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This is a provisional text, which reflects the final wording, but still needs to be officially finalised by the Secretariat General of the Commission

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on the harmonisation of certain aspects of copyright and related rights in the Information Society

(presented by the Commission)

EXPLANATORY MEMORANDUM

Introduction

1. The present Directive aims to provide a harmonised and appropriate legal framework for copyright and related rights in the Information Society. It adjusts and complements the existing framework so as to ensure the smooth functioning of the Internal Market and bring about a favourable environment which protects and stimulates creativity and innovative activities within the Community.

2. The Commission has clearly identified intellectual property protection as a key issue given the critical role creative content and innovation will play in the further development of the Information Society[1]. The Green Paper of 19 July 1995[2] focused the debate on the challenges to copyright and related rights brought about by the new technologies. Following its publication, the Commission received input through more than 350 written submissions, in the context of a hearing in Brussels on 8 and 9 January 1996[3] and through numerous bilateral contacts with all parties concerned. The consultation process was concluded at a conference organised by the Commission in Florence from 2 to 4 June 1996[4].

3. The consultation confirmed that the existing Community framework on copyright and related rights, although not explicitly shaped for the features of the Information Society, will be of crucial relevance for this new technological environment. However, it needs adaptation: all categories of rightholders and their intermediaries expressed concern over new uses of protected material in ways that are not authorised or not foreseen under existing laws in this area. Users and investors also want to know which copyright rules they will have to comply with. All interested parties stressed the need for further harmonisation of copyright and related rights aspects in the framework of the Internal

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1 See only the Commission's action plan on "Europe's Way to the Information Society", COM (94) 347 final of 19 July 1994, which has been regularly updated since then stressing the crucial role of IPR; see also the "Bangemann report" on "Europe and the Information Society" - Recommendation of the High-level Group on the Information Society to the Corfu European Council, 26 May 1994.

2 "Copyright and Related Rights in the Information Society", COM(95) 382 final of 19 July 1995.

3 The hearing addressed specific questions relating to the exploitation of rights, as addressed in Chapter 2, part 3 of the 1995 Green Paper.

4 "Copyright and Related Rights on the Threshold of the 21st Century", organised by the European Commission, DG XV, in co-operation with the Italian Authorities, Florence, Italy, 2.- 4.6.1996.

Market and for their adaptation to the new challenges of digitisation and multimedia. The European Parliament[5] and a majority of Member States share this view and have called for the Commission to present harmonising measures in order to bring about a coherent and favourable environment for creativity and investment in the framework of the Internal Market. The Commission's Communication of 1996[6] sets out the results of this consultation exercise and explains the reasoning behind its policy approach, notably with respect to the priorities and means of action chosen.

4. Action is considered necessary in two areas: first, through harmonised legal protection, by adapting copyright and related rights to the new risks and opportunities, in order to achieve a level playing field for copyright protection across national borders to allow the Internal Market to become a reality for new products and services containing intellectual property. Secondly, on the technological side, by developing adequate systems allowing for electronic rights management and protection. The Communication identifies four issues requiring immediate legislative action to eliminate existing or potential barriers to trade between Member States: the reproduction right, the right of communication to the public, legal protection of the integrity of technical identification and protection schemes, and the distribution right, including the principle of exhaustion. The present initiative on the harmonisation of certain aspects on copyright and related rights in the Information Society was announced in the Commission 1997 Work Programme and in the Information Society "Rolling Action Plan"[7]. The importance of presenting legislative measures in the area of intellectual property was also highlighted in the Commission's Communication "A European Initiative on Electronic Commerce"[8].

5. While the proposal originates in the Internal Market consultation exercise, it is in its present form closely linked to, if not based upon international developments, as the markets for the exploitation of protected works and subject matter are increasingly interrelated, particularly in the digital environment of the Information Society which operates across borders. Such standards have already been adopted by the two new

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5 See in particular Resolution on the Green Paper on Copyright and Related Rights in the Information Society N° A4-0255/96, adopted on 19 October 1996 (Report of Mr. Barzanti); cf. also Resolution on the Commission's Communication "Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society", N° A4-0297/97,adopted on 23 October 1997 (Report of Mr. Barzanti).

6 Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society, COM(96) 568 final of 20 November 1996.

7 COM(96) 607 final of 27 November 1996.

8 COM(97) 157 final of 16 April 1997.

WIPO Treaties[9], the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty". They deal respectively with the protection of authors and the protection of performers and phonogram producers. They update international protection for copyright and related rights significantly, including measures relating to the "digital agenda", and improve the means to fight piracy world-wide. The Directive will implement a significant number of these new international obligations.

CHAPTER 1: THE ECONOMIC, SOCIAL AND CULTURAL DIMENSION OF THE MARKET IN COPYRIGHT AND RELATED RIGHTS

I. The market in copyright goods and services

1. The market in copyright goods and services comprises a wide variety of products and services containing protected subject matter, ranging from traditional products, such as print products, films, phonograms, graphic or plastic works of art, electronic products (notably computer programs), to satellite and cable broadcasts, CD and video rental, theatre and concert performances, literature and music, art exhibitions and auctions. The rightholders concerned include authors, performers, phonogram producers, film producers and broadcasters. Output and added value in the areas protected by copyright and related rights have both grown considerably in recent years, often at a rate higher than that of the economy as a whole[10].

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9 These Treaties have been adopted by the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, on 20 December 1996, which was convened under the auspices of the World Intellectual Property Organisation (WIPO) in Geneva.

10 The following figures may illustrate this: The market in recorded music - worth US $ 39.8 billion world-wide in 1996, whereas Europe makes up for 34% of global music sales - has grown by nearly fourfold in dollar value over the last decade, see International Federation of the Phonographic Industry, World Sales 1996, April 1997; the EU market in software products, with 27.3 billion ECU in 1995, realised a growth of 8.8%; in 1996 and 1997, growth of 9.2% and 8.8% is anticipated for this segment, see Panorama of EU Industry 97, Volume 2, 26-5; the total audio-visual turnover for the 50 leading European companies amounted to 49 billion ECU in 1994, up 10.2% from 1993, see Panorama of EU Industry 97, Volume 2, 27 -1; the electronic information services sector, which also exploits a wide range of protected subject matter, expanded rapidly between 1989 and 1994, with an emphasis on databases, with an annual growth rate of 27% over that period, see Panorama of EU Industry 97, Volume 2, 26-13.

2. Recent growth has been fuelled by the further spread of digital technology, and by the emergence of new distribution channels (*e.g.* cable, satellite and digital transmission methods). Such technological developments have led to new and higher performance products and services containing, or protected by, intellectual property (such as VHS, CD-Audio, CD-ROM, and CD-I). The evolution towards convergence of the audio-visual, telecommunications and information technology sector will add to this growth potential. Digitised content of any kind, whether sound, data, images, text or a combination of these (in the form of multimedia), will be made available by a variety of distribution channel (satellite, cable or telephone line or as packaged media like CDs or CD-ROMs), for exploitation via the TV set, the computer, or other electronic platform.

A. The "off-line" market

3. In Europe and elsewhere, "off-line applications" (CD-Audio, VHS, CD-ROMs, CD-Is...) still account for the most of this new market for intellectual property, as the networks are not yet capable of transmitting huge amounts of data at an appropriate quality and speed[11]. These off-line products serve mainly leisure activities, information and education, financial transactions, and communication. According to market analysis, European consumers will increasingly demand content better adapted to Europe's cultural and linguistic diversity. European media groups are ready to respond to this challenge. Traditional publishers and audio-visual companies are increasingly involved in electronic publishing, which is estimated to make up 5 - 15% of the publishing market by the year 2000 and to be worth 8.8 - 12.4 billion ECU[12]. These developments will also benefit SMEs, who, in contrast to the US market, already have a considerable presence in the multimedia market across Europe[13].

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11 For instance, as stated by the President of EACEM (European Association of Consumer Electronics Manufacturers) in "The Dynamics of new Technology, Economics and Copyright", 1997, the transmission of the data contained on one CD-ROM over the Internet would take around 17 hours.

12 Cf. the study "Strategic developments for the European Publishing Industry towards the year 2000", done by Andersen Consulting for the European Commission, 1996.

13 For figures see Panorama of EU-Industry, Volume 2, 26-32.

4. The capacities of off-line carriers are growing even more rapidly than on-line. For example, one DVD can carry about ten times the content of a CD, depending on the specific characteristics of the carrier[14], and the quality is perfect. The consumer electronic industry projects that 25 million DVD drives will have been sold by the year 2000[15], offering considerable scope for the content industries to develop new markets for films and music or multimedia content. These new products also provide for interactive features, such as multilingual dialogue and subtitles, of particular interest to European consumers. With latest developments, users will now be able to record their own audio CDs in perfect quality or even to copy text, sound or films onto a blank CD an unlimited number of times. This will give copying for private purposes, currently allowed in the majority of Member States, a completely new dimension.

5. Digital broadcasting, which is in the process of being introduced in a number of Member States, starting in 1996, will further enlarge the market for copyright and related rights. It has the potential to overcome the main constraint of analogue technology, which is channel scarcity[16]. The result will be a much larger number and choice of programmes often with highly specialised subject matter.

B. The "on-line" market

6. On-line applications, through the Internet as well as through other networks, are gradually being opened to the general public to satisfy the growing demand for "on-demand" services. A range of such "on-demand" services has already emerged in the European market, starting in 1995 and 1996, particularly in the United Kingdom, France and Germany, although still at the prototype or trial stage. Interactive "on-demand" services are characterised by the fact that a work or other subject matter stored in digital format is permanently made available to third parties interactively, *i.e.* in such a way that users may order from a database the music or film they want; this is then relayed to their computer as digital signals over the Internet or other high speed networks, for display or for downloading, depending on the applicable licence. On-demand services and to a certain degree also multichannel broadcasting may dispense consumers from buying or renting physical copies of, for instance, videos, books, such

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14 For instance, as reported in the Information Society Trends, European Commission, April 1997, N°. 67, p.5 the DVD-R (recordable once) will be recordable once with a capacity to carry 3.95 Gbytes, the DVD-RAM (rewritable) may carry more than 2.6 Gbytes, the DVD- non-recordable more than 4.7 Gbytes.

15 See presentation given by the President of EACEM on "The Dynamics of new Technology, Economics and Copyright", 1997.

16 It is reported that digital technology will allow broadcasting to carry up to ten times more channels than at present, see presentation given by the BBC in the framework of its "Digital Television Seminars", Brussels, October 1996.

as encyclopaedias, recorded music or combined products. Supply and consumption will be often "tailor made" according to the demand of the consumer, including for instance, language choices for or background information on a film, a piece of music or a book.

7. In view of the considerable technical and financial investments necessary to allow for such interactive on-line retrieval of protected material (texts, videos, audio, combined products, ...) from electronic databases in good quality, views differ as to when these services will really have penetrated the market. Estimates range from between the year 2000 to 2005, although the music market has already successfully started selling music in so-called electronic shops, with developments in the US being the most advanced. In Europe, the first "digital on-line jukebox" was launched in the United Kingdom in 1995[17], with other "on-line music shops" following in 1997 in France[18]. Other "on-line music shops" are in the process of being set up, amongst others in Germany[19] and in the UK[20].

8. These developments, however, do not mean that analogue technology will soon disappear. All players in the market recognise that it will co-exist with digital technology for some time to come, and estimates range between 5 and 15 years. One of the reasons is that the production of the digital products and services and the corresponding hardware is still generally very capital intensive.

II. Common risks and opportunities

9. These new opportunities for creating and exploiting intellectual property across borders and even world-wide may carry the potential for considerable economic, social and cultural benefits: they should lead to substantial investment in creativity and innovation, including network infrastructure, and in turn to growth and competitiveness of the European industry and an increase in market share - both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will also generate new employment opportunities. The new environment may contribute to an increase in the provision of protected content Community-wide, at affordable costs for professional users or the public at large, supplied by a dynamic market and by efficient distribution channels,

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17 Cf. Press Release of "Cerberus Sounds and Vision", October 1995, which started its on-line music service in the United Kingdom as early as 1995.

18 Cf. Eurodat in France, which has launched an Internet based music shop, Paris Music, starting its service in some parts of France in 1997. It is reported that the service shall be extended to Finland, Germany and the UK in the course of 1998; see also Financial Times, 20 May 1997, "EMI in talks over plan to sell music on-line".

19 For details see Financial Times, 5 June 1997, "Deutsche Telekom in on-line music link".

20 Financial Times, 7 August 1997, p.10, "US record companies to launch internet sales drives".

provided that adequate protection and sufficiently large markets can be ensured. It may also lead to a larger variety of specialised cultural content, better reflecting Europe's cultural and linguistic diversity and enhancing cultural exchanges within Europe.

