

# COMMISSION OF THE EUROPEAN COMMUNITIES

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## FOLLOW-UP TO THE GREEN PAPER

Working programme of the Commission  
in the field of copyright and neighbouring rights

(Communication from the Commission)

## INTRODUCTION

This paper sets out to define a general policy programme outlining the steps the Commission will be taking in respect of copyright and neighbouring rights<sup>(1)</sup> following publication of the Green Paper on Copyright and the Challenge of Technology (COM(88) 172 final, June 1988) and the reactions it elicited. This action programme covers the period up to 31 December 1992, the date by which the internal market is to be established.

The 1988 Green Paper was a consultative document intended to provide a basis for wide-ranging discussion particularly among those directly involved both in the Community and internationally. It represented neither a definitive statement of the Commission's position nor an exhaustive study of the problems at issue.

Before embarking on a programme of specific measures to harmonize legislation in the field, the Commission felt it would be advisable to seek the opinion of all those concerned so as to be able to make a proper assessment of the interests affected, that is to say the interests of authors, artists, the cultural industries, and consumers, and to identify the areas to which priority should be given.

In this extensive process of consultation the views of interested parties were put forward both in the form of written comments and at hearings arranged for the purpose. Four hearings were held. The first took place on 6 and 7 October 1988, and dealt with the legal protection of computer programs (Chapter 5 of the Green Paper). The second was held on 1 and 2 December 1988, and dealt with audio-visual home copying (Chapter 3 of the Green Paper). The third took place on 18 and 19 September 1989 and was devoted to rental rights (Chapter 4 of the Green Paper) and certain aspects of piracy (Chapter 2 of the Green Paper). Finally, the fourth hearing took place on 26 and 27 April 1990; it dealt with the protection of data bases (Chapter 6 of the Green Paper).

Chapters 2 to 7 of the present document follow the order of the corresponding chapters of the Green Paper.

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(1) In this paper the term "neighbouring rights" refers to the rights of performers, producers of phonograms and broadcasting organizations guaranteed by the Rome Convention of 26 October 1961.

CHAPTER 1 : COPYRIGHT, NEIGHBOURING RIGHTS AND THE EUROPEAN COMMUNITY - THE NEED FOR A GLOBAL APPROACH

1.1. The emergence of new technologies in the last ten years has aroused fresh interest in the subject of copyright and neighbouring rights. The new technologies have brought three main developments with them:

- (i) the increasing role played by copyright and neighbouring rights in the economy, particularly in the western countries, with their growing orientation towards goods and services with a high value-added content;
- (ii) the internationalization of questions of copyright and neighbouring rights, as the new technologies have removed or at least blurred the frontiers between countries so that difficulties can no longer be contained within a single state and dealt with at a purely domestic level;
- (iii) profound changes in the use made of goods and services with links with copyright, neighbouring rights and the cultural sector in general.

These aspects are closely bound up together. The new uses of copyright and neighbouring rights which have been made possible by technological advances are in many cases practiced on an international scale. The approach taken consequently has to operate in a multilateral and Community context to take account of this new dimension.

1.2. The new technologies represent both an opportunity and challenge: an opportunity, because of the scope they open up for individuals to improve their quality of life and businesses their effectiveness, by providing access to literary and artistic works and to information and data, frequently on a real-time basis; and a challenge, because of the scope for large-scale and uncontrolled copying of works, with no proper return to the holders of the rights involved.

1.3. In the face of these developments, and given the imminent establishment of the 1993 single market, the Community has a duty to act.

Copyright provides a basis for intellectual creation. To protect copyright is to ensure that creativity is sustained and developed, in the interest of authors, the cultural industries, consumers, and ultimately of society as a whole. Neighbouring rights underpin these objectives in various ways, particularly by guaranteeing a proper return to performing artists and those who invest in the provision of these cultural goods and services.

- 1.4. The Commission will be guided by two principles here: firstly, the protection of copyright and neighbouring rights must be strengthened; secondly, the approach taken must as far as possible be a comprehensive one.
- 1.5. The changes which technological advance has brought make it urgently necessary to strengthen the protection of copyright and neighbouring rights, if an important economic and cultural asset in the Member States is not to be lost.

The rights existing under the international conventions must be adapted to the changed technology, in ways which improve the protection given to authors, and new rights must be conferred on authors to prevent their creative efforts and their investments from being unlawfully appropriated by others.

- 1.6. The author's exclusive right to exploit his work or to authorize others to do so is the fundamental economic element in copyright. Holders of neighbouring rights have similar entitlements in respect of certain uses.<sup>(1)</sup>

The holder of an exclusive right may exercise it himself, and thus himself determine the extent of dissemination of his work and the financial terms for its exploitation. But when an international system of copyright was set up it was immediately clear that certain rights, notably the right of public performance of musical works, would be difficult to exercise on an individual basis. As technology progressed the areas in which individual exercise was difficult or impractical expanded. In recent times the technological developments which have permitted new forms of use on an international scale, and no longer at a purely domestic level, have added a new dimension to the question of individual or collective rights management. The problem is rendered all the more important by the prospect of the adaptation of existing rights and the conferring of new rights on authors.

The completion of the internal market requires that authors and other right holders will find a level of protection at least comparable if they wish to exploit their rights in other Member States. Thus the conferring of a right and the practical management of that right are more and more closely bound up together.

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(1) For other uses holders of neighbouring rights have a claim to remuneration.

Under these circumstances, the Commission has also to consider the question of the management of copyright and neighbouring rights in the light of the completion of the internal market in 1993. The Commission has the intention of carrying out in the near future a study on the question of collective management in order better to identify the issues.

- 1.7. The Commission proposes to take a comprehensive approach to the problems of copyright and neighbouring rights. The approach would be "comprehensive" in three ways.

Within the Community, first of all, the Commission must not confine itself to a few salient points but must try to tackle all the main aspects which might have implications for the creation of the single market in cultural goods and services. Indeed in its communication Books and Reading: a Cultural Challenge for Europe<sup>(2)</sup> the Commission emphasized that alongside the matters looked at in the Green Paper there were other questions of copyright which needed to be considered at Community level. Similarly, in its communication on audiovisual policy<sup>(3)</sup>, the Commission emphasised the need for action on copyright in the field of broadcasting.

Next, 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. If protection is inadequate outside the borders of the Community creative work produced in the Community can be plagiarized in non-member countries, and productive activity displaced to countries in which the level of protection of intellectual property is lower. As we move towards an intensification of world trade the Community would find itself having to deal with growing imports of work produced in breach of copyright in those countries:

Neither can we underestimate the fact that the rule of national treatment laid down in the international copyright conventions means that any improved protection available in the Member States of the Community has to be granted to natural or legal persons from non-member countries, even though in those countries natural or legal persons from the Community may receive a lower level of protection. The existing imbalances would be aggravated.

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(2) COM(89) 258 final, 3 August 1989.

(3) COM(90) 78 final, 21 February 1990.

The same thing holds for neighbouring rights, with one qualification. Under the Rome Convention national treatment is granted only to the nationals of other contracting states which are party to the Convention.

