the arrival of the all-digital age may facilitate rights management in some areas. The scope it offers for tracing and monitoring use in general, and private copying in particular, constitutes an opportunity which ought to be grasped at once. Rather than having to think in terms of a generalized right to remuneration, therefore, we may, if systems of this kind become a reality, be moving towards a more and more finely tuned and individualized form of rights management.

But this will happen only if the traditional rights managers, namely the collecting societies, producers and publishers, realize quickly how their role has to change. They ought to be encouraged to do this.

At the hearing of interested parties on 7 and 8 July 1994 the Commission departments put forward questions regarding the administration of rights in the information society. One question asked whether the role of collecting societies needed to be reviewed in the context of the information society; the answers given varied with the particular organization's own experience, but some broad tendencies can be discerned.

In general it does not seem that intervention on the part of the Community authorities is regarded as desirable at this stage. Participants often accepted that the collecting societies would have to evolve, but felt that they should be left to do so themselves, as they had always done. Some participants were strongly of the opinion that rights to equitable remuneration would no longer be justified in the information society, and that a return to individual management would be possible.

It was generally felt that management by collecting societies should continue to be voluntary. The Commission side put questions regarding the introduction of automatic schemes of management or compulsory recourse to a collecting society in order to facilitate management in the case of multimedia products; the parties represented replied almost unanimously that any system of compulsory licences should be avoided. They were often prepared to accept the idea of some sort of centre for rights management, but said that the establishment of such centres should to be voluntary, as should membership, and that the possibility of individual rights management should remain open.

It may be worth pointing out that in France the several authors' societies[1] have decided to pool their resources and have set up a scheme including all their repertoires. Each of the different societies represents different categories of works. The new body, SESAM, is to ensure the respect of the exclusive rights of the authors to the exploitation of their works; it will thus provide an answer to the producers and editors who are confronted by the need to obtain multiple authorisations in view of the many rights used in respect of existing or original works when those works are reproduced in multimedia programs .

It is reasonable to suppose that certain alliances would be a major step forward for collecting societies, which are currently organized by category of work or class of rightholder (e.g. authors, performers etc.). To allow centralized management or administration of the rights over all works, performances and other protected matter incorporated into multimedia works, the collecting societies and other rights managers ought to be encouraged to set up joint bodies allowing a simplification of right management.

Alliances under the form of a "one stop shop" would give authors, performers and also editor-producers, a tool which would allow them to identify the origin of very diverse works, by bringing together the repertoires which might be valuable to the new technologies. Users could obtain information which interested them, such as the level of the fees and the rights given. Such provision of information could be possible if different societies operated together and combined their databases, and systems of identification were progressively introduced. Both pre-existing and new works which might be integrated into multimedia products must therefore be on offer.

Uniting the available information would be an appropriate way to ensure the right environment for creativity in the multimedia age, since it would increase the transparency and efficiency of the current system. Increasing transparency in such a way can only benefit the interested commercial parties, the rightholders just as much as the users. That does not mean that right management should be taken away from the individual and collectivised, simply that the *identification* of individual rights would be centralised. This "one stop shop" intermediary would not replace the collecting societies.

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[1] *Société des auteurs dans les arts graphiques et plastiques* (ADAGP); *Société des auteurs et compositeurs dramatiques* (SACD); *Société des auteurs, compositeurs et éditeurs de musique* (SACEM); *Société civile des auteurs multimedia* (SCAM); and *Société des auteurs des arts visuels* (SPADEM).

Interested bodies are also discussing the possibility of moving towards more centralised management, especially by way of a "clearing house".

Identification opens up the possibility of technical centralisation, especially by creating interconnections of the identifying files, and that could result in a simplification of what is required to obtain authorisation and certainly a reduction in the cost of fee administration. Rightholders would be able to use a central body as an intermediary when assigning their rights over multimedia use. That body could negotiate contracts and could, where appropriate, charge fees to users with a view to channelling them to rightholders. The decision to move towards such systems can only come from the professionals themselves.

Even if certain management aspects were centralised, that would by no means exclude the possibility of going back to more individualised management.

Individual contracts between the different parties must in any case therefore remain possible, as must individualised licences; each rightholder would determine the price to be paid to him for the rights. The parties' freedom of contract must be respected.