10. The growing availability of protected works and other subject matter in on-line digital formats, however, also creates significant new risks for large scale piracy of intellectual property, which, in the off-line environment, already constitutes a major problem in a number of Member States for important parts of the copyright industry, notably in the area of software[21], music recording[22] and audio-visual and video production[23]. This situation is not only detrimental to economic and cultural wealth, but also prejudices the functioning of the Internal Market. As regards the new network environment, unauthorised postings of computer programs, phonograms, photographs, videoclips, or bootleg recordings of live concerts on websites even now make copyright material unlawfully available to millions of consumers throughout the world. Often unauthorised sites copy material from official sites of, for instance, the music market[24]. Some of the sites are run by pirates[25] who dispose of unauthorised products (such as CD's and tapes) for commercial gain to unsuspected clients. Although illegal making available of protected material may in many cases be for free, the economic damage to rightholders and their intermediaries can be as significant as in the case of piracy (done for commercial gain). Today, the copyright industry already stands to lose substantial sums of money because of the unauthorised transmission of its protected subject matter over the networks, and concern is growing that the further proliferation of illegal transmission of protected material on-line might put legitimate on-line sale at severe risk.

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21 According to a survey conducted by International Planning and Research (IPR) for BSA and SPA, piracy losses in Western Europe exceeded US $ 3.5 billion in 1995.

22 According to the International Federation of the Phonographic Industry (IFPI), pirate sales of pre-recorded music amounted to more than 24% of total unit sales (cassettes, CD's, LP's) in Europe and led to an estimated US $ 944.6 million loss in Europe to the music industry, cf. IFPI, Pirate sales 1995, May 1996.

23 According to the International Video Federation, the European Video industry lost an estimated ECU 810 million in 1994 to piracy.

24 Cf. Financial Times, 17 June 1997, "Music Pirates take to cyberwaves".

25 The term "piracy" is generally used to describe the deliberate infringement of copyright or related rights on a commercial scale.

CHAPTER 2: THE NEW ENVIRONMENT MAKES FURTHER HARMONISATION NECESSARY

I. The need for legislative action

1. Appropriate measures are critical in order to achieve a favourable environment which stimulates creativity and investment, with respect both to the traditional and the evolving new markets in intellectual property. Legal certainty through transparent, up-to-date and effective intellectual property protection will play a major role in achieving this end. Without an adequate and effective copyright framework, content creation for the new multimedia environment will be discouraged or defeated by piracy, penalising authors, performers and producers of protected material. This would necessarily have a negative impact on related industries as well as on users of protected material, such as on-line and off-line providers of services, and notably on consumers, as these would eventually have less content at their disposal or content of lower quality.

II. The Internal Market need to further harmonise copyright and related rights at Community level

2. The new technologies have already greatly increased the transborder exploitation of literature, musical or audio-visual works and other protected subject matter such as phonograms or fixed performances. These developments will undoubtedly and should increase further. Existing differences in protection between Member States will therefore have a greater impact. Further differences could arise if Member States unilaterally adapt their rules on copyright and related rights to the new technological developments. These differences may lead to distortions in trade, and notably to the provision of on-line services only to those Member States with lower levels of protection. A lack of appropriate and comparable legal protection of copyright and related rights across Member States, or a lack of legal certainty may also make rightholders and their intermediaries hesitant to authorise the exploitation of their material on-line, or at least in those Member States with no or less effective protection. This could leave several stumbling blocks for the healthy development of the Information Society in Europe. Further harmonisation of copyright and related rights protection is therefore required in order to ensure a genuine Internal Market in goods and services based on these rights.

3. Such an Internal Market, characterised by comparable effective and transparent terms of protection across national borders, is not only beneficial for rightholders, but also for users and investors, such as providers of services. It fosters adequate, comparable and secure investment conditions and legal certainty across Member States. This will enable rightholders and those who use protected material to further develop cross-border exploitation of copyright protected goods and services. This is vital for the development of the Information Society in Europe, and electronic commerce in

particular, as the availability of protected material over the networks is, as described above (cf. Chapter 1, I.), still lagging behind potential demand. A level playing field across national borders will significantly contribute towards generating a diversity of content and a distribution economy of scale for new products and services, which is essential to make the Information Society a reality.

4. As set out in the Commission's Communication, the following issues, in view of their relevance for the Internal Market, require immediate legislative action at Community level: The legal protection of

   - the right of reproduction;
   - the right of communication to the public;
   - technological measures and rights management information;
   - the right of distribution of physical copies, including its exhaustion.

5. **The Communication also addressed other issues (relating to digital broadcasting, applicable law, the management of rights and the protection of moral rights). While these items are certainly no less important for the exploitation of copyright in the Information Society than the priority issues mentioned above, they need further consideration or action before policy decisions can be made. With respect to some of the issues, market developments need to be further studied before a policy decision on their follow-up can be taken. This is in particular true with respect to the issue of moral rights protection in the Information Society context where an initiative for harmonisation could be prepared as soon as the need occurs. Other items may require clarification and explanation (such as the issue of applicable law and law enforcement). Work on these issues is well underway.**

6. The proposal aims at maintaining the traditionally advanced level of copyright protection in Europe while safeguarding, at the same time, a fair balance of rights and interests between the different categories of rightholders, as well as between rightholders and users of protected material. The proposal does not introduce radical changes to the existing Internal Market regulatory framework in the area of copyright

and related rights. It is the environment in which works and other subject matter are being created and exploited which has changed - not the basic copyright concepts.

7. The issue of liability as regards copyright and related rights, *i.e.* the question as to who is liable for infringements, has been subject of intensive debate since the WIPO negotiations. While this proposal includes a general provision on the enforcement of intellectual property rights, it contains no specific provision on the issue of liability. Rules on liability for copyright infringements are established at national level and, in principle, would also apply to the digital environment. Recent pieces of jurisprudence at Member States' level confirm this. Some Member States have taken initiatives to promote self-regulatory systems (codes of conduct) dealing with illegal and harmful content on the networks, as well as intellectual property infringements. These market led mechanisms are being set up by the parties concerned.

It is clear that, as already indicated in the course of the WIPO negotiations, liability is a horizontal issue affecting a number of areas other than copyright and related rights (from trademarks or misleading advertising to defamation or obscene content). There is a need to clarify the situation for the various parties concerned (notably access providers, service providers, others) on the basis of a horizontal approach within the framework of a separate Internal Market measure. The Commission's 1998 Programme on Legislative Initiatives therefore announces proposals on the establishment of a regulatory framework for electronic commerce and other electronic services which will harmonise various legal aspects relating to Information Society services, including electronic commerce. In this context, a directive, which will clarify among other issues the question of liability, is planned for the first months of 1998. Already at this stage the Commission has launched work, including a study, to this end and is in particular examining what would be the appropriate rules to be applied Community-wide. The objective is to define the different roles and activities undertaken by a number of Internet actors and to clarify their liability, in particular for third party content. This initiative should come into force, as far as possible, within a similar time-scale as this Directive.

In order to find a solution in the interest of all parties concerned, due account will have to be taken of the horizontal nature of the issue, of the balance of rights and interests, of legal concepts and traditions in Member States and, finally, of the particular features copyright and related rights infringements may have as compared with other areas.

8. Although the growth in digital technology has led to increasing opportunities for the exploitation of works and other subject matter through goods and services which cross borders, the intrinsically territorial nature of copyright and related rights, as set out in the international conventions, has not changed. Rights are granted for a particular country according to the laws of that country. As a general rule, the acts of exploitation of rights including potential infringements are governed by the national laws under which the right has been granted and where protection is sought. This is also the case with respect to transnational acts of exploitation, with the result that several national laws may apply in parallel.

This issue was explored during the consultation exercise following the Green Paper, and, as explained in the Communication of 20 November 1996[26] was not considered appropriate for the time being for legislative action at Community level. The majority of those commenting on the issue were in favour of maintaining existing regimes. They were strongly against any harmonisation establishing the country of origin of a digital transmission as the country where the act of transmission is taking place and its law as the only one applicable. There were two reasons for this. First, the technical nature of digital transmission is such that it is quite difficult to establish one single place where the transmission originates. This is contrast to the case of transfrontier satellite broadcasting where such a solution was chosen within the Community[27]. Secondly, the application of such a "country of origin" principle bears the risk of leaving rightholders without adequate protection - in particular when transmissions originate in third countries. However, also in the Community, unless laws governing rights and their exploitation are almost completely harmonised (such as first ownership, transfer of rights, scope of protection, including limitations and exceptions to the right, etc.), - such a solution could lead to a delocalisation of services being provided from the country with the lowest level of protection for copyright and related rights. This, in turn, would cause distortions of competition in the Internal Market and

26 COM(96) 568, p.22 *et sequ.*

27 See Article 1 of 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"), OJ L 248/15 of 6.10.1993.

be severely detrimental to the intellectual property regimes in other countries, by diminishing the effective value of the rights awarded. It could have significantly adverse effects on the functioning of the Internal Market and on creativity, competition and employment within the Community. A separate section of the Copyright Communication of November 1996 has been devoted to this issue.[28]

III. Need to implement international obligations

9. Internal Market concerns have been at the origin of this proposal and continue to form its basis. However, the European Community cannot afford to focus on domestic initiatives alone. Even more than in the past, the markets for the exploitation of protected subject matter are interrelated. This is also true for a large market like the Internal Market in relation to third countries. The more communication becomes international and the more language barriers are overcome, the further works and other subject matter are distributed - via print media, broadcast, or via world-wide on-line networks. In particular the increased number of forms of exploitation of intellectual property in the on-line environment knows no national or regional border. Internationally agreed minimum standards of protection are therefore today more important than ever.

10. International protection of copyright and related rights is the subject matter of the three main multilateral agreements: the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement, 1995). The WIPO Diplomatic Conference of December 1996 led to the adoption of two new Treaties in the area of intellectual property: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Both Treaties, which were adopted by consensus by over 100 countries, constitute a major step forward in international protection for copyright and related rights and substantially improve the tools for the fight against piracy. They also contain a number of provisions which will

28 See Chapter 3 (Issues requiring further evaluation), section 2 (Applicable law and law enforcement).

form the basis for an international level playing field with respect to copyright and related rights in the digital era. The European Community can adhere to these Treaties in its own right. It is now vital that these two new Treaties come into force as soon as possible. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaty by the Community and Member States is under way.

The four priority items addressed in this proposal for a directive correspond largely to, or are identical with, important parts of the new international obligations set out in the two new WIPO Treaties. The implementation of those new international obligations which are likely to be implemented more satisfactorily at Community level through this proposal has therefore become its complementary, if not the principal, foundation. The proposal implements and integrates the obligations under the new WIPO Treaties in the light of the *acquis communautaire* and of the needs of the Internal Market.

CHAPTER 3 : THE PARTICULAR ISSUES FOR HARMONISATION

I. Reproduction right

A. The existing legal framework

1. The right of reproduction has always been considered the cornerstone of copyright. It is to be found in virtually all national laws and international conventions, and has been partially harmonised at Community level, notably for computer programs, databases and related rights.

2. All Member States provide for an exclusive reproduction right. However, the national copyright laws in question are extremely heterogeneous as to the scope of this right. A substantial degree of uncertainty exists as regards the precise acts of reproduction which are protected - notably with respect to the new electronic environment. Most laws provide for a broad definition of what constitutes a protected act of reproduction,

thereby including acts such as the digitisation of a work, or acts such as uploading or downloading of a work to or from the memory of a computer. Other laws, while also providing for a wide definition, still focus on material reproduction, which may raise some legal uncertainty as regards the coverage of electronic acts of reproductions in general. Furthermore, the treatment of temporary acts of reproduction is generally still not addressed, with the result of significant legal uncertainty with respect to the exploitation of protected subject matter in the electronic environment.

3. The scope of the reproduction right also depends on the limitations and exceptions applying to the right. Numerous differences exist in Member States legislation with respect to such exceptions and limitations. For example, some Member States (UK and Ireland) provide in their legislation a general "fair dealing" exception for the purposes of research, private study, criticism and review and reporting of current events. Exceptions for these purposes also exist in other Member States, but are more narrowly defined there (such as in Sweden, Belgium, Germany and Greece). Exceptions for educational and scientific purposes form another important category set out in most Member States' legislation, whereas the scope of such exception differs widely. In some Member States, exceptions for educational purposes allow for the copying of entire works; in others only particular kinds of, or parts of, a work may be copied as illustration for teaching or examination purposes. The picture is even more fragmented with respect to exceptions set out for the benefit of institutions accessible to the public, such as libraries and archives, since the international conventions do not provide for minimum standards in this area. In certain Member States, whilst no specific exceptions for library use exist (for example Germany, Belgium, France, ...), these institutions may benefit from the general exceptions set out in favour of educational or private use. Other Member States (such as the UK, Austria, Sweden, Finland, Denmark, Portugal, Greece...) set out specific exceptions for the benefit of libraries and archival use of protected subject matter, although these differ widely and do not necessarily cover the use of digitised material. With respect to the use of digitised material by libraries, on-line as well as off-line, initiatives are on-going in a number of Member States, notably the UK, where library privileges are most developed, to arrive at more flexible contractual solutions.