- 1.8. The Commission and the Community have accordingly been making an active contribution to the work on trade-related aspects of intellectual property rights ("TRIPs") in the framework of the GATT Uruguay Round, in order to arrive at a minimum level of substantive and effective protection at world level. While taking account of the legitimate interests of the developing countries and of the need to secure as broad a consensus as possible, the Commission feels that the level of protection provided should be high. It feels that in the medium term this would profit all countries, developed and developing.
- 1.9. The Commission would also like to repeat its full backing for the sustained efforts undertaken by the World Intellectual Property Organization (WIPO) to ensure adequate protection of copyright and neighbouring rights. The Commission supports the initiatives worked out, and particularly the preparation of standard provisions intended to serve as a model for national copyright legislation in the countries party to the Berne Convention and the setting up of a committee of experts to consider whether a protocol to the Berne Convention should be drawn up and if so what its content should be.
- 1.10. Finally it is necessary to have a basic level of harmonisation common to all Member States upon which it is possible to build more easily as means of a complementary harmonisation of these rights in specific areas.
- 1.11. Proposed Community action
  - 1.11.1. The Commission feels that to parallel and complement the steps taken in the multilateral framework the protection of copyright and neighbouring rights should be consolidated inside the Community. This is why it intends to take its first initiative in the form of a joint approach.
  - 1.11.2. As well as, and without prejudice to the other measures referred to in this paper, it is vital that all the Member States of the Community should accede to the multilateral conventions administered by WIPO - alone or in conjunction with other international organizations - in the field of copyright and neighbouring rights.

- 1.11.3. This would supply a common foundation in all the Member States, on the basis of which specific aspects could be harmonized in the Community, and steps taken in the multilateral framework, in order to improve the level of protection. Such a common foundation would facilitate the practical exercise of the powers conferred by the Treaty of Rome, which already permit Community action on certain specific aspects of copyright and neighbouring rights.
- 1.11.4. As things stand at present the majority of Member States are already party to the Berne Convention on the protection of literary and artistic works, as revised by the Paris Act of 1971, and to the 1961 Rome Convention on the protection of performers, producers of phonograms and broadcasting organizations. In most of the Member States which have not yet acceded to these Conventions legislation allowing ratification or accession to the Rome Convention has already been passed or is currently before the national Parliaments.
- 1.11.5. In order to eliminate the distortions which exist and to clear the way for the large single market, therefore, the Commission is presenting to the Council a proposal for a decision which would require all Member States to have acceded to and comply with the provisions of the Berne Convention, as revised by the Paris Act, and to the Rome Convention, by 31 December 1992, the date on which the internal market is to be completed.
- 1.11.6. Such an initiation, which seeks to lay down a minimum level of protection, does not mean that on more specific matters the Commission will not propose a more complete harmonisation.
- 1.11.7. This proposal forms the subject of a separate document.

## CHAPTER 2 : PIRACY

### 2.1. Conclusions of the Green Paper

- 2.1.1. In Chapter 2 of its Green Paper on Copyright and the Challenge of Technology the Commission concluded that the repression of piracy of sound and audiovisual recordings in the Community requires the existence of clear substantive legal provisions in favour of authors, producers, performers and broadcasting organizations in respect of their right to authorize the reproduction for commercial purposes of their recordings and broadcasts.
- 2.1.2. In the view of the Commission, such substantive legal protection must be accompanied by appropriate procedures facilitating legal action and proof against acts of piracy, in particular provisions on search and seizure. Furthermore, efficient remedies must be at the disposal of right holders in infringement cases and deterrent criminal sanctions must be available. There must be an organized framework permitting an effective cooperation between right holders and public authorities, in particular, law enforcement authorities. Specific measures, such as the control of commercial tape duplication equipment, should be adopted where appropriate.
- 2.1.3. To achieve these goals, the Commission indicated its intention to submit to the Council as a matter of priority a proposal for a binding legal instrument :
- requiring all Member States to provide, through one legal technique or another, for rights for producers of cinematographic works, videograms and sound recordings to authorize the reproduction for commercial purposes of those works and their commercial distribution;
  - requiring all Member States to provide rights for performing artists to authorize the reproduction for commercial purposes of their fixed performances and their commercial distribution;
  - requiring all Member States to provide rights for organizations engaged in broadcasting to authorize the fixation and reproduction for commercial purposes of their broadcasts, as well as the commercial distribution of such fixed broadcasts, and the introduction of similar rights in respect of signals transmitted by cable in favour of cable television operators;

- requiring the introduction in all Member States of regimes making the possession of digital audio tape commercial duplicating equipment dependent upon a licence to be delivered by a public authority and the maintenance of a register or registers in respect of licensed equipment.

2.1.4. In addition, the Commission indicated an intention to submit to the Council in due course a proposal for a regulation :

- extending Council Regulation (EEC) no. 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods to cover equally goods under copyright;
- extending the mutual assistance regime to include first counterfeit and then copyright infringements.

2.1.5. Furthermore, the Commission stated the desirability of:

- recommending to Member States the provision of rights for authors, producers of phonograms and videograms and performers to request public prosecution in respect of acts of piracy;
- recommending to Member States the introduction of minimum requirements as regards search and seizure procedures in cases of suspected piracy of copyright goods;
- recommending to Member States the introduction of minimum requirements as to criminal sanctions and civil remedies;
- creating at the appropriate Community or international level a register or registers, financed by right holders, of rights in sound recordings, video recordings and feature films, possibly linked to the C.D. project<sup>(1)</sup>;
- setting up an agreement at the international level on the seizure of counterfeit goods, applicable not only to counterfeit of trade marks but also to intellectual property rights including copyright and related rights.

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(1) CD project : A computerised data storage system containing information on a range of materials protected by intellectual property rights.

## 2.2. Hearing

The conclusions suggested by the Commission for the harmonization of certain neighbouring rights (see 2.1.3. above) were also dealt with in the hearing the Commission held for interested circles on 18 and 19 September 1989 in Brussels.

There was general support for the Commission to submit a proposal on those items mentioned above (under 2.1.3) which would in effect harmonize the protection for performing artists, producers of phonograms and videograms and broadcasting organizations on the line of the Rome Convention of 1961.

Furthermore, participants unanimously held that the term of protection for all neighbouring right holders protected by the Rome Convention of 1961 should be harmonized and fixed to 50 years from production, performance or publication for all rightholders.

## 2.3. Proposed Community action

2.3.1. A proposal for a directive on the harmonization of certain neighbouring rights has been prepared. This proposal is intended to follow the suggestions in the Green Paper to fight piracy (above 2.1.3). Based on these suggestions, on the results of the hearing and the written and oral comments received, the proposal includes the following elements :

- Introduction of exclusive rights of reproduction and distribution for performing artists, phonogram producers, videogram producers and broadcasting organizations;
- Introduction of an exclusive right of fixation for performing artists and broadcasting organizations.

2.3.2. Thus, the proposal would follow the line of the Rome Convention of 1961, to which a majority of Member States have adhered, and go beyond it in some respects. This proposal on the harmonization of neighbouring rights may be linked, for practical purposes, to the proposal for a directive on rental/lending right.