It must be remembered that digital technology will mean more and more frequently that the transmission of the data to the user will also include the necessary authorisations for the purposes of copyright and related rights. In such situations, each use will be dealt with individually.

It is, however, clear that the transparency and effectiveness of the systems of management are most important in order to ensure the healthy development of the information society.

Obviously both the agreements establishing such links and the actual administration of the rights will have to comply with the competition rules of the EC Treaty. A major consideration here will be the extent of the territory for which the joint bodies grant licences, and especially the management itself of the rights.

The competition rules are fundamental, but there is no reason why they should be in contradiction with the idea of centralized schemes, at least so far as the creation of "one stop shops" are concerned.

At the hearing held on 7 and 8 July 1994, interested parties were strongly opposed to the introduction of compulsory licenses. The Commission fully shares this point of view. Not only does it see no valid grounds for the general imposition of compulsory licenses for the creation of multimedia works, or for circulating protected works and other protected matter on the information superhighway, but it would argue that compulsory licences, if introduced on a national basis, would necessarily cause difficulty with the circulation of works and other protected matter. Of course, that does

not mean that the collecting societies, and even rightholders who have not combined forces, could not be obliged to grant licences under Article 86 of the Treaty of Rome.

The Commission takes the view that the emergence of digital technology is likely to change the shape of rights management in some respects. Centralized schemes for the administration of rights, which would be voluntary in character, would be an appropriate response to the information society. It would be a matter for interested parties themselves to set up such schemes. While rightholders should be left a broad measure of freedom, the Commission feels that the regulatory framework should be examined in order to ensure that the new methods adopted do not fragment the market but rather help, respecting the principles of transparency and non-discrimination, to facilitate the acquisition of rights in a multimedia context.

4. Questions

1) What form should be taken by centralized schemes set up by rightholders and managers? Would a "one-stop-shop" system be desirable or indeed sufficient to deal with the demands of the information society?

2) Should these centralized schemes be confined to issuing licences for the creation of multimedia works, or should they become general mechanisms?

3) Do you think that competing schemes, that is to say schemes covering the same rights, can coexist in the same Member State, in the Community as a whole or at world level (these might cover separate repertoires, or perhaps even identical repertoires)? How could such competition work in practice?

4) Assuming that the information society will operate on a world-wide basis, do you think that the licenses granted by a scheme or schemes of this kind will be or should be world-wide licences?

5) Do you think that licences for a more limited territory will continue to be a possibility?

6) Do you think that alongside the existing competition rules the Community legislation should lay down guidelines for collecting societies or centralized management schemes? If so, what sort of rules are needed: a code of conduct regulating competition between societies or schemes, rules governing relations between societies or schemes and their members, or both?

SECTION IX
TECHNICAL SYSTEMS OF PROTECTION AND IDENTIFICATION

Essential points
Digitization allows works and other protected matter to be identified, tattooed, protected and automatically managed, provided the appropriate systems are installed. It would appear necessary for these systems to be introduced and accepted at international level if the information society is not to operate to the detriment of rightholders.

1. Introduction

The digitization of works and other protected matter is both an opportunity and a serious danger. It allows material to be stocked, accessed and used far more easily than before; this opens up new markets, with the inevitable corollary that it creates new scope for piracy and the incentive to engage in it. But digital technology and the growing capacity to process data which it has provided will also permit better protection of works and other protected matter provided systems are installed rapidly which have the agreement of everyone - rightholders, equipment manufacturers, the distributors of works and other protected matter, and network operators. Two classes of question arise. The first is the systematic identification of works and other protected matter. Publications of a literary nature all carry an ISDN number which allows them to be identified. A system of identification of this kind could be set up covering all works and other protected matter; the identification tag might contain information on the work only, or much more complete information on the rightholders and even the terms of the licence. A code of this kind, known as the International Standard Recording Code or ISRC, has been established for sound recordings. Work is in progress in other areas.