4. Almost all Member States provide in their legislation an exception from the exclusive right of reproduction for copying of audio and audio-visual material for private use. The major reason for this exception has been the non-enforceability of the exclusive right in this area in practice as well as the thought that it was not even desirable to try to enforce an exclusive right in this area of private use for reasons of privacy. In view of the significant economic importance of "private copying" of copyright protected material, eleven out of fifteen Member States do not provide for a "free exemption" but set out a "legal licence"; they compensate rightholders for taking away their exclusive right with a right to remuneration ("levy system"). These systems vary widely in their scope and the way in which they function. The economic significance of private copying revenues is considerable[29].

Usually, no distinction is made in Member States' private copying legislation between analogue and digital technology. At present, only one Member State (Denmark), does not provide for a "private copy exemption" for the copying of protected subject matter incorporated in digital media, regardless of whether the copying facility is digital or analogue. Figures indicate that, in parallel with the new digital environment, analogue private copying will remain an important market at least for the next five to fifteen years to come.

5. In recent years, the majority of Member States has also provided for an exception to the reproduction right for photo/print type reproductions ("reprography"), combined with a right to remuneration. The *rationale* for this exception is similar to that for private copying of audio and audio-visual material. These levy systems, where they exist, differ only to some extent.

6. Almost all Member States' laws list a variety of other exceptions and limitations to the reproduction right and, to a much more limited extent, to the distribution right or the communication to the public right. These include a variety of specifically defined, but widely differing exceptions for educational and/or scientific use as well as for library and archival use. Apart from these situations, many national legislations provide for a wide set of other exceptions, which were, at least in the traditional environment, of a more limited economic significance. These are, for example, exceptions allowing for short excerpts in connection with the reporting of current events, for the purpose of criticism and review, in favour of people with disabilities, for the purpose of public security, or for administrative or judicial procedures.

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29 For instance, in 1995, 120 million ECU were collected in France as remuneration for private copying, in Germany around 75 million ECU.

7. At Community level, the reproduction right has been harmonised for two categories of works, namely for computer programs[30] and for databases[31]. These directives define the acts of reproduction and the legitimate exceptions to the reproduction right for the authors concerned. Under these Directives, the acts of reproduction are widely defined and include temporary reproductions. They provide for an exhaustive list of permitted exceptions. "Private copying" of computer programs and electronic databases is not permitted. For neighbouring rightholders, namely performers, phonogram producers, film producers and broadcasting organisations, the reproduction right has been harmonised by the Rental Right Directive[32]. This Directive, however, does not define the precise scope of this right, nor does it contain a harmonised list of exceptions.

8. At international level, the exclusive reproduction right is granted to authors, performers, phonogram producers, and broadcasting organisations, on the basis of the Berne Convention, the Rome Convention and the WTO/TRIPs Agreement respectively. In view of the broad formulation of this right in the Berne Convention[33], it is widely recognised that the reproduction right granted therein to authors covers all methods of reproduction, even electronic ones which may not be perceptible to the human senses[34]. With respect to neighbouring rightholders, the Rome Convention and the WTO/TRIPs Agreement, however, do not define what constitutes an act of reproduction.

9. The question as to whether the scope of the reproduction right should be adapted or clarified to explicitly cover electronic reproductions was subject of discussions in the course of the negotiations which took place in the framework of WIPO and which led to the adoption of two new WIPO Treaties. With respect to the definition of what

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30 Cf. Article 4 of Council Directive 91/250/EEC on the legal protection of computer programs (the "Computer Programs Directive"), OJ L 122/42 of 17.5.1991.

31 Cf. Article 5 of European Parliament and Council Directive 96/9/EC on the legal protection of databases (the "Database Directive"), OJ L 77/20 of 27.3.1996.

32 Cf. Article of 7 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"), OJ L 346/61 of 27.11.1992.

33 Cf. for instance Article 9(1) Berne Convention, which stipulates "authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works in any manner or form".

34 This has been stressed by a WIPO/UNESCO Committee of Experts, convened in 1982 in Paris, see Report of the WIPO/UNESCO Committee of Experts, 1982.

constitutes an act of reproduction, particularly concerning temporary or incidental reproductions in the electronic environment, no new provisions were considered necessary for authors' rights, as the concept of this right is not limited by reference to particular technologies or formats of creation. The definition contained in Article 9(1) Berne Convention was judged valid also in the digital environment and was incorporated accordingly into the WCT obligations (see Article 1(4) WCT). Furthermore, a statement adopted by the Diplomatic Conference which adopted the new WIPO Treaties clarifies that the existing international rules are sufficiently wide so as to cover reproductions made in the digital environment[35]. The broad definition of Article 9(1) Berne Convention has now also been used for the definition of the reproduction right of performers and phonogram producers (cf. Articles 7 and 11 WPPT). The wording is more precise than that of the respective provisions in the Rome Convention and the WTO/TRIPs Agreement.

10. The limitations set out to the reproduction right at international level vary. The Berne Convention provides for a number of compulsory exceptions (for news of the day, miscellaneous facts, quotations,) as well as several exceptions of an optional nature, notably for informational and educational use. These exceptions apply to most rights and only allow for those uses which are justified by the specific purpose envisaged in the exception and which are compatible with fair practice. The Berne Convention, in its Article 9(2), furthermore allows for limitations to the reproduction right in "certain special cases", which do not "conflict with a normal exploitation of the work" and do not "unreasonably prejudice the legitimate interests of the author". These three conditions, the "three step test", apply cumulatively. This scope of the reproduction right for authors, including the exceptions applying thereto, has been confirmed by the WTO/TRIPS Agreement. Moreover, the latter applies the "three step test" to all exceptions concerning authors' rights.

11. The limitations set out in the Rome Convention and the WTO/TRIPs Agreement with respect to related rights are wider to some extent. Several exceptions to the reproduction right are permitted under both Treaties, in particular as regards "private use", "use of short excepts in connection with the reporting of current events", "ephemeral fixation by a broadcasting organisation" and "use solely for the purpose of

35 See Agreed Statements to the WIPO Copyright Treaty concerning Article 1(4). A similar statement was adopted with respect to the reproduction right granted to performers and phonogram producers, cf. Agreed Statements to the WIPO Performances and Phonograms Treaty concerning Articles 7, 11 and 16.

teaching or scientific research". Other limitations are also allowed, as long as they correspond to those applying to authors' rights under domestic law. The "three step test" (Article 9 (2) Berne Convention, Article 13 WTO/TRIPs) was not adopted for holders of neighbouring rights under the Rome Convention or the WTO/TRIPs Agreement.

12. As regards limitations of and exceptions to the rights, both new WIPO Treaties refrain from listing particular exceptions. They, however, make the "three step test" of Article 9(2) Berne Convention, as confirmed by Article 13 WTO/TRIPs with respect to all authors' rights, applicable to all exceptions concerning authors' rights granted by the Treaty (Article 10 WCT) as well as to all exceptions concerning rights granted under the Treaty to performers and phonogram producers (Article 16 WPPT). It was understood that these provisions permit Contracting Parties to carry forward into, and to devise new exceptions and limitations that are appropriate in the digital environment, provided that these comply with the standards set out in the Berne Convention[36]. It goes without saying that the obligations under the new Treaties have to be met in any case. Both Treaties provide for important clarifications and further guidance, which will have to be respected by those adhering to the Treaties. In particular the "three step test" will serve as an important guideline for the definition and application of limitations. This implies that, also with respect to the reproduction right, certain limitations set out at Community level as well as at national level will have to be amended to be brought in line with the new WIPO Treaties also in the Community and its Member States.

B. The need for action

13. Common ground on both the definition of the act of reproduction and the issue of exceptions is crucial for the smooth operation of the Internal Market. The increasingly cross-border exploitation of information and entertainment products and services including copyright protected works and other subject matter, implies that significant disparities between exceptions and limitations to the exclusive reproduction right currently allowed under Member States' laws need to be eliminated as they would inhibit the achievement of an Internal Market for those products and services.

14. Action at Community level is also needed to comply with the obligations arising from the two new WIPO Treaties. If nothing is done at Community level, at this stage, to define the protected acts of reproduction and harmonise legitimate exceptions, there is the risk that Member States might individually adopt different or even inconsistent approaches to the reproduction right which would further jeopardise attainment of the Internal Market objective by amplifying the current disparities.

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36 See Agreed Statements to the WCT concerning Article 10.

II. Communication to the public right, including the right of making available works and other subject matter

A. The existing legal framework

1. Technological developments have made it possible to make protected works and other subject matter available in new ways which differ significantly from traditional methods of exploitation. This is particularly true with respect to the exploitation of intellectual property on-line over the networks, and notably "on-demand". Such "on-demand transmissions" are characterised by the fact that a work or other subject matter stored in digital format is made available to third parties interactively, *i.e.* in such a way that they may access it and request its transmission individually with respect to the time and place. One of the key questions in this context, at national, regional and international level, has been whether existing provisions on intellectual property adequately respond to this development or whether adaptations are necessary.

2. In economic terms, the interactive on-demand transmission is a new form of exploitation of intellectual property. In legal terms, it is generally accepted that the distribution right, which only applies to the distribution of physical copies does not cover the act of transmission. Also the reproduction right does not cover the act of transmission as such, but only the reproductions which take place in this context. In Member States' legislation on copyright and related rights, no specific right is explicitly provided for this activity. During the preparation and adaptation of the two new WIPO Treaties, where this key issue for the further development of the network environment also played a major role, all Member States shared the view that these new forms of exploitation should be covered by the right to control communication to the public (or a right of this kind). This right, however, does not correspond to the same concept in all Member States. This situation reflects the somewhat scattered approach to this family of rights in the Berne Convention, which has been revised on this aspect several times, and the Rome Convention.

   Member States' laws provide rather for a number of specific rights, with widely differing characteristics, which form part of the right of communication to the public (right of performance and representation, right of communication to the public by means of sound and visual recordings, right of communication to the public by wire, broadcasting right, right to include a work in a cable programme, ...). The provisions existing in Member States on communication to the public, in particular, do not always protect the same categories of works and other subject matter, which may result in significant legal loopholes when being applied to this new form of "on-

demand" exploitation. First of all, Member States apply different interpretations to the term "public"; in many Member States, on-demand transmissions, according to the present legal situation, may be considered as non-public communications, not being covered by this right. Furthermore, in the traditional, non-interactive environment, the characteristics and the interpretation of the existing provisions on the right of communication to the public or the rights belonging to this family and their delimitation from one another differ widely, with the potential result of significant legal uncertainty. It should also be noted that the degree of protection for rightholders (exclusive right or right to remuneration) and the management of the relevant rights differ substantially between Member States.

3. Substantial differences between Member States also exist with respect to the limitations and exceptions applied to the exercise of the communication right (or a right belonging to that family), which, for a number of uses (notably for the purposes of education and research, for information purposes, for library and archival use), are the same as those applicable to the reproduction right (see Chapter 3, I.a. above). Some Member States, however, do not provide for exceptions to the communication to the public right at all with respect to library and archival uses (e.g. Austria, Belgium, France, Spain, and Luxembourg). Moreover, it is far from being clear which of the limitations, where they exist, will be applicable in the new digital environment and in particular to "on-demand" on-line exploitation of protected material. Since the library use exception is in most cases limited to certain forms of copying and physical distribution of protected material, it seems that on-line delivery of protected material to remote users would, in general, not be exempted from the exclusive right of communication to the public by a large number of Member States (Italy, Sweden, Denmark, Greece, Portugal, Austria, Belgium, Finland, France, Luxembourg, and Spain). In other Member States the situation is less clear (Germany, Netherlands, UK, and Ireland).

In view of the significant economic importance of the use of digitised works by libraries and equivalent bodies and their users, a number of "library initiatives" are being undertaken, with a view to arriving at new solutions involving licenses, based on contracts. Their aim is to ensure adequate control and a fair economic return to the rightholders involved, while enabling users of protected material, such as non-profit libraries, to provide their information services even more efficiently and at affordable cost. First results appear to be promising, as it seems that it is possible to arrive at mutually satisfactory solutions for all parties involved, including libraries.

4. In most Member States, while favouring the application of the communication to the public right concept to "on-demand" exploitation of protected material, the view prevails that the relevant existing provisions need to be clarified, adapted to the new form of exploitation and strengthened, as appropriate. However, the precise characteristics of protection have been the subject of considerable debate, particularly in the context of the WIPO negotiations. Discussions have focused on the shape of the right and the legitimate exemptions to it. As is the case for the reproduction right, Member States are reflecting on the need to re-assess the legitimate exceptions to the right, in view of the new international obligations as well. Indeed, in a number of cases, traditional exemptions, if applied to the network environment, would have a significant negative impact on the normal on-line exploitation of protected material by rightholders and their intermediaries, particularly where these become a primary means of exploitation.