2.3.3. On duration of these rights, the Commission accepts the suggestion that their duration shall be 50 years after the fixation or the performance was made or took place or was published. For practical purposes this point will be included in a separate proposal which will deal with the problem of duration in general.

- 2.3.4. In addition, most of the other items mentioned in Chapter 2 of the Green Paper (above 2.1.4 and 5) are at present dealt with on a multilateral basis in the context of the Uruguay Round of the GATT (TRIPs) which is intended to improve the protection and enforcement of trade related Intellectual property rights.
- 2.3.5. The proposal concerning the reinforcement of neighbouring rights is presented in a separate document (see point 2.3.2.).

## CHAPTER 3 : HOME COPYING OF SOUND AND AUDIOVISUAL RECORDINGS

### 3.1 Introduction

- 3.1.1 The question of home copying of audio-visual recordings, which was discussed in Chapter 3 of the Green Paper, evoked considerable interest in relevant circles. The problem is a particularly important and complex one.

Home recording of sound and audio-visual works by private individuals for personal and non-commercial use, whether from other recordings or from broadcasts, has become a widespread practice both in the European Community and elsewhere. It can be expected to grow even further, as a result particularly of technological progress.

- 3.1.2 To take account of the new situation, copyright legislation in a number of countries, both within and outside the Community, has been amended to ensure the protection of right holders and to introduce a right to remuneration. The Commission also raised the question in the Green Paper. On that basis it engaged in a wide-ranging process of consultation with all interested parties.
- 3.1.3 On the basis of what was said in the Green Paper and in the course of the subsequent consultation, the Commission considers that measures must be taken to deal with the problem at the Community level.

### 3.2 Conclusions of the Green Paper

- 3.2.1 After thoroughly studying the legal, practical and technical aspects of the problem the Commission sought the views of interested parties.
- 3.2.2 As regards digital audio recordings the Commission asked for comments on the following propositions:
- (a) digital audio tape (DAT) recorders should be required to conform to technical specifications which prevent their use for unlimited acts of audio reproduction;
  - (b) the manufacture, importation or sale of machines which do not conform to the specifications should be prohibited;
  - (c) the measures outlined in (a) and (b) should apply to all DAT machines for recording audio;
  - (d) the manufacture, importation or sale of devices intended to circumvent or render inoperable the measures outlined in (a) and (b) should be prohibited;

- (e) possession of machines intended for professional or specialist use and not conforming to the specifications for home use outlined in (a) should be made dependent upon a licence to be delivered by a public authority and the maintenance of a register or registers in respect of licensed equipment.
- 3.2.3 The Commission also asked for views on the question whether it was acceptable that systems of remuneration for private copying should remain in those Member States which have introduced them, and could be introduced if Member States so wish in those countries which have not yet introduced them, no Community action being required for their introduction or harmonization.

### 3.3 Hearing and submissions

- 3.3.1 Since the Green Paper was published a great many opinions have been expressed, and some positions have shifted as a result of developments in the field.
- 3.3.2 The general comment was put forward that it was unwise to focus attention exclusively on digital recording, since analogue recording would continue to be the major form for years to come.

It was also said that there was no need to differentiate between the copying of audiovisual works and of works in sound only because from the point of view of copyright all reproduction is treated in the same way. Also, the progressive integration of technical means of reproduction tends to render such a distinction increasingly meaning less. Finally, a large majority opposed any prohibition on home copying.

- 3.3.3 On the question of systems of remuneration for home copying the opinions expressed differed. Right holders - authors, performers and the producers of phonograms and videograms - all insisted that this system must be generalized in all the Member States in order to safeguard their rights. Other groups, including consumers and the manufacturers of magnetic tape, were opposed to any system of levies.
- 3.3.4 Finally, as regards technical protection systems, there was a broad consensus in favour of a system to regulate DAT recording, which was supported by right holders, equipment and carrier manufacturers, and consumers. This system, the Serial Copy Management System (SCMS), permits copies to be made from the original work but not from other copies. The holders of rights in protected works would accept this system only if a right of remuneration was also ensured.

3.4 Proposed Community action

- 3.4.1 Given the need to complete the internal market the Commission intends initially to take two measures regarding the private copying of sound and audio-visual works.
- 3.4.2 Firstly, the Commission intends to lay before the Council a proposal for a directive on home copying.
- 3.4.3 Secondly, the Commission is favourably disposed to the general use of the SCMS system for digital audio tape (DAT) recording equipment. New technology is to be encouraged, but not where it would damage the interests of right holders and consumers.

The SCMS system satisfies these requirements, by allowing copies to be made while at the same time limiting the practice; the user thus has the full benefit of technological progress. It also allows right holders to keep at least partial control of the exploitation of their works by preventing the making of the unlimited series of copies permitted by DAT technology. There will also have to be consideration of the scope for extending such a system or an equivalent system to other forms of digital reproduction.

- 3.4.4 The Commission intends to include the drafting of a proposal for a directive in its work programme for 1991.

## CHAPTER 4 : DISTRIBUTION RIGHT, EXHAUSTION AND RENTAL RIGHT

### 4.1. Conclusions of the Green Paper

- 4.1.1. Upon review of the legal situation in the Member States and evaluation of the economic background, the Green paper on Copyright and the Challenge of Technology in chapter 4 concluded that there is a need to harmonize a rental right for certain areas of copyright and for certain recording media.
- 4.1.2. Thus, the Commission in the Green Paper (4.11.1.) suggested the introduction in all Member States of a right for the author, the performer and the phonogram producer to authorize the commercial rental of sound recordings. This suggestion is mainly based on the consideration that the increasing penetration of compact discs, which do not deteriorate upon repeated use, entails the risk that the author, the performer and the phonogram producer may suffer economic damage by the unauthorized commercial rental of sound recordings.
- 4.1.3. Furthermore, the Commission (Green Paper 4.11.2.) suggested the introduction or generalization in all Member States of a right for the producers of cinematographic works to authorize the commercial rental of their videograms. In the view of the Commission the economic interests of such producers of videograms make it necessary to guarantee them the right to choose the time and place to exploit their works by performance in movie theatres and by commercial rental.
- 4.1.4. However, the Commission in the Green Paper (4.11.3.) saw no obvious need for the introduction of a general right for authors to control other elements in the commercial distribution of their works or to harmonize exhaustion provisions. Neither did the Commission consider it necessary at that time to extend the scope of a rental right to non-commercial lending.
- 4.1.5. The harmonization of a right for the commercial rental of sound and audiovisual recordings was intended to be initiated by a proposal for a directive, to be submitted to the Council by the Commission based on Article 100A EEC (Green Paper 4.12.1.).

### 4.2. Hearing

- 4.2.1. The conclusions of the above mentioned proposals in Chapter 4 of the Green Paper were discussed at a hearing which the Commission held for interested circles on 18 and 19 September 1989 in Brussels.

4.2.2. Most participants in this hearing agreed to the need for a harmonization of rental rights. An overwhelming majority held that a harmonization should concern both rental right and non-commercial lending right and thus should go beyond the suggestions made in the Green Paper. There was unanimity that not only sound recordings and videograms should be covered by such a rental/lending right, but also all categories of works under Article 2 of the Berne Convention. In the view of many participants the determination of the beneficiaries of a rental/lending right should not be decided at the Community level but should be left to the legislation of Member States.