By resorting to these technical identification systems, it would be possible to facilitate the collection and distribution of the fees due to rightholders. That would be the case if the systems for identifying works and other protected matter, as well as data on right ownership, were linked to the system used for charging for network access or for services available at a distance, and for the administration of the corresponding revenue, while respecting the rules on the personal privacy of users. In effect, this revenue normally includes the fees in respect of the original right which go to copyright holders. Such systems already exist for certain purposes, but commercial agreements between operators would be necessary for such systems to become general. In Europe, where a significant number of operators will be involved in cross-border provision of services, it is possible that such systems require the adoption of regulatory decisions and technical standards.

Similarly, a detailed examination will be necessary of the questions of protection of users' privacy which are raised by the fact that the network operators will be collecting and compiling precise details about the use of information and cultural services by each individual consumer.

The tattooing of digitized works and other protected matter is also under study. Some digital marking systems, such as Cyphertech, already exist. Each component in the program contains a digital distinguishing mark which receivers can receive and decode in real time. This will allow automatic management systems to be set up for uses such as broadcasting, where it will be possible to determine the time for which the work or other protected matter has been used to within several seconds.

The second central concern is the installation of these systems of protection and other systems in the equipment, in order to obtain the full benefit of the coding system. This Paper does not seek to consider the question of systems allowing operators to restrict the reception of a service, nor the possible need of legal protection to deal with illicit reception, because they are being dealt with in a separate green paper. Systems such as the Serial Copyright Management System or SCMS, on the other hand, which prevent a second copy being made privately from the first copy, are essential here.

In the same way, if the systems sold to consumers do not allow for the reading of codes, it will not be possible to establish schemes of individual invoicing.

There is also another aspect which can only be considered briefly since it does not directly affect copyright and related rights; that is the matter of the security of transmissions over the network. At the moment, data and other matter circulating on the network are no more secure than telephone calls. For the most part that is sufficient. It could, however, be possible that that would not be true for protected works and other matter. It would become more difficult to monitor the way in which the copyright and other related rights are exercised and remunerated, if the networks do not dispose of a satisfactory security system for the transmissions. In addition, even though the issue of the security of transmissions over the network is distinct from those of identification and protection, it seems important that the debate upon the question of the former should also encompass the aspects affecting the protection of copyright and related rights.

2. The present legal context

2.1. The international conventions do not at present cover these questions. But they have been raised in the negotiations going on in WIPO on a possible protocol to the Berne Convention and a possible new instrument for phonogram producers and performers, at least in part.

2.2. Community law has already touched on the question of technical measures of this kind: under Article 7(1)(c) of the Computer Programs Directive, Member States are to provide appropriate remedies against persons putting into circulation, or possessing for commercial purposes, "any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program". Article 7(3) then makes it clear that "Member States may provide for the seizure of any means referred to in paragraph 1(c)".

Thus Community law does not require the introduction of technical systems for the protection of computer programs, but it does protect those who install such systems by making it unlawful to put pirate decoding or other equipment into circulation or to possess it for commercial purposes.

3. An assessment of the question from the Community viewpoint

The importance of technical systems for identification, tattooing and protection has been recognized for a long time at Community level. Not only does the Computer Programs Directive provide a basis for measures to combat piracy, but the question of the encryption of broadcasts as such is currently under study, and is to be the subject of a separate green paper.

The CITED programme should be mentioned here; it is financed by the Commission under the Esprit programme. CITED is based on the needs of the information industry in the broad sense, and is intended to safeguard copyright and related rights in all works and other protected matter which may be stored or transmitted digitally. The purpose is to establish a scheme of protection in order to calm the fears of rightholders and to help to ensure that all the "information" available is placed at the disposal of as broad a public as possible.

In its first phase the project excited considerable interest among those involved with the problem. A thorough study of the problems raised by digital technology was carried out in consultation with WIPO and the most important standardization agencies. It showed clearly that the protection of copyright and related rights was of cardinal importance, and that none of the technical solutions currently available was fully satisfactory. The current arrangements are based on standards which have grown up in practice.

CITED has therefore sought to define a general model which could be applied across the board, and which takes account of all the players in the information chain. The CITED model defines the measures needed to combat piracy, both accidental and deliberate. The model has now to be tested in pilot projects.

At the hearing held on 7 and 8 July 1994 the question was asked whether identification systems ought to be incorporated into products. The interested parties there represented said that such systems would be useful, or indeed necessary in some cases. Many emphasized that systems of this kind should be voluntary rather than obligatory. Some also felt it was absolutely necessary to protect such systems themselves from imitation, saying that otherwise their introduction might actually make matters worse. The question of the information to be given was also controversial. Some felt it should be complete, and should identify the rightholders; others took the view that it should be confined to details of the work or other protected matter itself.