5. Community law, as it stands, does not explicitly cover "on-demand transmissions" of protected works or other subject matter[37]. Nor does it provide for a general exclusive right of communication to the public which could be applied to such new forms of interactive electronic delivery of works and other subject matter. Until now, the right of communication to the public has only partially been harmonised at Community level. The Database Directive harmonises a general right of communication to the public, display or performance to the public. This right is, however, limited to one category of works, namely databases (Article 5). The Cable and Satellite Directive, in Article 2, grants authors an exclusive right of communication to the public of works by satellite and a cable retransmission right with respect to transfrontier exploitation of programmes containing protected works (Article 8 *et seq).* The Computer Programs Directive, in its Article 4, however, only protects "any form of distribution to the public" of computer programs, not expressly addressing its on-line transmission over the networks. Indeed, at the time of adoption of the Directive the usual form of distribution took place on the basis of floppy discs and not on-line. For certain neighbouring rightholders, the Rental Right Directive provides for minimum protection with respect to certain forms of broadcasting and communications to the public of particular subject matter, as further set out in the Directive.

6. With respect to the international framework, interpretations, until recently, varied considerably as to whether the fragmented provisions of the right of a communication to the public as provided for in the Berne and the Rome Convention already cover "on-demand transmissions" of works or other subject matter. In the context of the

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37 The Database Directive protects "any form of making available to the public all or a substantial part of the contents of a database ... by on-line or other forms of transmission" under the *sui generis* right (Article 7(2)(b)), thereby also covering "on-demand transmission" of the content of a database.

international negotiations of the new WIPO Treaties, it soon became clear that, in any case, the existing provisions in this area need to be supplemented, to cover all categories of works, and adapted, as regards both the protection of authors and certain neighbouring rightholders, to respond better to this new form of copyright exploitation.

As a result, the WIPO Copyright Treaty, in Article 8, extends the traditional exclusive right of authors as regards non-interactive communication to the public, by wire or wireless means, to all categories of works. Furthermore, it explicitly states that the right of communication to the public includes the "making available to the public of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them". This part of the right concerns the new, interactive activity. The wording reflects the proposal on this issue made by the European Community and its Member States during the negotiations. With a view to providing for an adequate level of protection, as regards the new interactive environment, also for performers and phonogram producers, the WIPO Performances and Phonograms Treaty introduces an equivalent exclusive right "of making available" to the benefit of performers and phonogram producers (cf. Articles 10 and 14 WPPT).

B. The need for action

7. On the whole, it can be stated that the existing situation in Member States with respect to the communication to the public of works and other subject matter is characterised by significant legal uncertainty and legal differences between Member States in the nature and the characteristics of protection. This applies not only to the "traditional" communication to the public of protected works, including "on-line", where this has not yet been harmonised, but also in particular to the interactive "on-demand" access to works and other subject matter. As the market in "on-demand" exploitation of intellectual property is considered to be one of the main areas of growth, the provision of adequate and coherent protection of this new economic form of exploitation is a key element of this proposal. In view of the fact that such "on-demand transmissions" over the networks will, by their very nature, tend to be transnational and, in a number of cases, be dependent on Community-wide markets in order to be economically viable, clear and harmonised rules at Community level covering all rightholders recognised by this draft directive are called for.

8. The harmonisation of such rules would also implement the new international obligations described above which are enshrined in the two new WIPO Treaties in a coherent manner.

III. Legal protection of the integrity of technical identification and protection schemes

A. The existing legal framework

1. New communication technologies will provide new opportunities to exploit works or other subject matter, notably in the framework of the on-line services which are being developed on the networks. However, these new technologies will bring about new risks of piracy. There will be an increased need for more effective protection against unauthorised acts of exploitation, and, linked to this, the necessity to identify the protected material disseminated on the networks, and the respective rightholder.

   Since technological identification and protection schemes may, depending on their design, process personal data about the consumption patterns of protected subject matter by individual consumers and thus may allow for tracing of on-line behaviour, it has to be ensured that the right of privacy of individuals is respected. Therefore, such technological measures must incorporate in their technical functions privacy safeguards in accordance with the Data Protection Directive[38].

2. The main thrust of the current proposal is the adaptation and harmonisation of intellectual property rights. However, technology will also provide for solutions, through technological measures that will protect against unauthorised acts of exploitation, and electronic information that could be attached to the works or other subject matter in order to facilitate the management of rights. Interested circles including rightholders are already engaged in efforts to introduce, and agree on, such technology. It is expected, however, that, in parallel with the development and use of protection and identification schemes, a market for "pirate" devices would develop, that would enable or facilitate the unauthorised circumvention of and/or removal of these schemes. Interested circles have stressed the need to meet this risk by adopting, at international and national level, specific rules providing rapid and effective legal protection of identification and protection schemes.

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38 Directive 95/46/EC of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and the free movement of such data, OJ L 281, 23 November 1995.

3. At present, the laws of the Community Member States only provide for rather general, if any, rules which may cover this issue. While Member States are generally in favour of the development of technical protection and identification schemes, provided that any such initiative is entirely market driven, the process of supplementing technological measures with legislation has not yet started.

4. At international level, the issue was discussed in the framework of the WIPO negotiations on certain questions on copyright and related rights. The two new WIPO Treaties contain two parallel provisions on "technological measures"[39] and on "obligations concerning rights management information". The first prohibits the circumvention of technological measures that are used by holders of copyright or related rights in connection with the exercise of their rights, the latter prohibits the removal and altering of certain electronic rights management information attached to a work or other subject matter.

B. The need for action

5. A fragmented approach at Member States' level with respect to the legislation that should flank the technical protection and identification schemes used by holders of copyright and related rights would not only entail difficulties for the protection of copyright and related rights, but also adversely affect the proper functioning of the Internal Market. Disparities in levels of protection might hinder the development of new services at European level, and will imply serious distortions of competition. Therefore, action to establish an equivalent level of protection amongst all Member States seems necessary. This would ensure the proper functioning of the Internal Market, and would at the same time establish a level playing field in which new Information Society services can develop.

6. Moreover, the harmonisation of such rules, which has been requested almost unanimously, would not only provide for a common Community framework for the protection in question, but would be based on the new international obligations stemming from the two new WIPO Treaties in a coherent manner.

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39 See Article 11 WCT and Article 18 WPPT.

IV. The distribution right, including the principle of exhaustion

A. The existing legal framework

1. The Rental Right Directive has already harmonised the distribution right (the right to authorise and prohibit the distribution of tangible copies) for four groups of related rightholders (performers, broadcasters, phonogram producers and film producers). Although Community harmonisation of the distribution right has also already been achieved for certain categories of works such as computer programs and databases, which enjoy copyright protection, different Member States apply different regimes to the distribution right in respect of other works not covered by the Computer Programs Directive and the Database Directive. For example, one group of Member States does not provide for a separate right of distribution. This group includes countries having systems in which the reproduction right covers the right of the author to control the destination of copies, even their re-use and resale (e.g. France, Belgium) and those where distribution falls within the right of publication (e.g. Netherlands, Ireland, the Nordic countries). Another, larger, group of Member States does provide for a distinct distribution right for all works (Germany, Austria, Spain, Greece, Italy, Portugal, UK).

2. Member States also apply different limitations to the distribution right related to works, whether the right itself is provided for explicitly or implicitly. The most important limitation is that of exhaustion upon first sale. Some national legislations (exceptions being Belgium, France, Luxembourg and Portugal) provide explicitly that the first domestic sale of a copy of a work with the consent of the rightholder exhausts the distribution right in the country concerned (national exhaustion). Following the jurisprudence established by the European Court of Justice[40] with a view to reconciling the principle of free movement of goods throughout the Community with the protection of the specific subject matter of intellectual property rights, the distribution right must be exhausted on first sale of the article in the Community, provided, as in the case of national exhaustion, that the sale is made by the rightholder or with his consent (Community exhaustion).

3. Certain Member States have not territorially confined the principle of exhaustion. As a result, they apply international exhaustion at least in certain cases so that the first sale

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40 For copyright cf. case 270/80 (Polydor v. Harlequin Record Shops), 1982 ECR 329, ground 7 and case 395/87 (Tournier) ECR 2565, grounds 11-13 for rights related to copyright see case 78/70 (Deutsche Grammophon) 1971 ECR 487, joined cases 55 and 57/80 (Musikvertrieb Membran) 1981, 147 and case 341/87 (EMI Electrola v. Patricia), 1989, ECR 92, ground 9.

of an article anywhere in the world by the rightholder or with his consent exhausts the right of distribution associated with that article. This may have profound consequences for the operation of the Internal Market and for users and rightholders within the Community.

B. The need for action

4. As stated above, Member States apply different concepts for classifying the restricted act of distribution of works and they pursue likewise somewhat conflicting policies in the field of exceptions to the distribution right, in particular as regards the principle of exhaustion.

5. It should be noted that the new WIPO Copyright Treaty provides in Article 6(1) for authors the exclusive right of authorising distribution of the original and copies of their works. It goes on to provide in Article 6(2) that nothing in the Treaty shall affect the freedom of Contracting Parties to determine the conditions under which the exhaustion of this right applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author. Harmonising the distribution right for all types of works at Community level would therefore also implement the new obligations under Article 6(1) WCT.

6. The smooth functioning of the Internal Market cannot be guaranteed if Member States apply different regimes in respect of the exhaustion of intellectual property. Obstacles to trade and distortion of competition may arise. For example, if Member State A provides in its national legislation for rules according to which, once the original good which includes a protected work has been put into circulation in a third country by or with the consent of the rightholder, the import of this good is lawful, then as a consequence, the rightholder does not obtain any benefit from the right associated with that product in that Member State. However, if in the same case, Member State B does not provide for international exhaustion, the rightholder may invoke his exclusive right on the territory of B and may prevent the parallel import of the good concerned. Discrepancies in applying the exhaustion principle by Member States lead therefore to repartitioning of the Internal Market into separate national markets and territories. Furthermore, due to the abolition of border controls inside the Community, the lawful restriction of intra-Community trade in goods would also meet with practical difficulties. As a consequence, distortions in trade of such goods and displacement of supply channels would occur.

7. All Member States must therefore apply the exhaustion principle in a coherent manner. Existing secondary Community legislation already rules out international exhaustion for the covered areas of protection and provides for Community exhaustion only. As regards intellectual property, the Directives dealing with computer programs and database works as well as topographies of semiconductor products set precedents in this area. Just like the Rental Directive for related rightholders, they must be interpreted as not permitting exhaustion of the distribution right on an international basis. It is therefore logical to continue on the basis of, and to complement, the existing *acquis communautaire.*

8. Both the considerable discrepancies in Member States' legislation and practice and the WIPO Treaty obligations therefore necessitate legislative action at Community level with a view to achieving a harmonised situation with respect to the right of distribution for all authors and holders of related rights. At the same time, this proposal gives an opportunity to provide for a coherent level playing field for the electronic and tangible distribution of protected material and to draw a clear line between them.

CHAPTER 4 : LEGAL FRAMEWORK

I. The appropriate legal instrument

1. For reasons of proportionality, the Commission considers that the appropriate form for this instrument is a Directive: while achieving the Internal Market objectives discussed above, Member States will retain a certain flexibility as to the means to achieve these objectives.

II. The appropriate legal basis

2. In its Communication on the Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society (COM(96) 568 final), the Commission announced that it intended to propose a number of harmonising measures in the field of copyright and related rights with a view to adjust and further complement the existing legislative framework, where this is necessary for the proper functioning of the Internal Market and for bringing about a favourable regulatory environment for the development of the Information Society in Europe. Following the analysis of the responses received to the Copyright Green Paper of 1995 and its 1996 Follow-Up Communication, the Commission proposes Article 57(2), 66, and 100A as the legal basis for the present proposal.

3. Certain differences between Member States in the legal protection of works and other subject matter may constitute significant obstacles to the freedom of establishment and the freedom to provide services within the Community in the sense that the legal regime on copyright and related rights in force in one Member State will prevent the production of goods such as CD-ROMs in other Member States or will seriously impede the provision of services, such as on-line services, in another Member State. Articles 57(2) and 66 are therefore an appropriate basis for the proposal.

4. In respect of the free circulation of goods and distortions of competition, differences in and legal uncertainties regarding the scope of certain copyright and related rights can have a negative effect on the functioning of the Internal Market. Therefore, Article 100A is also an appropriate legal basis for the present proposal.

   As set out above, the new technological environment, for technological and for economic reasons, has already led to an increase in transborder exploitation of works and other subject matter such as phonograms or fixed performances. These developments will and should increase further. The proper functioning of the Internal Market in copyright and related rights therefore requires a higher degree of harmonised protection of copyright and related rights than presently in place. The present proposal will favour the free circulation of works and other subject matter across the Community and eliminate significant distortions of competition, between content providers as well as between users of protected material, by establishing comparable and transparent terms of protection of copyright and related rights across Member States. Such a level playing field will significantly contribute towards generating a diversity of content and an economy of scale for new products and services, which is essential to make the Information Society a reality.

5. This proposal follows, with respect both to the choice of the legal instrument and the legal basis, the pattern chosen so far for harmonisation measures in the area of copyright and related rights.

PART TWO: Comments on the Articles

Article 1: Scope

Article 1 is a standard provision. It describes the scope of application of the Directive and underlines that the existing Directives in the area of copyright and related rights are not affected by the present proposal, unless otherwise provided.