4.2.3. Most participants were in favour of an exclusive right (to authorize or prohibit) for commercial rental. For lending right, most participants considered that a right to remuneration would suffice, which could preferably be exercised by collecting societies or other similar bodies.

#### 4.3. Proposed Community action

4.3.1. A proposal for a directive on the harmonization of rental and lending right has been prepared.

4.3.2. On the basis of the Green Paper, the results of the hearing and the numerous written and oral comments submitted to the Commission on these issues, the proposal is intended to include the following elements:

- An exclusive right (to authorize or prohibit) the commercial rental of protected copyright works, phonograms and videograms.
- The beneficiaries of such a rental right will be the authors, performing artists and producers.
- An exclusive lending right, which may be subject to derogations, on the part of Member States, for cultural or other reasons.
- The duration of the rental/lending right will follow the minimum term of the Berne Convention (at least 50 years after the death of the author) and Rome Convention (at least 20 years) until such time that a Community harmonization of the duration of these rights has taken effect.

4.3.3. This proposal is the subject of a separate document.

## CHAPTER 5 : THE LEGAL PROTECTION OF COMPUTER PROGRAMS

### 5.1. Conclusions of the Green Paper

- 5.1.1. Chapter 5 of the Green paper proposed the submission of a proposal for a Council Directive on the legal protection of computer programs, and indicated the possible contents of such a directive in broad terms (5.7.1)
- 5.1.2. In October 1988 the Commission held a hearing of interested circles to discuss the conclusions set out in the Green Paper. Participants from major organizations representing producers and users of computer programs were invited to contribute oral and written statements.

### 5.2. Hearing

- 5.2.1. The hearing of October 1988 confirmed the support of industry for the broad terms of paragraph 5.8.2 (i.e., the contents of any Directive which might be proposed) of the Green Paper with the following reservations:
- Point c) It was generally felt that access protocols and interfaces should not be treated differently from other parts of programs.
- Point d) It was generally felt that the normal restricted acts provided for by the Berne Convention should apply, and that these should be listed as separate acts.
- Point j) There was no support for this point.
- 5.2.2. The conclusions of the hearing were:
- a) a directive should be prepared without further delay;
  - b) it should be based on copyright; neighbouring right or sui generis protection were rejected;
  - c) it should correspond to the majority view expressed in the hearing, and depart as little as possible from the legislation already enacted in the Member States.

### 5.3. Proposed Community Action.

- 5.3.1. The text of a proposed directive was adopted by the Commission in December 1988 and published in the Official Journal.

- 5.3.2. The opinion of the Economic and Social Committee was received in October 1989. It was generally favourable to the Commission' proposal.
- 5.3.3. Considerable controversy was generated in industry circles by the proposed directive on two specific points: the scope of protection (whether protection covered interfaces or not) and reverse engineering (the changing of the object code form in which the program is supplied to the source code form in which it was first written in order to study aspects of the program design). The controversy on these issues delayed the Parliamentary opinion by several months.
- 5.3.4. The opinion of the Parliament was delivered in July 1990.
- 5.3.5. The Commission amended its proposal on 17 October 1990<sup>(1)</sup> by incorporating those amendments of the European Parliament which it considered to be acceptable.
- 5.3.6. A common position of the Council is expected by the end of 1990.

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(1) COM(90) 509 final SYN 183.

## CHAPTER 6 : DATABASES

### 6.1. Conclusions of the Green Paper

- 6.1.1. The Commission solicited views as to whether databases should be protected by copyright or a sui generis system, and whether protection should be granted by virtue of the selection and arrangement of the compilation.
- 6.1.2. The conclusions of this chapter of the Green Paper were left relatively open ended, with no firm indication being given of specific action by the Commission in view of the rapid development of this new sector. Comments received on Chapter 6 indicated a strong desire in many quarters to see measures introduced within the Community to clarify and harmonize protection of databases, where such protection exists at present, and to introduce protection explicitly in those Member States where existing legislation is unclear or deficient as regards databases.

### 6.2. Hearing

- 6.2.1. A hearing of interested circles was held on April 26/27 1990. The hearing confirmed that there was overwhelming support from right holders for protection of databases by means of copyright. No support was expressed for a 'sui generis' approach.

- 6.2.2. The conclusions of this hearing were as follows:

- (1) As regards the first question on the questionnaire, a large majority spoke against making any distinction between "database" and "data bank". Both terms are used equally at present. However, there is a growing tendency to use the general term "database".
- (2) As regards a definition of "database", several participants proposed a broad definition which includes the following elements :
  - a) collection, organization and storage of data;
  - b) information in a digital form in which it can be processed by means of a computer.

In the course of the discussion it became clear that the fact that the information is stored digitally means that the definition of "database" can include all media, e.g. text, image, sound, whether protected as such by copyright or not.

- (3) All speakers indicated that databases are in their view protected by copyright. This view was shared by the representative of WIPO.

- (4) Copyright should apply to databases without prejudice to the application of other forms of legal protection such as patents, unfair competition, criminal law, contract, etc.
- (5) As to the applicability of an alternative form of protection instead of copyright (neighbouring right or sui generis right) a large majority of participants rejected this approach.
- (6) As to the categorization of databases, speakers did not indicate a desire to limit this to "compilations" given that some databases are "literary works" in their own right.
- (7) As far as the protection of personal data is concerned, this problem was considered to be outside the scope of the hearing.
- (8) As to the distinction which could be made between real time and static databases, the majority of speakers believed no distinction should be made. Copyright could apply to and resolve legal problems arising in respect of all databases regardless of the technique used to create them.
- (9) Regarding the ownership of rights in the database itself, all participants felt that the author, in the sense of the person creating the database, should be the first rightholder.
- (10) As regards databases created by joint authors or under a contract of employment, in the absence of contractual provisions to the contrary, the Berne Convention would provide the appropriate legal framework.
- (11) The question of the inclusion in a database of protected works was raised. A large majority believed that normal copyright rules should apply. All participants agreed that indexing (inclusion of bibliographical information) of protected works without authorization of the rightholder should not be an infringement of copyright. The same rule could apply to abstracts of protected works provided that they did not substitute for the original protected works themselves. Normal copyright rules should apply in this instance.
- (12) As regards the term of protection, Article 7 of the Berne Convention was referred to on a number of occasions. The term of protection should be compatible with the provisions of the Berne Convention. The possibility of increasing the term of protection to 70 years met with no particular resistance. Some participants however reserved their position on this issue.

- (13) As to the originality issue, most participants expressed a desire to see a criterion of originality compatible with the requirements of the Berne Convention and which would impose no special requirements on the authors of databases.
- (14) As regards the restricted acts, there was general agreement that classic copyright principles as laid down in the Berne Convention should apply. These restricted acts should cover : displaying, inputting, loading, transmission, storage, downloading.
- (15) The need to provide for the collective administration of rights in works input into databases was indicated by some participants.
- (16) Several speakers advocated that no distinction should be drawn between databases on CD Rom and on-line databases. It was felt that the physical medium on which the database was stored was irrelevant to this issue.
- (17) It was said that the use of the same software to create different databases did not affect their protectability: sufficient choices were available to make different databases using the same software.
- (18) As regards technical measures to protect databases, several speakers indicated that in their view rightholders should use all available means to control access to and use of their works.