Obviously this aspect is closely bound up with the question of the acquisition and management of rights.

The need for action on the part of the Community has to be considered in the light of the principle of subsidiarity and the standards policy followed under the New Approach. It is clear, in any event, that if the Member States were to take uncoordinated measures prohibiting the marketing of certain goods, on the ground that they infringed standards of protection, obstacles would be placed in the way of trade.

Steps have been taken in one Member State in association with the relevant professional groups and the International Standards Organization (ISO), with a view to developing a method of embedding identifying characters in the binary code sequences. Thanks to that initiative, the ISO has already agreed to adopt the principle of such insertion. The nature and composition of these markers is still being determined. It is particularly important that the tagging methods be internationally accepted, and the creation of "proprietary" systems by certain manufacturers, who would impose a standard calculated to serve their own commercial ends, must be avoided.

The Community may find it advisable to act in order to make technical systems of protection compulsory, on a harmonized basis, once they have been developed and accepted by industry.

4. Questions

1) Do you think the Community, in co-operation with the Member States, should make provision for legal measures which guarantee compliance with:
   - identifying tags;
   - standards for protection against private digital copying;
   - other technical systems of identification or protection against private digital copying?

   What would be your view if these had been introduced and accepted by industry?

2) What sort of information should the identifying contain:
   - identification of the work or other protected matter;
   - identification of the original rightholders;
   - identification of the work or other protected matter, of rightholders, of licensees and other managing parties;
   - licence terms for possible future assignees of the licence?

3) In your opinion, should works and other protected matter originating in third countries be prevented from entering the Internal Market if it does not incorporate systems of identification compatible with those recognized in the Community?

4) To the extent that technical systems of protection against private digital copying can be developed and applied, what other legislative measures in respect of those systems would it be necessary and possible to adopt?

5) If a technical system of protection against private digital copying were introduced on a harmonized basis, do you think that the marketing and importation of any equipment not containing such systems of protection should be forbidden?

6) Do you consider that the eventual effectiveness of technical systems of protection against private digital copying depends upon the creation of international standards?

7) How should it be determined whether works and other protected matter are in the public domain? How could it be guaranteed that protection of works and other protected matter by intellectual property law does not hinder or restrict access to data in the public domain?

ANNEX

QUESTIONS TO INTERESTED PARTIES

INTRODUCTION
PRELIMINARY GENERAL QUESTIONS

1. A number of areas of uncertainty are identified in point II.A. Do you know of anything which might help to clarify the questions raised there regarding the development of the market and of new services?

2. Of the factors affecting copyright, which ones seem to you most likely to evolve, and consequently to merit special attention?

3. Are there any committees, reports, studies or even concrete plans in your Member State concerning the national legislation which might be necessary in the field of copyright and related right in the information society? If so, has a timetable been fixed?

4. What do you think is the most appropriate level for dealing with questions of intellectual property in the information society: national, Community or international?

5. Does the creation of multimedia products based on elements of the cultural heritage mean that specific new legislative provision, taking account of the necessity of protecting the cultural heritage, is needed? If so, what provision?

6. The works and services to be supplied on the information superhighway are protected by property rights. To what extent, and according to which criteria, do you think that it is possible to measure the overall economic value of these copyrights and related rights?

7(a) Do you have more precise statistical or economic data on the partitioning of the economy between the various economic sectors (e.g. publishing, audiovisual products, music etc) affected by activities linked to the Information Society? What percentage of the turnover of these sectors is covered by the protection of copyright and related rights?

7(b) Do you have specific economic data or predictions which would allow assessment of the contribution which activities protected by copyright or related rights make to the economic process of the creation of services to be furnished on the information superhighway?

7(c) Do you have any statistics or analysis on the employment aspects (qualitative/quantitative) of activities protected by copyright and related rights within the context of the superhighway?

8. Would you say that stronger laws on copyright and related rights would be an advantage for SMEs, and, if so, in which sector in particular?

9. In what ways do you foresee employment being affected by the development of new activities protected by intellectual property and associated rights within the context of new services to be diffused along the information superhighway?