Article 2: Right of Reproduction

1. Article 2 grants authors, who, except for computer programs and databases, do not yet dispose of a harmonised right of reproduction, an exclusive right to authorise or prohibit reproductions. Furthermore, the reproduction right enshrined in the Article also applies to the other rightholders recognised in the *acquis communautaire.* These rightholders already benefit from an exclusive right of reproduction on the basis of Article 7 Rental Right Directive. The latter provision, however, provides for a very general definition of the scope of the right, not yet taking into account the new electronic environment. For reasons of legal clarity and consistency with the *acquis communautaire* on the reproduction right for computer programs and databases, Article 7 of the Rental Right Directive is therefore repealed (see Article 10(1)) and replaced by this Article. This solution ensures that all authors, performers, phonogram and film producers and broadcasting organisations benefit from the same level of protection for their works or other subject matter as regards the acts protected by the reproduction right.

2. The provision sets out a broad, comprehensive definition of the reproduction right covering all relevant acts of reproduction, whether on-line or off-line, in material or immaterial form. It follows the approach of the *acquis communautaire.* It is also based on proposals made by the Community and its Member States during the WIPO Diplomatic Conference in December 1996 as well as on the formulations in the WPPT.

3. The draft definition includes direct and indirect reproduction, whether temporary or permanent, in any manner or form. The first element in the proposal relates to the terms “direct” and indirect” reproduction. Such a formulation can be found both in Article 7 of the Rental Right Directive and in Article 10 of the Rome Convention. This term means reproducing a work or other protected subject matter directly onto the same or a different medium. The term “indirect” covers reproductions done via an

intermediate stage, for example, the recording of a broadcast which itself has been made on the basis of a phonogram. The provision is also intended to make clear that the right is not affected by the distance between the place where an original work is situated and the place where a copy of it is made. The second element (temporary/permanent) is intended to clarify the fact that in the network environment very different types of reproduction might occur which all constitute acts of reproductions within the meaning of this provision. The result of a reproduction may be a tangible permanent copy, like a book, but it may just as well be a non-visible temporary copy of the work in the working memory of a computer. Both temporary and permanent copies are covered by the definition of an act of reproduction.

Article 3: Communication to the public right, including the right of making available works or other subject matter

1. In line with Article 8 WCT, Article 3 (1) complements at Community level the existing harmonisation by providing authors with a general exclusive right to authorise or prohibit any communication to the public, outside the interactive environment. This covers all forms of public communication and all categories of works, as far as these have not as yet been addressed in the existing *acquis communautaire*. As stressed in Article 1, it leaves the existing provisions in this area (Article 2 Cable and Satellite Directive, Article 5 Database Directive) untouched. Such harmonisation will provide authors and providers of services containing protected works with a compatible level of protection for the communication to the public of all categories of works across Member States.

The expression "communication to the public" of a work covers any means or process other than the distribution of physical copies. This includes communication by wire or by wireless means. An act of communication to the public can involve a series of acts of transmissions as well as acts of reproductions, for instance a temporary storage of a work. With respect to the acts of reproduction, such as storage, the reproduction right (cf. Article 2) is of relevance. If, at any point of a transmission or at the end of a transmission the work is communicated to the public, including through public display on screen, each such communication to the public requires authorisation of the author. The notion of "communication to the public" has been used as in the *acquis communautaire* and the relevant international provisions, such of the Berne Convention and the WCT. As in the *acquis communautaire*, it is a matter for the national law to define "public".

2. The second part of Article 3(1) addresses the interactive environment. It follows closely the pattern chosen in Article 8 WCT and implements it at Community level. The provision clarifies, in line with the results of the consultation exercise, that the right of "communication to the public" includes the making available to the public of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. One of the main objectives of the provision is to make it clear that this right covers interactive "on-demand" acts of transmissions. It ensures legal certainty by confirming that the communication to the public right is also pertinent when several unrelated persons (members of the public) may have individual access, from different places and at different times, to a work which is on a publicly accessible site.

   As was stressed during the WIPO Diplomatic Conference, the critical act is the "making available of the work to the public", thus the offering a work on a publicly accessible site, which precedes the stage of its actual "on-demand transmission". It is not relevant whether any person actually has retrieved it or not. The "public" consists of individual "members of the public".

   The element of individual choice hints at the interactive on-demand nature of access. The protection offered by the provision thus does not comprise broadcasting, including new forms of it, such as pay-TV or pay-per-view, as the requirement of "individual choice" does not cover works offered in the framework of a pre-defined programme. Similarly, it does not cover so-called near-video-on-demand, where the offer of a non-interactive programme is broadcast several times in parallel at short intervals. Furthermore, the provision does not cover mere private communication, which is clarified by using the term "public".

3. Whereas Article 3(1) addresses authors' rights, Article 3 (2) introduces, in line with the WPPT, an exclusive right to authorise or to prohibit the making available of protected subject matter for the four groups of neighbouring rightholders already mentioned in Article 2 (performers, phonogram producers, film producers, broadcasting organisations). It implements Articles 10 and 14 WPPT. The provision does not cover non-interactive transmissions. It leaves the existing provisions in this area (Article 8 Rental Right Directive, Article 4 Cable Satellite Directive) untouched.

   Its scope of application, however, goes beyond these international obligations. In contrast to the WPPT, the proposal grants this right to all rightholders who already enjoy related rights in the *acquis communautaire.* Furthermore, and in this respect also following the approach taken in the *acquis communautaire,* the right is not limited to the area of sound performances but also covers audio-visual material. An exclusive

right in all these situations is justified by the significant economic impact the new forms of use will have on the exploitation of the protected subject matter of these rightholders and the increased risk of piracy, which they imply. The opening of a database to the public for the direct delivery "on-demand" of recorded music, audio-visual productions or multimedia products via networks to home computers or other digital units may easily replace direct sales of physical copies of this type of matter. Holders of related rights should therefore enjoy the exclusive rights of reproduction and of "making available to the public" in parallel.

The making available right set out in Article 3(2), covers, as does paragraph 1 with respect to authors, the making available of such subject matter by wire or wireless means. It is limited to situations where the subject matter is made available from a place and at a time individually chosen, *i.e.* interactive and "on-demand". Likewise, it does not cover on the one hand private communications nor any forms of broadcasting, including "near-on-demand" services. As explained in the Commission's Copyright Communication of November 1996[41] conclusions to the Green Paper consultation, the need for an exclusive right for certain forms of broadcasting to the benefit of neighbouring rightholders has not as yet been ascertained.

4. In order to enhance legal certainty across Member States, Article 3 (3) reiterates that the on-line transmission of a work or other subject matter with the consent of the rightholder does not exhaust the relevant right which protects this act of exploitation, *i.e.* the communication to the public right, including its "making available" form. Thus, the communication to the public of a work or other subject matter, whether by wire or by wireless means, is an act which can be repeated an unlimited number of times and will always require authorisation, within the limits set out by the law. This provision is only a clarification of the existing legal situation at Community level, recalling that the provision of services does not give rise to exhaustion of rights[42]. A similar clarification had been added to the Rental Right Directive in the course of its discussion in the legislative procedure (cf. Article 1(4)) Rental Right Directive).

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41 Follow-Up to the Green Paper on Copyright and Related Rights in the information Society, COM(96) 568 final of 20 November 1996.

42 See Case 62/79, Coditel v. Ciné-Vog Films (1980) ECR 881; Case 262/81, Coditel v. Ciné-Vog Films (1982) ECR 3381; Case 156/86 Warner Brothers and Metronome Video v. Christiansen (1988) ECR 2605.

Article 4: **Distribution right**

1. In line with Article 6(1) WCT and with a view to promoting the Internal Market in subject matter governed by copyright, Article 4 (1) of the proposal provides for authors the exclusive right of authorising any form of distribution to the public, by sale or otherwise, of the originals and copies of their works. It thereby harmonises the distribution right for authors of all categories of works where this has not yet been done. Equally in line with the *acquis communautaire*, Member States remain free to continue to apply their own concept of this right, provided that material equivalence is achieved. As in the *acquis communautaire* on this issue, the expressions "copies" and "originals and copies", being subject to the distribution right, refer exclusively to fixed copies that can be put into circulation as tangible objects.

2. Paragraph 2 harmonises the exception to the distribution right, namely exhaustion. The provision sets out that the distribution right is only exhausted in the whole of the Community upon the first sale of the copy of a work in the Community, providing that the sale is made by the rightholder or with his consent. This reflects the established jurisprudence of the Court of Justice, which aims at reconciling the principle of free movement of goods throughout the Community with the protection of the specific subject matter of intellectual property rights. Thereby it is guaranteed that the distribution right under Article 4 paragraph 1 will not create new barriers to trade in the Internal Market.

   In line with the approach chosen in the *acquis communautaire*, the provision excludes the possibility of Member States to apply international exhaustion (where the first sale of an article anywhere in the world by the rightholder or with his consent exhausts the right of distribution associated with that article). At present, the EU's major trading partners either provide for separate importation rights or otherwise rule out international exhaustion. Consequently, a competitive disadvantage may occur if international exhaustion of the distribution right were to apply. Moreover, there are a number of questions about the impact on rightholders in third countries, which would need to be answered favourably before the imposition of a system of international exhaustion could be contemplated. A harmonised exclusion of international exhaustion with respect to all categories of works would put an end to existing distortions in trade of such goods and to a repartitioning of the Internal Market into separate national markets and territories.

Article 5 : Exceptions to the restricted acts set out in Articles 2 and 3

1. Article 5 harmonises the limitations and exceptions to the reproduction right and the communication to the public right, including its interactive making available part. Such harmonisation is indispensable for the smooth functioning of the Internal Market: Without adequate harmonisation of these exceptions, as well as of the conditions of their application, Member States might continue to apply a large number of rather different limitations and exceptions to these rights and, consequently, apply these rights in different forms. This risk has not diminished with the adoption of the new WIPO Treaties. Their relevant provisions on exceptions (Article 10 WCT and Article 16 WPPT) provide for general guidance on their use and limits. Unless interpreted in the light of the *acquis communautaire*, these new international obligations might lead to divergent interpretations between Member States and the risk of obstacles to trade within the Community, notably in on-demand services containing protected material.

   The provision aims at striking a balance between, on the one hand, providing the strongest possible incentives to encourage the creation of original works and other protected subject matter and, on the other, facilitating the dissemination of such works to users. It is based on a re-assessment in the light of the new technological developments since their economic impact may be quite different compared to the traditional environment. In such cases, exceptions and limitations must be construed in a more narrow way by the Community legislator as well as by the Member State applying the exceptions, in order to prevent economic damage to the market of protected works and other subject matter.

2. The guiding principles for this Article, both with respect to the structure and the substance of the exceptions, are derived from the *acquis communautaire* (the Computer Programs Directive and the Database Directive). As far as the structure is concerned, Article 5 sets out a list of permitted exceptions, which is exhaustive. Member States will not be allowed to provide for any exceptions other than those enumerated. The degree of harmonisation of the exceptions has been made dependent on their impact on the smooth functioning of the Internal Market, taking due account of the principle of subsidiarity and proportionality and of the new WIPO obligations. Those exceptions and limitations, which have a greater impact on the Internal Market, have been made obligatory or the conditions of their application have been harmonised to a larger degree, where appropriate. Therefore, the degree of harmonisation envisaged in this Article reflects the balance between Internal Market needs, on the one hand, and the principle of subsidiarity on the other. As regards the optional exceptions, Member States will be free to choose to keep or introduce these exceptions at their national level. If they so choose, they must then meet the conditions spelled

out in the directive and in the international instruments, such as the "three step test" which is also reiterated in one of the provisions on the exceptions. This differentiating approach, which is further set out below and has been derived from the *acquis communautaire*, aims at enshrining a level playing field in copyright and related rights across Member States, whilst leaving Member States with sufficient room to keep their national legal and cultural traditions in place.

3. Article 5 (1) introduces an obligatory exception to the right of reproduction for certain technical acts of reproductions that are integral to a technological process and made for the sole purpose of executing another act of exploitation of a work. When applying this exception, or any other exception listed in this Article, the "three step test", as set out in paragraph 4 of this Article, has, of course, also to be met.

   The purpose of Article 5(1) is to exclude from the scope of the reproduction right certain acts of reproduction which are dictated by technology, but which have no separate economic significance of their own. It applies notably to the on-line environment, but also to acts of reproduction taking place in the context of the use of a protected subject matter in off-line formats. In such cases, it is appropriate to limit the scope of the reproduction right and only protect those acts of reproduction which are of a separate economic relevance. Such an obligatory exception at Community level is vital as such short lived reproductions ancillary to the final use of a work will take place in most acts of exploitation of protected subject matter, which will often be of a transnational nature. For instance, when transmitting a video on-demand from a database in Germany to a home computer in Portugal, this retrieval will imply a copy of the video, first of all, at the place of the database and afterwards, in average, up to at least a hundred often ephemeral acts of storage along the transmission to Portugal. A divergent situation in Member States with some requiring authorisation of such ancillary acts of storage would significantly risk impeding the free movement of works and services, and notably on-line services containing protected subject matter.