### 6.3. Proposed Community Action

- 6.3.1. The above conclusions suggest that a uniform and stable legal environment for the creation of databases within the Community should be established without further delay, given the economic importance of the sector and the risk of distortions arising within the Single Market.
- 6.3.2. Given that there was general support for a directive harmonizing copyright protection for databases, it has therefore been announced that a proposal for a Directive to this end should be prepared for adoption as soon as possible.
- 6.3.3. The Commission will include this initiative in its working program for 1991.

CHAPTER 7 : THE ROLE OF THE COMMUNITY IN MULTILATERAL AND BILATERAL EXTERNAL RELATIONS

7.1. Conclusions of the Green Paper

7.1.1. In Chapter 7 of its Green Paper on Copyright and the Challenge of Technology, the Commission dealt with the international aspects of copyright protection, including the negotiations currently taking place in the framework of the GATT.

7.1.2. The Commission concluded that copyright also is placed in a multi-faceted, plurilateral world. The success or failure of multilateral efforts, and the ongoing negotiations in the new GATT round in particular, cannot fail to have an effect on the Community's bilateral efforts. These, in turn, will affect and are affected by the use which interested parties may make of the autonomous new commercial policy instrument.

7.1.3. Rather than submitting specific proposals for initiatives, the Commission has in the Green Paper submitted for discussion the following matters :

- the priorities to be given to the different aspects of reinforcement of intellectual property protection in the international context ;
- the development by the GATT of new disciplines as regards the effective reinforcement of intellectual property laws, in particular, copyright, as well as the adoption, as appropriate, of improved substantive standards ;
- the more systematic use of bilateral relations, to ensure better protection in non-Member States of the intellectual and industrial property of Community right holders, particularly in the copyright field.

7.2. Negotiations on "TRIPs" in the Uruguay Round of the GATT

7.2.1. Numerous written and oral submissions to the Commission have encouraged the active role the Community, as represented by the Commission, plays in the negotiations on "TRIPs" (Trade related Intellectual Property Rights) in the ongoing Uruguay Round of the GATT.

7.2.2. The mandate for the TRIPs-negotiations is included in the Ministerial Declaration of Punta del Este. It was further specified and clarified in the course of the Mid-term Review (Montreal/Geneva) which struck a balance between the items industrialized countries are seeking and points of importance for developing

countries. According to this mandate, the negotiations aim at establishing a multilateral agreement on the improved protection of intellectual property rights, governed by the GATT.

- 7.2.3. The issues to be included in the TRIPs agreement are substantive standards (copyright, neighbouring rights, patents, trademarks, industrial design, chips/semiconductor layouts, trade secrets and geographical indications); enforcement (internal enforcement including provisional measures, border enforcement and the acquisition of IPR's) and basic principles (national treatment, MFN/non-discrimination, transparency, dispute settlement, relationship between organizations, developing countries, transitional periods).
- 7.2.4. On all of these three issues, the Community submitted in 1989 comprehensive and detailed written proposals (Doc. W26 on substantive standards, Doc. W31 on enforcement and Doc. W49 on basic principles). Among the other participants in the group, nearly all industrialized countries, but also some developing countries, have also submitted written proposals. The Community proposals have succeeded in forming the main basis for discussion.
- 7.2.5. Finally, the Community was the first participant in the negotiating group to submit, in March 1990, its own complete legal draft of an agreement on "TRIPs" (Doc. W68). On this draft the Commission has received on the whole very positive reactions, including from among developing countries. Thus the Community has become a leading force in its commitment to the highest possible level of intellectual property protection, particularly in the field of copyright and neighbouring rights.
- 7.2.6. The Commission strongly believes that the agreement on TRIPs should become an integral part of the GATT. This would strengthen the role and function of the GATT. Furthermore, it is the declared interest of the Community to enable as many developing countries as possible to join such a TRIPs agreement, while not compromising on the level of protection.
- 7.2.7. Ministerial meetings on the Uruguay Round have confirmed that adequate protection for intellectual property rights is an issue of increasing importance for international trade in the global economy. Some issues in the negotiations, such as the level of intellectual property protection, the relationship between GATT and WIPO and the balance between the in part diverging interests of developing and industrialized countries, were identified as still pending reasonable definition.

### 7.3. Work in WIPO

7.3.1. The World Intellectual Property Organization (WIPO) has worked constantly to render the protection of intellectual property, including copyright and neighbouring rights, more effective throughout the world. WIPO administers the relevant international conventions, including the Berne and Rome Conventions, alone or in conjunction with other international organizations. The Commission has hitherto taken part in WIPO's work in these fields in an observer capacity.

7.3.2. Since the 1971 Paris revision of the Berne Convention there have been several fresh developments with implications for the creation, dissemination and use of literary and artistic works, mainly as a result of the appearance of new technology. A number of meetings held under WIPO's auspices have analysed copyright-related questions raised by these developments.

In the course of WIPO's 1982-83 and 1984-85 biennial meetings of governmental experts were held to discuss such new uses as home copying, hiring and lending, storage and recovery of data processing systems, cable television and satellite broadcasting.

During the 1986-87 biennium and the first part of 1988, guidelines with commentaries covering nine categories of literary and artistic works were discussed at meetings of governmental experts called jointly by WIPO and UNESCO. These guidelines and their commentaries were revised and supplemented in Geneva in June and July 1988 by a committee of governmental experts given the task of evaluating and drawing together the principles relating to the different categories of work.

7.3.3. In accordance with the WIPO Programme for the 1988-89 biennium a committee of governmental experts has examined the question of model provisions for legislation in the field of copyright, on the basis of documents drawn up by the International Bureau.<sup>(1)</sup>

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(1) Document CD/MPC/1/2-1 to 111; document CE/MPC/11/2, Addendum to Chapter IX, "Obligations concerning Equipment used for Acts Covered by Protection", of document CE/MPC/1/2; and document CE/MPC/111/2.

These model provisions are intended to serve as examples for the drafting of aspects of national copyright legislation in the Berne Union countries which are indispensable to the strict and proper interpretation of the Convention, and to provide satisfactory answers to traditional copyright questions and to the new questions linked to the development of technology.

The committee completed its work at its third session in Geneva on 2 to 13 July 1990. In the light of the opinions received the model provisions are now to be drawn up and published by the International Bureau.

- 7.3.4. The Programme for the 1990-91 biennium which the Governing Bodies of WIPO approved at their twentieth series of meetings<sup>(2)</sup> includes item PRG 02.7 entitled "setting of norms for the protection and enforcement of intellectual property rights," which calls for the following initiatives:

"(a) in the field of norm setting by treaties

...