10. Have you other comments to make on questions which are not raised in this chapter?

QUESTIONS ON THE SECTIONS IN CHAPTER 2

SECTION I: APPLICABLE LAW

(1) Does the application of the country-of-origin rule mean that additional criteria and provisions are necessary? If so, what should they be?

(2) Do you think, considering the country-of-origin rule, that it is necessary to identify a certain number of complementary criteria for determining its application? If so, what criteria?

(3) In order to determine all parties which might be liable, do you think that it would be possible to identify each possible participant along the transmission chain? If so, please could you specify those participants.

(4) Given the differences there are in levels of protection, should the country-of-origin rule be used in the Community to define the act of transmission in respect of:

- only those transmissions which originate in a Member State;
- only those transmissions which originate in a Member State or in a third country which applies the Berne Convention (Paris Act 1971) and the Rome Convention of 1961;
- all transmissions, originating in any country?

(5) If the country-of-origin rule ought to be retained, which laws and areas of national law should be harmonised so as to avoid deflection of trade and loss of protection for rightholders, considering particularly:

- exceptions to exclusive rights;
- ownership;
- moral rights;
- other rights?

(6) How, to what extent and in which areas should the protection of rightholders be improved in countries which apply the Berne and Rome Conventions, or indeed in the Community, if the country-of-origin rule is to be applied?

(7) If in your opinion the country-of-origin rule should not be introduced, what rules would you like to see applied instead?

(8) Do you think that safeguard clauses can properly protect Community rightholders where matter is first entered into a network in a third country which does not provide sufficient protection for intellectual property?

(9) Do you think that parties should be entirely free to choose the law of the contract, or do you think that freedom of contract should be restricted:
- across the board;
- only so as to protect certain specific aspects such as moral rights, equitable remuneration, or management by a collecting society;
- only where the contract is concerned with the works or other protected matter of European Union rightholders?

SECTION II. EXHAUSTION OF RIGHTS AND PARALLEL IMPORTS

(1) Should a rule be made excluding the international exhaustion of copyright, along the lines of Article 9(2) of the Rental Right Directive?

(2) Should it be reaffirmed that there is no exhaustion of any rights (e.g. broadcasting, transmission and rental rights) in respect of the supply of services?

(3) How do you see these questions against the background of on-line networks which seem destined to become world-wide?

(4) Can systems providing for international exhaustion coexist with others which do not?

PART TWO: SPECIFIC RIGHTS

SECTION III. REPRODUCTION RIGHT

(1) Do you think that the digitization of works and other protected matter should be covered by a reproduction right? Would exceptions to the exclusive character of this right be justified? If so, what exceptions and why?

(2) Do you think that private copying and reprography of digitized works, other protected matter, or both, other than computer programs:

- should be fully subject to this reproduction right;
- should be subject to this reproduction right, except that a single copy would be permitted (as with the SCMS system);
- should be authorized, with or without a system of remuneration?

SECTION IV: COMMUNICATION TO THE PUBLIC

1) Under what conditions do you think that the following acts can be considered as forms of private use:

- transmission over the network between two private persons;
- transmission over the network between a number of private persons (e.g. bulletin board services);
- transmission over the network between a private person and a firm;
- transmission over the network within one or between several firms?

(2) In the case of transmission over the network between more than two private persons, do you think that the fact that the people concerned know each other or belong to the same family should play any part in the definition of communication to the public?

(3) If transmission is point-to-point, how does the nature of the persons communicating - private persons, firms, public bodies etc. - affect the classification of the act as communication to the public?

(4) Do you think that copyright and related rights apply to the act of connecting a server which holds works protected by copyright to the network? If so, which rights apply? Do you know of any legislation which takes a position on the matter?

(5) What other tests or acts do you think should be looked at to determine whether or not there is communication to the public?

SECTION V: DIGITAL DISSEMINATION OR TRANSMISSION RIGHT

(1) The Computer Programs Directive (91/250/CEE) and the Rental Right Directive (91/250/CEE) could be applicable by extension to electronic transmission from point-to-point. Given that possibility, do you think that certain elements should be adapted? If so, which ones?