4. Article 5 (2) (a), (b) and (c) sets out three optional exceptions to the reproduction right, which Member States may set out, provided that these comply with the conditions enshrined in this Article, including this paragraph. Thus, Member States retain a considerable degree of flexibility when re-assessing their regimes for such reproductions.

5. Article 5 (2) (a) allows Member States to maintain or introduce an exception for photo/print type reproduction ("reprography"), with or without a remuneration scheme for rightholders, provided that they are in line with the conditions of this Article and notably the "three step test". This provision is limited to reprography, *i.e.* to techniques which allow a facsimile, or in other words a paper print. It does not focus on the technique used but rather on the result obtained, which has to be in paper form.

The Directive provides for such an exception on an optional basis despite existing differences between Member States which provide for exceptions for reprography, as their effects are in practice rather similar. The differences in the rates and revenues are not so significant between the Member States that provide reprography schemes. The Internal Market is far less affected by these minor differences than by the existence of schemes in some Member States and their inexistence in others. Consequently, to the extent that the differences in the existing reprographic regimes do not create major barriers to the Internal Market, and in view of the probability that the differences will be further reduced with other Member States introducing such schemes, there is no obvious need for a further harmonisation of this exception to the reproduction right.

Those Member States that already provide for a remuneration should remain free to maintain it, but this proposal does not oblige other Member States to follow this approach.

6. Article 5(2) (b) allows for exceptions to the reproduction right for reproductions of audio and audiovisual material for private use. It leaves Member States with the possibility of maintaining or introducing exceptions for these types of reproductions. This means that Member States with exceptions on private copying in the form of legal licenses combined with a levy system or not, can keep them, whereas others are not obliged to follow this approach, provided that they are in line with the conditions of this Article and in this paragraph, and notably the "three step test".

The provision does not make any distinction between analogue and digital technology. It provides that such reproduction must be made "for private use and for non-commercial ends". Private use must be understood in a narrow sense. The making of a private copy of a phonogram, for example, by a person for his strictly personal use naturally falls within this domain. It is also indicated that the private copy must be made for non-commercial ends. This guarantees that the reproduction is confined to a private context, otherwise it would constitute an act of piracy.

When deciding upon the appropriate approach to private copying in the context of this proposal, technological developments have to be taken into account. Digital technology enables consumers, in principle, to make fast and multiple private copies in master quality. It is, however, still largely unknown whether digital private copying will be a widespread activity of consumers or not. It is expected that digital technology may allow the effective control of private copying, and the replacement of levy schemes by individual licensing solutions which are under development (in the context of "electronic copyright management"), at least in the on-line environment. This may lead some Member States to abolish private copy exceptions for digital copying, as has already been done by one Member State, in view also of the economic impact private copying may have on the normal exploitation of the reproduction right. Others may want to allow for some degree of digital private copying, combined with remuneration schemes, albeit probably in a more limited scope than in the traditional environment, as copy limitation technology may not be available or appropriate with respect to every type of private copying. In view of these uncertainties - with respect to the enforceability of private copying in the digital environment as well as with respect to consumers' behaviour in this domain - it appears premature at this stage to provide for a more harmonised solution with respect to digital private copying. It is therefore proposed to leave Member States with the possibility of maintaining or introducing exceptions for digital private copying. These must, of course, comply with the international obligations in this respect (notably the "three step test", mentioned above). The Commission will closely follow market developments with respect to digital private copying and consult interested parties in the second half of 1998, with a view to taking appropriate action. The consultation will focus in particular on technological aspects and the balance of rights and interests.

This approach is also suggested with respect to analogue private copying, albeit for different reasons. Although analogue private copying has been the source of significant damage to the legitimate interests of rightholders, there are indications that analogue private copying may be decreasing and may even disappear within a medium term period; the impact of the diverging regimes on the Internal Market may diminish accordingly. Furthermore, this issue is generally perceived as being less relevant to the Information Society and to the digital environment. In view of the complexity of the issue, which raises significant technical and political questions, it appears justified to leave Member States with the flexibility to choose their preferred option to private copying also for the analogue environment, whereas, of course, due account must be taken of the new international obligations in this respect (and notably the "three step

test"). This approach should also avoid the risk of delaying the harmonisation process with respect to those other issues where action is urgently awaited. Whether legislation in the area of copyright and related rights could be based on a technology-specific differentiation between analogue and digital deserves further reflection. In fact, only one Member State provides for such a differentiated approach at present.

7. 5(2)(c) allows Member States to exempt certain acts of reproduction from the reproduction right to the benefit of establishments which are accessible to the public, such as public libraries. The definition of the beneficiaries of this exception has been taken from Article 1 of the Rental Right Directive. The provision does not define those acts of reproduction which may be exempted by Member States. In line with the "three step test", Member States may not, however, exempt all acts of reproduction, but will have to identify certain special cases of reproduction, such as the copying of works which are no longer available on the market. Member States may also provide for remuneration, where appropriate.

This exception does not apply to the communication to the public right. In view of the economic impact at stake, a statutory exemption for such uses would not be justified. Thus, for instance, the making available of a work or other subject matter by a library or an equivalent institution from a server to users on-line should and would require a licence of the rightholder or his intermediary and would not fall within a permitted exception. Any other solution would severely risk conflicting with the international obligations which have been reinforced by the two new WIPO Treaties[43], *i.e.* with the normal exploitation of protected material on-line, and would unreasonably prejudice the legitimate interests of rightholders. For instance, the communication of copyright protected material by a library, or its making available via a library homepage will in many cases be in competition with commercial on-line deliveries of material (whether literary, audio-visual or other protected subject matter).

This, of course, does not mean that libraries and equivalent institutions should not engage in on-line deliveries. To the contrary, these activities may well play a major role in the tasks of such institutions in the future. As on-going library projects in a number of Member States show, such uses can and should be managed on a contractual basis, whether individually or on the basis of collective agreements. The Commission, however, believes that the use of protected material by public libraries should not be subject to undue financial or other restrictions. This approach appears to

43 See Article 10 WCT and Article 16 WPPT.

reflect the current situation in most Member States and it provides for the necessary legal certainty across the Community. As such on-line exploitation of protected material will often take place on a transnational basis, it is imperative to provide for a clear and transparent solution Community-wide. This is, of course, without prejudice to Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of the Rental Right Directive.

8. Article 5(3) provides Member States with the possibility of certain limitations to Article 2 (the reproduction right) and Article 3 (the communication to the public right), provided that they are in line with the conditions of this Article, including the "three step test".

Article 5(3)(a) allows Member States to exempt the use of a work, such as a work of literature or a photography, or other subject matter, such as a sound or visual recording, or parts of it, for instance for a compilation of an anthology, provided that such use exclusively serves the purpose of illustration for teaching or scientific research. Member States may provide for a remuneration right. In any case, only the part of the use which is justified by its non-commercial purpose may be exempted from the exclusive right. Moreover, the source must be indicated. This provision is identical with the relevant provision in the Database Directive (Article 6(2)(b)) which, in turn, follows Article 10 Berne Convention. It does not only cover traditional forms of using protected material, such as through print or broadcasted media, but might also serve to exempt certain uses in the context of on-demand delivery of works and other protected matter. Member States will have to take due account of the significant economic impact such an exception may have when being applied to the new electronic environment. This implies that the scope of application may have to be even more limited than with respect to the "traditional environment" when it comes to certain new uses of works and other subject matter.

9. Paragraph (3) (b) to (e) allow Member States to provide for further exemptions to the reproduction right and to the communication to the public right. Some of these limitations take provisions in the multilateral copyright conventions (in particular the Berne Convention) as a model, which many countries have followed, such as those for information purposes (reporting of current events, quotations). Others are limitations which are not specifically addressed in the multilateral conventions, but which are known in a large number of Member States, such as exemptions to the benefit of certain categories of people (persons with disabilities) or for use of works for purposes

of administrative or judicial procedures or for purposes of public security. In view of their more limited economic importance, these limitations are deliberately not dealt with in detail in the framework of this proposal. It only sets out minimum conditions of their application, and it is for the Member States to define the detailed conditions of their use, albeit within the limits set out by these paragraphs and this Article.

10. As stressed in Article 5(4), the application of the exceptions and limitations provided in this Article must follow the established principles enshrined in Article 9 §2 of the Berne Convention, Article 13 of the WTO/TRIPs Agreement and Article 10 WCT with respect to authors, and confirmed in Article 16 WPPT with respect to two categories of neighbouring rightholders. Therefore, limitations and exceptions have to be confined to certain specific cases and may not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests, or conflicts with normal exploitation of the protected subject matter (the "three step test").

Article 6: **Technological measures**

1. As to the provision dealing with the technological measures, the wording is largely inspired by the corresponding provisions of the WCT and the WPPT, retaining an element of flexibility ("adequate ...effective") which leaves Member States free to implement the principle according to their national legal traditions. However, the provision provides at the same time for more specific and transparent rules. It is not directed simply against the "circumvention of technological measures" as in the WIPO Treaties, but covers any activity, including preparatory activities such as the manufacture and distribution, as well as services, that facilitate or enable the circumvention of these devices. This is a fundamental element, because the real danger for intellectual property rights will not be the single act of circumvention by individuals, but the preparatory acts carried out by commercial companies that could produce, sell, rent or advertise circumventing devices.

2. As in the WIPO Treaties, the provision contains an element concerning the technical "effectiveness" of the measure, which is further defined in the provision. This would imply that rightholders have a duty to demonstrate the effectiveness of the technology chosen in order to obtain protection. The provision adds an element of knowledge by the party liable for the circumvention. The expression "knowingly or having reasonable grounds to know" is already used in the provisions on enforcement in the WTO/TRIPS Agreement (cf. Article 45 on damages). Thereby it excludes from protection those activities which are carried out without the knowledge that they will enable circumvention of technological protection devices. It furthermore covers only

those activities and services which have only a limited commercially significant purpose or use other than to circumvent. This solution would ensure that general-purpose electronic equipment and services are not outlawed merely because they may also be used in breaking copy protection or similar measures.

3. Finally, the provision prohibits activities aimed at an infringement of a copyright, a related right or a *sui generis* right in databases granted by Community and national law: this would imply that not any circumvention of technical means of protection should be covered, but only those which constitute an infringement of a right, *i.e.* which are not authorised by law or by the author.

4. It should be stressed that such legal protection is complementary with the initiative already proposed by the Commission in the field of the protection of conditional access services[44]. This latter proposal addresses in fact harmonised protection against unauthorised reception of a conditional access service, which may or may not contain or be based upon intellectual property, whilst this proposal deals with the unauthorised exploitation of a protected work or other subject matter, such as unauthorised copying, making available or broadcasting.

Article 7: Rights Management Information

1. As to the obligations concerning rights management information, the proposal follows the structure of the relevant Articles of the new WIPO Treaties (Articles 12 WCT, 19 WPPT), giving Member States appropriate flexibility in implementation. It aims only at the protection of electronic rights management information, and does not cover all kinds of information that could be attached to the protected material.

2. Moreover, the activity must be done "without authority". It would therefore not cover the removal or alteration of rights management information done with the permission of the rightholder (or his intermediary) or permitted or even required by law, such as for data protection reasons (cf. the Data Protection Directive[45]). Furthermore, the forbidden activity, in order to benefit from protection, should lead to, or be preparatory to, an infringement of an intellectual property right provided by law. The provision

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44 Cf. Commission Proposal for a European Parliament and Council Directive on the Legal Protection of Services based on, or consisting of, Conditional Access, COM(97) 356 final of 9 July 1997.

45 Directive 95/46/EC of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and the free movement of such data, OJ L 281, 23 November 1995.

concentrates therefore on the protection of intellectual property rights, and does not cover complementary activities such as the fraudulent communication of rights management information to a public authority.

Article 8: Sanctions and Remedies

1. As enshrined in the Commission's Communication on the Role of Penalties implementing Community Legislation (COM (95) 162 final), any legal provision, for it to be effective, must be associated by appropriate sanctions or remedies. This does not necessarily mean fixing a harmonised level of penalties: Article 8(1) indicates a set of criteria chosen to achieve the objective, which is to provide for effective remedies, including their application, in respect of infringements of the rights and obligations set out in this Directive, while leaving enough flexibility to Member States.

2. As has been stressed in the relevant provisions in the two new WIPO Treaties, the remedies in order to be effective have to be expeditious to prevent infringements and deter further infringements. Useful elements may be found in Part III of the WTO/TRIPs Agreement ("Enforcement of Intellectual Property Rights"), which includes a comprehensive set of measures against piracy. As regards copyright and related rights protection in general, such measures will already exist to a large degree but may need to be complemented notably in relation to the rights given in Articles 8 (Technological measures) and 10 (Rights Management Information) of this proposal.