(iii) preparations for

- the conclusion of a protocol to supplement the Berne Convention ("Protocol to the Berne Convention"),
- the conclusion of a treaty on the settlement of disputes between States in the field of intellectual property ("Treaty on the Settlement of Intellectual Property Disputes between States"),<sup>(3)</sup>

- 7.3.5. Under item PRG.03, "Exploration of intellectual property questions in possible need of norm setting," the Programme for the 1990-91 biennium refers to "Intellectual Property Disputes between Private Parties."

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(2) Document AB/XX/2, 31 May 1989.

(3) "WIPO will invite GATT to cooperate, if GATT so desires, with WIPO in this undertaking. The treaty would cover possible disputes arising in all fields of intellectual property, particularly concerning any disputes that may arise in connection with the interpretation or application of the Paris Convention, the Berne Convention, other treaties or other international obligations."

Document AB/XX/2 already referred to, Annex A, page 17.

The International Bureau is to study the possibilities of establishing a mechanism to provide services for the resolution of disputes between private parties over intellectual property rights. Recourse to such a mechanism would be open to private parties (not governments) on a completely voluntary basis.

The mechanism would situate the settlement of disputes in WIPO's specialized and clearly neutral environment, and, in most cases, would make the non-judicial procedures much faster and cheaper than today.

- 7.3.6. These initiatives, which by no means account for the whole of WIPO's extensive activities in the field of copyright, are of particular interest to the Community. The Commission intends to take part, and to make its own contribution within the limits of its powers.
- 7.3.7. In the Green Paper (point 7.2.3.) the Commission concluded that "the further evolution of the Community's role within WIPO in general is a matter of considerable importance given the likelihood of further Community legislation on copyright and related rights and, indeed, on other forms of intellectual property."
- 7.3.8. Before 31 December 1992 the Commission will reconsider the need for a change in the status of the Community within WIPO in respect of copyright and neighbouring rights.

7.4. The Community and other European States and Institutions

The pursuit of effective and appropriate protection for intellectual property rights at the world level, which in the nature of things must seek a balance between the interests of the industrialized countries and those of the developing countries, must not be allowed to obscure the need for more extensive protection in Europe. Such an approach is fully in line with the letter and spirit of the Berne Convention (Article 20) and the Rome Convention (Article 22), and with the cultural traditions of the European countries. Discussion must continue with the other European States and institutions, particularly those of the European Free Trade Association (EFTA), the countries of central and eastern Europe, and the Council of Europe.

7.5. Negotiations on the European Economic Area

7.5.1. With a view to the establishment of a European Economic Area the Council has given the Commission a brief to negotiate an agreement between the Community and EFTA and Liechtenstein. The agreement is to allow free movement of goods, services, capital and persons within the European Economic Area by 31 December 1992. The basis of the agreement would be the relevant acquis communautaire, i.e. the general principles of the Community Treaties and secondary legislation as interpreted by the Court of Justice. The acquis communautaire would be integrated into the agreement.

7.5.2. Community secondary legislation in the intellectual property field is so far very limited, but the Court of Justice has developed a number of principles regarding the implications for copyright and neighbouring rights of the free movement of goods and the freedom to provide services. These principles therefore form an integral part of the acquis communautaire.

7.5.3. The various proposals in the field of copyright and neighbouring rights which the Commission intends to submit to the Council and Parliament should also be considered to form part of the acquis communautaire as soon as they are adopted.

This would emphasise once again the importance which the Commission attaches to the maintenance and reinforcement of a high level of protection for intellectual property rights, and more particularly copyright and neighbouring rights, not only in the Community but also in the wider context of the European Economic Area.

7.6. The Community and the countries of central and eastern Europe

7.6.1. In the trade and cooperation agreements concluded in 1989 and 1990 between the Community and most of the countries of central and eastern Europe the question of intellectual, industrial and commercial property was given particular attention, particularly because of its implications for direct investment in those countries by Community businesses and for the transfer of technology.

In the present state of Community law, intellectual, industrial and commercial property rights are to a great extent within the jurisdiction of the Member States. Apart from the Directives on semiconductors and trade marks, the Council has not yet approved the proposals submitted by the Commission, on computer programs and biotechnology for example.

7.6.2. Despite this there is an article in the agreements concluded recently under which, within the limits of their respective powers, the Contracting Parties undertake to :

- ensure adequate protection and enforcement of industrial, commercial and intellectual property rights,
- ensure that their international commitments in the field of industrial, commercial and intellectual property rights are honoured,
- encourage appropriate arrangements between undertakings and institutions within the Community and the other party with a view to due protection of industrial, commercial and intellectual property rights,
- encourage cooperation and exchanges of views between organizations and institutions responsible for industrial, commercial and intellectual property.

It has also been agreed that Community right holders will have access to the relevant courts and administrative bodies of the countries of central and eastern Europe.

7.6.3. While aware of the limits to action on its part the Commission intends to make full use of the scope provided by these agreements to ensure effective and appropriate protection of the rights in question.

In this spirit the Commission held an information conference on intellectual property with the countries of central and eastern Europe in Brussels on 23 May 1990. Its aim was to improve mutual awareness of the present situation and future developments in the Community and in those countries. Such contact should go on, in a bilateral or multilateral framework.

7.6.4. The trade and cooperation agreements are the first step towards closer relations between the Community and the countries of central and eastern Europe. The protection of intellectual property, and more especially copyright and neighbouring rights, have so far played only a limited role in this connection.

At the European Council meeting in Dublin on 28 April 1990 the Commission envisaged the conclusion of association agreements with certain countries of central and eastern Europe under Article 238 of the EEC Treaty. These agreements will represent a major qualitative advance on the first step. They will establish a lasting and structured relationship with associate countries and will substantially shape tomorrow's Europe. They will include chapters on the following subjects: political dialogue, free trade and free movement, economic cooperation, financial cooperation, cultural cooperation and institutional aspects.

- 7.6.5. Questions regarding the protection of copyright and neighbouring rights are to be seen against this more general background.

A communication from the Commission was submitted in August 1990<sup>(4)</sup>, to the Council and was discussed on 17 September 1990. The outcome of the discussion was favourable and, on the basis of the communication, the Commission made explanatory contacts with Poland, Hungary and Czechoslovakia. The Commission informed the Council about these contacts and submitted proposals for negotiation guidelines with the countries in question. These were discussed in the Council in 4 December 1990.

- 7.6.6. Regarding intellectual property rights, the proposals for negotiating guidelines envisage that measures guaranteeing effective and adequate protection of intellectual, industrial and commercial property, at a comparable level to that which exists in the Community, will be taken by Poland, Hungary and Czechoslovakia. These countries would have undertake to join to those multilateral agreements in this field to which they are not yet party.

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(4) Communication from the Commission "Association agreements with the countries of Central and Eastern Europe : a general outline ", COM(90)398 fin, 27 August 1990.

7.7. The Council of Europe

- 7.7.1. In line with the exchange of letters between the Council of Europe and the European Community concerning the consolidation and intensification of cooperation, of 16 June 1987<sup>(5)</sup> the Commission intends to continue working together with the Council of Europe on matters of common concern in the copyright field, as it said in the Green Paper.<sup>(6)</sup>
- 7.7.2. The Council of Europe has already adopted recommendations in this field, such as those on sound and audiovisual private copying, piracy, and reprography.<sup>(7)</sup>

Work is going on on a legal instrument dealing with questions of copyright in broadcasting, either in the form of a separate instrument to the the European Convention on Transfrontier Television, which was opened for signature on 5 May 1989, or an additional protocol to the Convention. A final decision on this could be taken around the beginning of 1991.