(2) Would you be able to state the extent of the economic impact of the application of the rental and lending regime on rightholders and other parties?

(3) What would you say was the effect upon SMEs?

SECTION VI: DIGITAL BROADCASTING RIGHT

(1) In your opinion, will digital broadcasting, which allows a larger number of channels, increase the volume of cross-border broadcasting? Do you think this possibility justifies Community intervention, or is it still only theoretical?

(2) Do you think that digital broadcasting is a real threat to the holders of related rights, who do not currently have an exclusive broadcasting right? Is the introduction of exclusive digital broadcasting rights for phonogram and film producers and performers in these sectors necessary, or possible on certain conditions, or to be ruled out altogether?

(3) Do you think that distinctions between methods of dissemination can facilitate a solution (for example by including only certain forms of digital broadcasting, such as cable transmission)?

(4) Do you think that a tightening up of the reproduction right in the private sphere, which could be strictly enforced by means of technical arrangements preventing copying by receivers, would be sufficient to avoid problems of large-scale copying?

SECTION VII: MORAL RIGHTS

(1) Do you think that the differences between the laws of the Member States are such that the rules on moral rights should be harmonized? Would harmonization be justified in the present situation?

(2) Could it be decided that problems of moral rights are to be resolved by contract? When material is placed on the network, for example, or even when it is digitized, the author might agree to certain types of modification such as dubbing, subtitling, reformatting etc.

(3) Could the very fact that the author has agreed to digitization be taken to give rise to a presumption that he has agreed to certain modifications?

(4) Do you think that the acceptability of modifications could be defined in collective agreements between authors and performers on the one hand and producers and publishers on the other?

(5) Do you think that solutions should be negotiated globally or sector by sector (cinema, newspaper publishing, libraries, museums, etc.)?

PART THREE: QUESTIONS ON THE EXPLOITATION OF RIGHTS

SECTION VIII: ACQUISITION AND MANAGEMENT OF RIGHTS

(1) What form should be taken by centralized schemes set up by rightholders and managers? Would a "one-stop-shop" system be desirable or indeed sufficient to deal with the demands of the information society?

(2) Should these centralized schemes be confined to issuing licences for the creation of multimedia works, or should they become general mechanisms?

(3) Do you think that competing schemes, that is to say schemes covering the same rights, can coexist in the same Member State, in the Community as a whole or at world level (these might cover separate repertoires, or perhaps even identical repertoires)? How could such competition work in practice?

(4) Assuming that the information society will operate on a world-wide basis, do you think that the licences granted by a scheme or schemes of this kind will be or should be world-wide licences?

(5) Do you think that licences for a more limited territory will continue to be a possibility?

(6) Do you think that alongside the existing competition rules the Community legislation should lay down guidelines for collecting societies or centralized management schemes? If so, what sort of rules are needed: a code of conduct

regulating competition between societies or schemes, rules governing relations between societies or schemes and their members, or both?

SECTION IX: TECHNICAL SYSTEMS OF PROTECTION AND IDENTIFICATION

(1) Do you think the Community, in co-operation with the Member States, should make provision for legal measures which guarantee compliance with:
- identifying tags;
- standards for protection against private digital copying;
- other technical systems of identification or protection against private digital copying?

What would be your view if these had been introduced and accepted by industry?

(2) What sort of information should the identifying contain:
- identification of the work or other protected matter;
- identification of the original rightholders;
- identification of the work or other protected matter, of the original rightholders, of licensees and other managing parties;
- licence terms for possible future assignees of the licence?

(3) In your opinion, should works and other protected matter originating in non-Community countries be prevented from entering the Internal Market if it does not incorporate systems of identification compatible with those recognized in the Community?

(4) To the extent that technical systems of protection against private digital copying can be developed and applied, what other legislative measures in respect of those systems would it be necessary and possible to adopt?

(5) If a technical system of protection against private digital copying were introduced on a harmonized basis, do you think that the marketing and importation of any equipment not containing such systems of protection should be forbidden?

(6) Do you consider that the eventual effectiveness of technical systems of protection against private digital copying depends upon the creation of international standards?

(7) How should it be determined whether works and other protected matter have fallen into the public domain? How could it be guaranteed that protection of works and other protected matter by intellectual property law does not hinder or restrict the access to data in the public domain?