3. Paragraph 2 of this Article sets out the customary package of civil remedies to enforce copyright and related rights which is already at the disposal of rightholders in most Member States. It reflects Articles 44 (providing for injunctions), Article 45 (providing for damages) and Article 46 (providing for seizure of infringing material) of the TRIPs Agreement, whereas seizure of unauthorised computer software is also laid down in Article 7 of the Computer Programs Directive. These remedies should be made available to the rightholders concerned, including federations and associations having legal standing to assert such rights.

Article 9: Application over time

1. This provision addresses the application in time of the Directive. It is inspired by the respective provisions in previous directives on copyright and related rights. Paragraph 1 sets out that all those works and other subject matter benefit from protection under this Directive, which, on the date of transposition as referred to in the Directive, are

protected by the legislation of the Member States in the field of copyright and related rights, or meet the criteria of protection envisaged in this proposal and in the existing *acquis communautaire* on copyright and related rights.

2. Paragraph 2 reflects a general principle, ensuring that the Directive has no retroactive effect and does not apply to acts of exploitation of protected works and other subject matter which occurred before the date on which the Directive has to be implemented by Member States (the date of transposition as set out in the present Directive).

3. Paragraphs 3 and 4 sets out another general principle according to which contracts which have been concluded and rights which have been acquired before the adoption of the Directive could have been known by parties, are not affected by the latter, thereby excluding certain "old contracts" from the scope of application of the Directive. In contrast to the previous paragraphs the date of reference is the date of entry into force of the Directive, and not the date of transposition. Thereby, it will be ensured that the rights and obligations enshrined in the Directive will come into existence in a not too distant future, at the very latest five years after the publication of the Directive, while taking due account of the principle of legal certainty and legal predictability of legislation.

Articles 10: Technical adaptations

1. Article 10(1) (a) repeals Article 7 of the Rental Right Directive, which harmonises the reproduction right for certain holders of related right. This provision forms now part of Article 2 of the present proposal, which goes further insofar as it also defines the precise scope of this right.

2. Article 10(1)(a) amends Article 10(3) of the Rental Right Directive, which states that paragraph 1(a) of that Article (relating to "private use") shall be without prejudice to any existing or future legislation on remuneration for reproduction for private use. As Article 10, as amended by this draft Directive, will no longer apply to the reproduction right, this paragraph is repealed. It is replaced by a new paragraph, which brings Article 10 of the Rental Right Directive in to line with the new international obligations (Articles 10 and 16 WPPT), at least as far as its scope of application is concerned. As set out in the previous paragraph, these international provisions go further than Article 15 Rome Convention insofar as they establish that limitations and exceptions to the rights set out in the WPPT have to be confined to certain specific cases and may not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests, or conflicts with normal exploitation of the protected subject matter (the "three step test").

3. Article 10(2) replaces Article 3 (2) of the Term of Protection Directive[46] in order to bring it in line with Article 17 WPPT, which does not refer to the "communication to the public" as a starting point for computing the term of protection of phonogram producers. The new wording therefore only refers to the date of fixation of a phonogram as well as to the date of first publication of a phonogram being lawfully published during this period.

Article 11 : Final provision

1. Paragraph 1 of this Article is a standard provision. Paragraph 2 sets out a general review clause with special emphasis on the provisions on exceptions, technological measures, and remedies.

Article 12: Entry into Force

This is a standard provision following the Maastricht Treaty.

Article 13: Addressee of the measure

This is a standard provision.

46 Council Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights (the "Term of Protection Directive"), OJ L 290/9 of 24.11.1993.

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on the harmonisation of certain aspects of copyright and related rights in the Information Society

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57(2), 66 and 100a thereof,

Having regard to the proposal from the Commission[47],
Having regard to the opinion of the Economic and Social Committee[48],
Acting in accordance with the procedure laid down in Article 189b of the Treaty[49],

(1) Whereas the Treaty provides for the establishment of an Internal Market, the removal of barriers to the free movement of goods, the freedom to provide services and the right of establishment and the institution of a system ensuring that competition in the Internal Market is not distorted; whereas harmonisation of the laws of Member States on copyright and related rights contributes to the achievement of these objectives;

(2) Whereas the European Council, meeting at Corfu on 24 and 25 June 1994, has stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the Information Society in Europe; whereas this requires, *inter alia,* the existence of an Internal Market for new products and services; whereas important Community legislation to ensure such a regulatory framework is already in place or is well underway; whereas copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content;
(3) Whereas a harmonised legal framework on copyright and related rights, through increased legal certainty, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally

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across a wide range of industrial and cultural sectors; whereas this will safeguard employment and encourage new job creation;

(4) Whereas technological development has multiplied and diversified the vectors for creation, production and exploitation; whereas, while no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights will have to be adapted and supplemented to adequately respond to economic realities such as new forms of exploitation;

(5) Whereas, without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the Internal Market and legislative inconsistency; whereas the impact of such legislative differences and uncertainties will become more significant with the further development of the Information Society, which has already greatly increased transborder exploitation of intellectual property; whereas this development will and should further increase; whereas significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights;

(6) Whereas the Community legal framework for the legal protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the Internal Market; whereas, to that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the Internal Market and the proper development of the Information Society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the Internal Market need not be removed or prevented;

(7) Whereas the various social, societal and cultural implications of the Information Society require that account be taken of the specific features of the content of products and services;

(8) Whereas any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation; whereas their protection helps to ensure the maintenance and development of creativity in the interests of authors, performing artists, producers, consumers, culture, industry and the public at large; whereas intellectual property has therefore been recognised as an integral part of property;

(9) Whereas if authors or performing artists are to continue their creative and artistic work they have to receive an appropriate reward for the use of their work; whereas the investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable; whereas adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment;

(10) Whereas adequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint; whereas Article 128 of the Treaty requires the Community to take cultural aspects into account in its action;

(11) Whereas the Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers; whereas those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide; whereas the Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way; whereas this Directive also serves to implement a number of the new international obligations;

(12) Whereas liability for activities in the network environment concerns not only copyright and related rights but also other areas it will be addressed horizontally in the context of a forthcoming directive clarifying and harmonising various legal issues relating to Information Society services, including electronic commerce; whereas the latter initiative should come into force, as far as possible, within a time-scale similar to that of this Directive;

(13) Whereas the provisions of this Directive should be without prejudice to existing Community provisions in the area of copyright and related rights, unless otherwise provided in this Directive;

(14) Whereas this Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries; whereas this should be done in conformity with the *acquis communautaire*; whereas a broad definition of these acts is needed to ensure legal certainty within the Internal Market;

(15) Whereas this Directive should harmonise the right applicable to the communication to the public of works, where this is not yet done by existing Community legislation*;*

(16) Whereas the legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level; whereas it should provide all rightholders recognised by the Directive with an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions; whereas such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them; whereas this right does not cover private communication;

(17) Whereas the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive;

(18) Whereas copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article; whereas the first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community; whereas this right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community;

(19) Whereas the question of exhaustion does not arise in the case of services and on-line services in particular; whereas this also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder; whereas, unlike CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorisation where the copyright or related right so provides;

(20) Whereas the rights referred to in this Directive may be transferred, assigned or subjected to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights;

(21) Whereas a fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded; whereas the existing exceptions to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment; whereas existing differences in the limitations and exceptions to certain restricted acts have direct negative effects on the functioning of the Internal Market of copyright and related rights; whereas such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities; whereas in order to ensure the proper functioning of the Internal Market, such exceptions should be defined more harmoniously; whereas the degree of their harmonisation should be based on their impact on the smooth functioning of the Internal Market;

(22) Whereas this Directive provides for an exhaustive enumeration of exceptions to the reproduction right and the right of communication to the public; whereas some exceptions only apply to the reproduction right, where appropriate; whereas this list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning Internal Market; whereas it is desirable that Member States should arrive at a coherent application of these exceptions, which will be assessed when reviewing implementing legislation in the future;

(23) Whereas the exclusive right of reproduction should be subject to an exception to allow or certain acts of temporary reproduction which are made as part of a technological process and are incidental to, and made for the sole purpose of enabling the use of protected subject matter and which have no separate economic value on their own; whereas under these conditions this exception should include acts of caching or browsing;

(24) Whereas Member States should be given the option of providing for certain exceptions for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings;

(25) Whereas existing national schemes on reprography, where they do exist, do not create major barriers to the Internal Market; whereas Member States should be allowed to provide for an exception in respect of reprography;

(26) Whereas Member States should be allowed to provide for an exception to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use; whereas this may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders; whereas, although differences between those remuneration schemes affect the functioning of the Internal Market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the Information Society; whereas digital private copying is not yet widespread and its economic impact is still not fully known; whereas, therefore, it appears justifiable to refrain from further harmonisation of such exceptions at this stage; whereas the Commission will closely follow market developments in digital private copying and will consult interested parties, with a view to taking appropriate action;

(27) Whereas, when applying the exception on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available; whereas such exceptions should not inhibit the use of technological measures;

(28) Whereas Member States may provide for an exception for the benefit of establishments accessible to the public, such as non-profit making libraries and equivalent institutions; whereas, however, this should be limited to certain special cases covered by the reproduction right; whereas such an exception should not cover uses made in the context of on-line delivery of protected works or other subject matter; whereas this Directive should be without prejudice to Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property[50] as amended by Directive 93/98/EEC[51];

(29) Whereas, when applying those exceptions, they should be exercised in accordance with international obligations; whereas such exceptions may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject matter; whereas the provision of such exceptions by Member States should, in particular, duly reflect the increased economic impact that such exceptions may have in the context of the new electronic environment; whereas, therefore, the scope of certain exceptions may have to be even more limited when it comes to certain new uses of copyright works and other subject matter;

50 OJ L 346, 27.11.1992, p. 61.

51 OJ L 290, 24.11.1993, p.9.

(30) Whereas technological development will allow rightholders to make use of technological measures designed to prevent and inhibit the infringement of any copyright, rights related to copyright or *sui generis* rights provided by law; whereas the danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures; whereas, in order to avoid fragmented legal approaches that could potentially hinder the functioning of the Internal Market, there is a need to provide for harmonised legal protection against any activity enabling or facilitating the circumvention without authority of such measures; whereas such a legal protection should be provided to technological measures that effectively inhibit and/or prevent the infringement of any copyright, rights related to copyright or *sui generis* rights provided by law; whereas such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection;

(31) Whereas such a harmonised legal protection should not inhibit decompilation permitted by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs[52] as amended by Directive 93/98/EEC;

(32) Whereas important progress has been made in the international standardisation of technical systems of identification of works and protected subject matter in digital format; whereas, in an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community; whereas compatibility and interoperability of the different systems should be encouraged; whereas it would be highly desirable to encourage the development of global systems;

52 OJ L 122, 17.5.1991, p.42.

(33) Whereas technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to better identify the work or other subject matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject matter in order to render easier the management of rights attached to them; whereas, there is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public copies from which such information has been removed without authority; whereas in order to avoid fragmented legal approaches that could potentially hinder the functioning of the Internal Market, there is a need to provide for harmonised legal protection against any of these activities;

(34) Whereas any such rights management information referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject matter by individuals and allow for tracing of on-line behaviour; whereas these technical means, in their technical functions, should incorporate privacy safeguards in accordance with European Parliament and Council Directive 95/46/EEC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data[53];

(35) Whereas this Directive is without prejudice to the application of European Parliament and Council Directive …/…/EC of … concerning the legal protection of services based on, or consisting of, conditional access[54];

53 OJ L 281, 23.11.1995, p. 31.

54 OJ L

(36) Whereas Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive; whereas they shall take all the measures necessary to ensure that those sanctions and remedies are applied; whereas the sanctions thus provided for shall be effective, proportionate and dissuasive.

(37) Whereas, in order to comply with the WIPO Performers and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended;

(38) Whereas, after a period of two years following the date of implementation of this Directive, the Commission should report on its application; whereas this report should examine in particular whether the conditions set out in the Directive have resulted in ensuring a proper functioning of the Internal Market, and should propose action if necessary;

HAVE ADOPTED THIS DIRECTIVE

CHAPTER I: OBJECTIVE AND SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the Internal Market, with particular emphasis on the Information Society.

2. Unless otherwise provided, this Directive shall apply without prejudice to existing Community provisions relating to:

   (a) the legal protection of computer programs;

   (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;

   (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;

   (d) the term of protection of copyright and certain related rights;

   (e) the legal protection of databases.

CHAPTER II: RIGHTS AND EXCEPTIONS

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of the original and copies of their works,
(b) for performers, of fixations of their performances,
(c) for phonogram producers, of their phonograms,
(d) for the producers of the first fixations of films, in respect of the original and copies of their films, and
(e) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

Article 3

Right of communication to the public, including the right of making available works or other subject matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of originals and copies of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances,

(b) for phonogram producers, of their phonograms,

(c) for the producers of the first fixations of films, of the original and copies of their films, and

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public of a work and other subject matter as set out in paragraph 2, including their being made available to the public.