- 7.7.3. The Council of Europe and the Commission are already working together. The Commission would repeat its desire to pursue this process, in the interests of both sides, in order to consolidate the protection of copyright and neighbouring rights at European level.

7.8. The role of the Community in bilateral relations

- 7.8.1. The Green Paper pointed out that the existing international conventions had not yet achieved the objective of providing effective copyright protection on a large enough international scale. In addition to the work in the multilateral context, therefore, problems existing with regard to individual countries or groups of countries need to be tackled bilaterally.

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(5) OJ No L 273, 26 September 1987, pages 35 to 39.

(6) Green Paper on Copyright, page 225.

(7) Recommendation No R(88)1 of the Committee of Ministers to Member States on Sound and Audiovisual Private Copying and Recommendation No R(88)2 of the Committee of Ministers to Member States on Measures to combat Piracy in the field of Copyright and Neighbouring Rights, adopted on 18 January 1988.  
Recommendation No R(90)11 of the Committee of Ministers to Member States on Principles relating to Copyright Law Questions in the field of Reprography, adopted in April 1990.

- 7.8.2. Community industry encounters difficulties of three kinds in non-member countries:
- the absence of adequate substantive standards protecting intellectual property,
  - the lack of effective enforcement where such standards exist,
  - failure to accord national treatment to Community right holders.
- 7.8.3. It will be clear that an agreement on the aspects of intellectual property rights affecting trade, which the Commission hopes can be concluded in the GATT framework (see point 7.2) and to which all the Community trading partners could agree, would place bilateral relations between the Community and non-member countries on an entirely new footing, and would make an important if gradual contribution to alleviating the current difficulties.
- 7.8.4. In order to prepare for an intensification of bilateral relations following the conclusion of the GATT multilateral trade negotiations, and particularly if the negotiations in the field of intellectual property do not produce the desired outcome, the Commission will need information on the legal and practical situation regarding all aspects of the protection of intellectual property in non-member countries. The Commission's information must be sound if it is to make the best possible assessment of priorities, to concentrate the action taken by the Community, and to select the most suitable forms of action, in the field of copyright and neighbouring rights as elsewhere.
- 7.8.5. The Commission accordingly proposes to draw up an inventory covering the situation with regard to intellectual property in the majority of non-member countries and the difficulties encountered by Community industry there. This would include a summary of legislation and regulations in force regarding copyright, neighbouring rights, designs and models, patents, trade marks, appellations of origin, etc.
- 7.8.6. Such an exercise will be of little use if it is not supplemented by an assessment of the factual situation in the relevant countries, since in some cases the legal position and the practical position are quite different. There will therefore have to be a study of the real difficulties encountered by Community industry. The Commission is in the process of consulting Community business, through UNICE, regarding the difficulties encountered in the field of intellectual property in all non-member countries.

- 7.8.7. The replies received will supplement the information already in the Commission's possession. Existing studies by international organizations will also be used.
- 7.8.8. The inventory will be published in 1991; it will of course have to be updated regularly. In time, therefore, it will allow a complete picture of the changing situation to be built up, and will put the Community in a strong position to defend its interests.

**CHAPTER 8 : OTHER COMMUNITY INITIATIVES IN THE FIELD OF  
COPYRIGHT AND NEIGHBOURING RIGHTS**

8.1. Introduction

In this Chapter the Commission outlines some areas for action in respect of copyright and neighbouring rights which were not discussed in the Green Paper. This is without prejudice to the other Initiatives referred to in the communication Books and Reading<sup>(1)</sup> or the communication on audio-visual policy.<sup>(2)</sup>

This is not an exhaustive account, and it may be that matters not referred to here will have to be tackled if the development of technology or legislation and national practice should make it advisable to take measures at Community level.

8.2. The duration of protection

The international conventions on copyright and neighbouring rights lay down minimum periods of protection; the states which are party to these conventions are free to apply longer periods. Some Member States have made use of this possibility, to different extents.

The result is that at present the duration of protection varies within the Community, in some cases according to the nature of the work. The disparities can create obstacles to the free movement of cultural goods and services and lead to distortion of competition, since the same work may at the same time be protected in one Member State and have fallen into the public domain in another.

- 8.2.2. In the Patricia case<sup>(3)</sup> the Court of Justice had to rule on the interpretation of Articles 30 and 36 of the EEC Treaty with regard to different periods of protection in force in two Member States. Legislation in one Member State allowed a manufacturer of sound recordings to invoke exclusive rights which it held over the reproduction and sale of certain musical works in order to prohibit the sale in that country of recordings incorporating some of those works which had

(1) COM(89) 258 final, 3 August 1989.

(2) COM(90) 78 final, 21 February 1990.

(3) Case 341/87 EMI Electrola v Patricia and Others; judgment delivered on 24 January 1989, not yet reported.

been imported from another Member State where they had been lawfully marketed, without the consent of the right holder or his licensee, a period of protection previously enjoyed by the manufacturer there having since expired.

- 8.2.3. The Court found that in the present state of Community law, which was characterized by a lack of harmonization or approximation of laws relating to the protection of literary and artistic property, it was for the national legislatures to determine the conditions and rules for such protection. In so far as disparities between national laws might lead to restrictions on intra-Community trade in sound recordings, those restrictions were justified under Article 36 of the Treaty as long as they were due to the disparity between the rules concerning the period of protection and this was inseparably linked to the existence of the exclusive rights.
- 8.2.4. This state of affairs is clearly not in keeping with the spirit and the reality of a Community area without internal frontiers in which the free movement of cultural goods and services is ensured in the same way as it is within a domestic market. The Commission therefore has a duty to take steps towards the harmonization of the duration of copyright and neighbouring right protection.
- 8.2.5. The Commission intends to draw up a proposal for a directive on this subject; it will be guided by four main principles:
- (a) The harmonization achieved should be total, that is to say that it should lay down fixed periods of protection, beginning and ending at the same time in all Member States of the Community, for each type of work and for each neighbouring right covered.
  - (b) The duration laid down should provide a high level of protection for authors and other holders of neighbouring rights. This will mean that the periods of protection will be longer than the minimum period laid down in the international conventions.
  - (c) The harmonization of periods of protection must not in any way prejudice rights acquired under existing national legislation. Transitional measures will be proposed in order to avoid any reduction in periods of protection already running which may be longer than those laid down under the directive.

(d) Lastly, the Commission's proposal will seek to preserve the delicate balance between copyright and neighbouring rights, while at the same time avoiding excessive complexity.

8.2.6. The Commission will include the presentation of such a proposal for a directive in its 1991 work programme.

### 8.3. Authors' moral rights

8.3.1. Copyright includes entitlements of an economic nature and entitlements of a moral nature. Economic rights are bound up with the author's right to benefit from the economic use of his work. Moral rights spring from the fact that the work is a reflection of the personality of the author. This approach is in fact enshrined in the Universal Declaration of Human Rights, and specifically Article 27(2).<sup>(4)</sup>

8.3.2. Article 6bis of the Berne Convention on the protection of literary and artistic works lays down minimum rules on the scope and duration of moral rights, while leaving it to legislation in the country where protection is claimed to define the means of redress available to the author and other holders after his death.

As a result of different legal approaches and traditions, there are differences between the Member States of the Community, as well as between the States party to the Berne Convention, with regard for example to the extent and duration of moral rights.

8.3.3. In recent years cases have come before the courts of some countries in which moral rights, and more especially the right of the author to object to any distortion, mutilation or other modification of his work which would be prejudicial to his honour or reputation, were invoked against the way in which cinematographic works were being treated (the colourization of black and white films, commercial breaks in films broadcast on television, etc). Thus moral right entitlements can generate restrictions on the use of works already made public.

8.3.4. The Commission has not so far decided to propose any general harmonization of moral rights in the Member

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(4) "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

States. However, the Commission does not rule out the possibility that it might have to take action in respect of one or other defined area of moral rights if that should prove advisable in connection with any of the measures referred to in this communication. The duration of moral rights, for example, might have to be harmonized.

- 8.3.5. The Commission proposes to make a more thorough study of all problems raised by the differences existing between Member States' legislation on moral rights, beginning in 1991. It will then decide what initiatives may be called for on the question of moral rights in the Community.

8.4. Reprography

- 8.4.1. Reprography of printed works, that is to say their reproduction by photocopying or by similar mechanical reproduction processes, has grown considerably in the last few years. This is due primarily to improvements in the machines used. These have become smaller while nevertheless giving a better quality product more rapidly and at a lower cost. The appearance on the market of colour photocopying machines has opened up new scope for the reproduction of protected works, as has the possibility of combining reprography with the recovery of works stored on computer.
- 8.4.2. Article 9(1) of the Berne Convention allows authors of literary and artistic works the exclusive right of "authorizing the reproduction of these works, in any manner or form." It is generally accepted that reprography is a form of reproduction covered by this exclusive right.

Limitations on this right are provided for in paragraph 2 of the same article, under which it is to 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 the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

- 8.4.3. In the light of this article and of the report of the Stockholm diplomatic conference,<sup>(5)</sup> it must therefore be asked whether technological developments in reprography do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
- 8.4.4. In 1990 the Commission undertook a study of the problems raised by reprography and of possible solutions, as it had promised to do in its communication Books and Reading.
- 8.4.5. After it has consulted interested parties the Commission envisages taking a Community Initiative in this area in 1991.
- 8.5. Resale rights
- 8.5.1. In accordance with Article 14ter of the Berne Convention for the protection of literary and artistic works, the laws of certain Member States give authors a resale right, which is an inalienable right enjoyed by the author, or after his death the persons or institutions authorized by the national legislation, to an interest in any sale of original works of art and original manuscripts of writers and composers subsequent to the first transfer by the author of the work.
- 8.5.2. This article of the Berne Convention is an optional provision, and by way of exception from the general principle of national treatment its application may be made subject to a reciprocity condition.
- 8.5.3. The Commission proposes to examine this aspect, before 31 December 1992, looking particularly at the practice in the States which do confer a resale right, and the arguments for and against the introduction of such a right. The Commission will then take a decision on the advisability of a Community Initiative on this question.

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(5) The revision of the Berne Convention which was drawn up in Stockholm on 14 July 1967 has not entered into force as far as the substantive provisions are concerned. The same provisions were however taken over without change in the Paris Act of 24 July 1971, which is the most recent version of the Convention and to which most of the states of the Berne Union are party.

CHAPTER 9 : BROADCASTING AND COPYRIGHT

- 9.1. On the subject of broadcasting and copyright, in its communication on audiovisual policy, the Commission announced its intention to propose a directive on the harmonisation of copyright rules applicable to satellite broadcasting and cable retransmission. In order to facilitate the consultation of interested parties, the Commission has prepared a discussion paper on the problems raised by copyright in the field of satellite broadcasting and cable retransmission. The measures envisaged for satellite broadcasting are based on three principles.
- 9.2. Any satellite broadcast originating in a Community Member State, must be regarded as an act of broadcasting for copyright purposes, regardless of the technology used, once it constitutes communication to the public. As far as copyright is concerned, therefore there is no longer any point in making a distinction between direct broadcasting satellites and other satellites.
- 9.3. The right to broadcast protected works by satellite has to be acquired only in the country of establishment of the broadcaster. For the purpose of acquiring the rights, the parties may take into consideration the actual or potential audience within the footprint of the satellite.
- 9.4. An adequate level of protection for authors' rights and of the neighbouring rights of performers, producers of phonograms and broadcasters has to be secured by a minimum level of harmonisation of Member States' laws on the subject. In this respect, the possibility of a legal licence for satellite broadcasts must be ruled out. Thus, the interests of right holders will be safeguarded no matter in which Member State the broadcaster may be established.
- 9.5. The Commission's proposals in respect of simultaneous, unaltered and unabridged cable retransmission of broadcasts can be summed up in four principles.
- 9.6. The cable retransmission of a programme coming from another Member State is a form of exploitation subject to copyright. It follows that the cable operator must obtain authorisation from the owners of all rights in any part of the programme.
- 9.7. These authorisations must be obtained by contractual means.

- 9.8. It should be possible for such rights to be managed on an exclusively collective basis to the extent that this is made necessary by the specific features of cable retransmission. There should be a Community measure to ensure that the smooth operation of collective agreements is not brought to a halt by the opposition of the owners of individual rights in sections of the programme to be retransmitted.
- 9.9. On the other hand, negotiations between cable operators and right holders, these being represented by collecting societies, should be made eased by supplementary measures such as a voluntary conciliation mechanism and a mechanism designed to prevent abuse of negotiating positions.
- 9.10. The discussion paper forms a separate document which has been available since the end of November 1990.

ANNEX

ACTIONS PROPOSED IN THE FIELD OF COPYRIGHT AND NEIGHBOURING RIGHTS

- I. Legislative action to be taken by 31 December 1991
  - (I) Proposal for a decision that the Member States will, by 31 December 1992, ratify or adhere to and comply with the 1971 Paris Act of the Berne Convention and the Rome Convention of 26 October 1961.
  - (II) Proposal for a directive on rental right, lending and certain neighbouring rights.
  - (III) Proposal for a directive on home copying of sound and audiovisual recordings.
  - (IV) Proposal for a directive on the harmonisation of the legal protection of databases.
  - (V) Proposal for a directive on the harmonisation of the term of protection for copyright and certain neighbouring rights.
  - (VI) Proposal for a directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite and cable broadcasting.
  
- II. Studies to be carried out by 31 December 1992 at the latest.
  - (I) Moral rights,
  - (II) Reprography,
  - (III) Resale right,
  - (IV) Collective management of copyright and neighbouring rights and collecting societies.
  
- III. Other actions planned by 31 December 1992
  - (I) Consolidation of the role of the Community in the field of bilateral and multilateral external relations;
  - (II) Establishment of an inventory of the intellectual property situation in certain non-member countries.