Article 4

Distribution right

1. Member States shall provide authors, in respect of the original of their works or of copies thereof, with the exclusive right to any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original of their works or of copies thereof, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Article 5

Exceptions to the restricted acts set out in Articles 2 and 3

1. Temporary acts of reproduction referred to in Article 2 which are an integral part of a technological process for the sole purpose of enabling a use to be made of a work or other subject matter, and having no independent economic significance, shall be exempted from the right set out in Article 2.

2. Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in the following cases:

   (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects;

   (b) in respect of reproductions on audio, visual or audio-visual recording media made by a natural person for private use and for non-commercial ends;

   (c) in respect of specific acts of reproduction made by establishments accessible to the public, which are not for direct or indirect economic or commercial advantage;

3. Member States may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

(b) for uses for the benefit of visually-impaired or hearing-impaired persons, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;

(c) use of excerpts in connection with the reporting of current events, as long as the source is indicated, and to the extent justified by the informatory purpose;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or for the purposes of the proper performance of an administrative or judicial procedure.

4. The exceptions and limitations provided for in paragraphs 1, 2 and 3 shall only be applied to certain specific cases and shall not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with the normal exploitation of their works or other subject matter.

CHAPTER III: PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS MANAGEMENT INFORMATION

Article 6

Obligations concerning technological measures

1. Member States shall provide adequate legal protection against any activities, including the manufacture or distribution of devices or the performance of services, which have only limited commercially significant purpose or use other than circumvention, and which the person concerned carries out in the knowledge, or with reasonable grounds to know, that they will enable or facilitate without authority the circumvention of any effective technological measures designed to protect any copyright or any rights related to copyright as provided by law or the *sui generis* right provided for in Chapter III of European Parliament and Council Directive 96/9/EC[55].

2. The expression "technological measures", as used in this Article, means any device, product or component incorporated into a process, device or product designed to prevent or inhibit the infringement of any copyright or any rights related to copyright as provided by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall only be deemed "effective" where the work or other subject matter is rendered accessible to the user only through application of an access code or process, including by decryption, descrambling or other transformation of the work or other subject matter, with the authority of the rightholders;

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55 OJ L 77, 27.3.1996, p.20.

Article 7

Obligations concerning rights management information

1. Member States shall provide for adequate legal protection against any person performing without authority any of the following acts:

   (a) the removal or alteration of any electronic rights-management information,

   (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of copies of works or other subject matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights management information has been removed or altered without authority,

   if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling or facilitating an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. The expression "rights management information", as used in this Article, means any information provided by rightholders which identifies the work or other subject matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject matter, and any numbers or codes that represent such information.

   The first subparagraph shall apply when any of these items of information are associated with a copy of, or appear in connection with the communication to the public of, a work or other subject matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV: COMMON PROVISIONS

Article 8
Sanctions and Remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material.

Article 9
Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject matter referred to in this Directive which are, by the date referred to in Article 11(1), protected by Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).
2. This Directive shall apply without prejudice to any acts of exploitation performed before the date referred to in Article 11(1).
3. This Directive shall not affect any contracts concluded or rights acquired before the date of its entry into force.
4. Notwithstanding paragraph 3, contracts concerning the exploitation of works and other subject matter which are in force on the date referred to in Article 11(1) shall be subject to this Directive as from five years after its entry into force if they have not expired before that date.

Article 10

Technical adaptations

1. Directive 92/100/EEC is hereby amended as follows:

   (a) Article 7 is deleted.

   (b) Article 10(3) is replaced by the following:

   "3. The limitations may only be applied to certain specific cases and may not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with normal exploitation of their subject matter."

2. Article 3(2) of Directive 93/98/EEC is replaced by the following:

"2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram is lawfully published during this period, the rights shall expire 50 years from the date of the first such publication."

Article 11

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2000. They shall immediately inform the Commission thereof and shall also communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for making such reference shall be adopted by Member States.

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2. Not later than at the end of the second year after the date referred to in paragraph 1 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, *inter alia,* on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8. Where necessary to ensure the functioning of the Internal Market pursuant to Article 7a of the Treaty, it shall submit proposals for amendments of this Directive.

Article 12

Entry into Force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 13

Addressees

This Directive is addressed to the Member States.

Done at , ,

For the European Parliament — For the Council

The President — The President

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS
(with special reference to small and medium sized enterprises)

Title of proposal: Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society

Reference Number: 97010

The proposal

1. **Taking into account the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?**

   The proposal has a twofold objective. Its aim is to harmonise certain aspects of copyright and related rights to ensure a genuine Internal Market in relation to copyright and related rights with particular emphasis on new products and services containing intellectual property. At the same time, it implements a significant number of the new WIPO Treaty obligations (resulting from the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty") at Community level in parallel with the ratification of these Treaties by the Community.

   Like the other harmonisation measures in the field of copyright and related rights, this proposal does not aim at a general harmonisation of law on copyright and related rights. In accordance with the principle of subsidiarity, it only proposes to harmonise those matters which are most urgent as far as the smooth functioning of the Internal Market and the creation of a level playing field across national borders is concerned. This principle has been applied throughout the proposal, both to the choice of issues where harmonisation appears necessary, and to the degree of harmonisation envisaged.

The impact on business

2. Who will be affected by the proposal?

- Which sectors of business?

The proposed Directive will have impact across a wide range of business sectors, with the information and entertainment industries high on the list.

The protection proposed by the initiative would mainly affect intellectual property right holders and those who exploit and invest in these rights (producers, publishers and service providers, such as providers of on-line services). Their business varies widely. It is therefore difficult to enumerate exhaustively all the sectors of business directly affected by this initiative, although particular reference should be made to the software business, database makers, film producers, record companies, broadcasters, multimedia producers, or traditional and electronic publishers. The proposed directive will also have an indirect impact on the consumer electronic industry, such as producers of hardware and carriers of sound, audio-visual or printed material and the information technology industry, such as telecommunication companies, as their products and services to a large extent serve to exploit copyright protected material.

- Which sizes of business

In view of the wide variety of ways of creating and marketing intellectual property this proposal will serve companies of any size. In some areas - such as the software business, film business, record business, media business it will not only affect some large, often multinational companies, but also a high number of medium and even small size companies. In view of the considerable technical and financial investments in a number of new services protected by intellectual property (such as "on-demand services"), the proposal may, in some respects, affect more large companies already established in manufacturing, telecommunications or information technology. On the other hand, in view of the relatively low cost of getting connected to existing networks and in view of the huge and continuing diversification of the market, the new environment (particularly addressed by this directive) offers many opportunities to innovative and specialised SMEs. The barriers to entry for these markets are low and the chances for SMEs to be highly competitive, alone or in joint forces, are very high. It should be stressed that small and medium size enterprises already have a considerable presence in the multimedia market (on-line and off-line) across Europe today.

- Are there particular geographical areas of the Community where these businesses are found?

As a general rule, businesses creating and exploiting copyright and related rights can be found within the whole of the Community.

As regards the development and marketing of new products and services, and in particular on-line services, these are not yet found in the whole of the Community. Pilot projects are still concentrating in the UK, France, Germany, and a few other Member States. However, with the continuing spread of networks and the gradual opening up of on-line applications to the general public, the business opportunities will no longer be limited to particular geographical markets. This will also assist in the further economic development of the regions.

3. What will business have to do to comply with the proposal?

Harmonisation is proposed on four elements: the reproduction right, the right of communication to the public, including making available "on-demand" over the net, the right of distribution of physical copies and the protection of technological measures and rights management information. The proposal also harmonises the exceptions to the three rights mentioned above (along the lines of the relevant *acquis communautaire* in this area), where the degree of harmonisation differs depending on their particular impact on the functioning of the Internal Market.

The proposed directive will not force business to make major adjustments, since it mainly implies a fine-tuning of the Member States' laws within their existing concepts and traditions.

Where new exclusive rights to authorise or prohibit certain uses will be introduced (such as, for instance, with respect to the "making available" of protected subject matter, such as sound or audio-visual material, to the public on-demand) or existing rights will be harmonised, with the result that certain exceptions to these rights, which are at present in existence in a few Member States, will no longer apply (such as on "international exhaustion" of the distribution right), some contractual practices concerning the exploitation of works and other subject matter might have to be adjusted. However, contracts already in existence at the date of transposition will only be subject to this Directive as from five years after its publication.

4. What economic effects is the proposal likely to have?

The proposed harmonisation of certain aspects of copyright and related rights will facilitate further cross-border circulation of goods and services which include material protected by copyright and will thus contribute to growth in the respective business sectors mentioned above.

- On employment

In particular within the emerging new markets for intellectual property, a considerable potential for job creation exists. The growth and diversification of consumption, of industries and of the intellectual property markets should have significant positive effects on employment.

The harmonised protection set out in the proposal should encourage rightholders and their intermediaries (including providers of on-line services) to invest in creative and innovative activities, which will in particular have a positive impact on employment in small and medium enterprises.

- On investment and the creation of new business

The new markets in creating and exploiting intellectual property will lead to the creation of new business particularly in the on-line environment. Appropriate and coherent protection of the exploitation in these markets Community-wide should serve as a further incentive for new investment in a wide range of activities protected by copyright and related rights. The harmonised protection of technological measures against illegal circumvention should be a further incentive for content providers and on-line service providers to invest in new services and products protected by copyright and to make them available on a large scale.

- On the competitive position of businesses

The proposed directive will help to achieve a level playing field for copyright protection across national borders to allow for the internal market to become a reality for new products and services containing intellectual property. This should significantly contribute to growth and competitiveness of the European industry, including small and medium enterprises, and lead to an increase in their market share - both in the area of content provision and information technology, and more generally across a wide range of industrial and cultural sectors.

5. Does the proposal contain measures to take account of the specific situation of small and medium sized firms (reduced or different requirements?)

The Directive does not contain any specific measures directed towards small and medium sized firms, but may be of even greater benefit to them than to large companies, as a Community-wide framework implies simplification, cost benefits and easier access to new geographical markets, which is of particular relevance for SMEs.

The proposed framework will also benefit SMEs (such as producers) as rightholders and will ensure balanced and harmonised conditions for the use of intellectual property across the Community, which will assist SMEs when exploiting and marketing intellectual property. As regards the Information Society context, it should again be stressed that small and medium sized businesses are especially well suited to face competition, in view of the fact that their business is often characterised by flexibility and innovation. Specific rules for SMEs are not indicated.

Consultation

6. List the organisations which have been consulted about the proposal and outline their main views.

In July 1995, the Commission published a Green Paper on "Copyright and Related Rights in the Information Society" (COM(95) 382 final), which focused the debate with the other Community institutions, Member States, industry, rightholders, users, and all other interested parties on the challenges to copyright and related rights brought about by the new technologies. As a response to this Green Paper, which was widely circulated to thousands of recipients, the Commission received input through more than 350 written submissions. On the basis of a considerable number of submissions from major industrial organisations, interested parties were invited to a hearing in Brussels on 8 and 9 January 1996. Furthermore, numerous bilateral contacts with all parties concerned took place. The consultation process was concluded in the framework of a conference organised by the Commission in Florence in June 1996.

All categories of rightholders (such as authors, phonogram producers, artists, broadcasting organisations, film producers) and their intermediaries (publishers, collecting societies, licensees) expressed concern over new uses of protected material in ways that are not authorised or not anticipated under existing laws in this area. Users and investors, such as providers of on-line services, also want to know which copyright rules they will have to comply with. All interested parties stressed the need for further harmonisation of copyright and related rights aspects in the framework of the Internal Market and for their adaptation to the new challenges of digitisation and multimedia.

The Commission's Communication of 1996 (follow-up to the Green Paper on Copyright and Related Rights in the Information Society, COM(96)568 final of 20 November 1996) sets out the results of this consultation exercise, identifying four issues requiring immediate legislative action to eliminate existing or potential barriers to trade between Member States. The reasoning behind this policy choice and the proposed action is set out in detail in this document.

With respect to the other issues discussed in the 1995 Green Paper (multichannel broadcasting, applicable law and law enforcement, management of rights and moral rights), the views of interested parties were less directed towards immediate legislative action. Whereas most parties agreed that these issues are as fundamental to the exploitation of copyright and related rights in the Information Society, parties felt that, as regards some of the issues (broadcasting right, management of rights, moral rights), further market developments should be awaited before a decision can be taken on the need for harmonised measures. With respect to other issues, such as the applicable law and law enforcement, parties were seeking guidance on existing rules rather than harmonisation.

Reactions to this Working Programme have been generally very favourable, in particular on the "priority issues" for harmonisation identified and further set out in the document. The proposal for a directive follows closely the approach presented in the Communication and takes account of these comments.

Some parties have stressed that in parallel to these measures, adequate and coherent rules on liability for copyright infringements on the net must be ensured. In this context, the need to tackle the scope and limits of the responsibility of on-line service providers is underlined repeatedly. While this proposal includes a general provision on the enforcement of intellectual property rights, it contains no specific provision on the issue of liability, as this is a horizontal issue affecting a number of areas other than copyright and related rights. The issue will therefore be addressed on the basis of a horizontal initiative within the framework of a separate internal market measure, to be launched in the first half of 1998.