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Copyright and Related Rights in the Information Society

Introduction

This briefing is EURIM's response to the European Commission's Green Paper on *Copyright and Related Rights in the Information Society* (COM(95) 382 final of 19 July 1995) and the Commission's Follow-up (COM(96) 568 final of 20 November 1996), in which it is proposed to adjust and build on the already existing Community-wide harmonisation of laws in the field of copyright and related intellectual property rights for the digital and network environment. Adoption of the measures proposed in the Green Paper and Follow-up within a proper legal framework, which maintains a fair balance of rights and interests between the different categories of rightholders and between rightholders and rightusers, will put the Community ahead of its commercial partners in the development and protection of services in the Information Society. It is, however, also recognised that, for such protection to be truly enforceable, it must be effected internationally. In December 1996, The World Intellectual Property Organisation (WIPO) adopted the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* to address similar copyright and related rights issues applicable to digital technology, particularly the Internet.

Copyright and related rights give the rightholder/author of works, the sole power to authorise or prohibit use, reproduction and other acts of exploitation. Technology now enables every kind of information, sound, text, data, pictures (still or moving and on film or video) to be represented in the form of electronic digits, which can be transmitted instantly across the world, copied a million times without the loss of quality, stored, manipulated and, eventually, displayed in a variety of ways. Such digitisation and ease of transmission requires a proper environment in both legal and regulatory terms to ensure the profitability and continuation of these developments, whilst maintaining the right balance of protection for rightholders, users, distributors and consumers alike.

Summary of Conclusions

1. The existing legal and regulatory structure in the UK and Europe provides a sound, established basis of rights and protection for copyright holders and users upon which new laws for the Information Society can be built.

2. To achieve consistent levels of copyright protection throughout the European Union, it will be appropriate to clarify and, where necessary, adapt rights relating to reproduction, communications to the public, the integrity of technical identification and protection schemes and distribution.

3. EURIM welcomes the Commission's longer-term intention to give further consideration to broadcasting rights, applicable law and enforcement, rights management and moral rights. In an age when information services are increasingly trans-national, the issue of applicable law is of special importance to copyright owners and information service providers. EURIM will encourage the Commission's and WIPO's efforts to resolve this.

4. European-wide harmonisation of rights is desirable to ensure consistent protection for copyright owners. In addition, consistent and clearly defined exceptions and limitations to the application of those rights are needed to safeguard the common interests of ordinary users of copyright material across the European Union and to ensure that businesses providing the services and technology required to deliver copyright works to users have clear guidelines and are not unreasonably restricted.

5. EURIM considers it is in the interests of the UK and Europe to establish a fair and proper balance of rights and protections for copyright owners, producers, distributors and consumers, so that copyright owners will make their works available and innovative new services can develop to the advantage of all.

Present UK/EU Legal Framework

The UK Copyright, Designs & Patents Act 1988 and subsequent legislation, consolidated existing laws on copyright and related rights and expressly introduced copyright in computer programs.

In Europe, the Computer Programs Directive (1991) established copyright protection for computer programs at Community level. The Rental Rights Directive (1992) extended and harmonised the rental and lending rights of authors, performers, phonogram and film producers. The Satellite and Cable Directive (1993) established the definition of *communication to the public* and that the laws of one country only (i.e. where the signals are introduced into the chain of communication) apply. It established satellite broadcasting and cable re-transmission rights and laid down the right to grant or refuse authorisation for cable re-transmission only through a collecting society. The Term of Protection Directive (1993) harmonised the duration of protection of copyright within the Community to 70 years after the author's death for copyright and 50 years for related rights (adopted into UK law by the Duration of Copyrights and Rights in Performance Regulations 1995). The Database Directive (1996), [see EURIM Briefing No: 6], extended copyright protection to databases which, by reason of the *selection or arrangement* of their contents, constituted the author's own intellectual creation. (This is independent of copyright in the *contents* of the database.) It introduced a new *sui generis* right to prevent unfair extraction in circumstances in which the maker of a database can show that there has been (qualitatively and/or quantitatively) a substantial investment in the obtaining, verification or presentation of the contents of the database.

Existing Rights relating to Copyright Works and Related Products

The owner of the copyright in a work has the *exclusive right* to do or authorise the following:

- to copy (which includes reproducing in any form or storing electronically);
- to issue copies to the public;
- to perform, show or play the work in public;
- to broadcast the work or include it in a cable programme service;
- to make an adaptation of the work or do any of the above in relation to an adaptation (including making a `translation' of a computer program - i.e. making a different version of the program).

Infringement occurs when any of the above acts are carried out or authorised by a party *without* the consent or licence of the copyright owner with respect to the *whole* or a *substantial* part of the works.

The types of *works* protected by existing legislation include: Literary (including computer programs), Dramatic, Musical, Artistic (including photography) and Scientific.

The types of *products* (of secondary authors/ makers/producers) protected include: Sound recordings, Films/photographs, Broadcasts, Published editions, Cable programmes, Typographical arrangements of published editions, Cinematographic, Semi-conductor topographics (protected under Design right) and Databases.

Clarification of Existing Rights

1. Right to Copy/Reproduce

As a result of digitisation, works can be reproduced in a multitude of new forms, some of which cannot be detected by human senses (comparable to the problem of intermediate reproduction of software in the chain of transmission). Once in a digital form, works are much more susceptible to exploitation by copying, especially over a network. The existing right of reproduction, and the authorised exceptions thereto, therefore need to be re-assessed and, if necessary, clarified to address digitisation. In the Follow-up to the Green Paper, the Commission stated that it intends to use the Directives on computer programs and databases as precedents in determining the extent of exclusive rights and clarifying *fair use* exceptions to protect the interests of users.

2. Communication to the Public

With the advent of innovative new services to deliver content to the consumers, copyright owners need an unambiguous right to control such new means of distribution. The proposed solution is to establish a specific, harmonised right to authorise *communication to the public*. This should be defined to include making a work available for transmission over so-called “on demand” services (i.e. at a time and place individually chosen by the user). This would encompass making works available on the Internet. However, it is an essential principle that this right would only be infringed by a person responsible for an initial act of making a work

available in this way (i.e. the person who actually put into circulation a copy of the work) and not by any innocent intermediaries (i.e. service providers) who happen to provide the technical facilities which might be necessary to carry or transmit the work.

3. Legal Protection of the Integrity of Technical Systems

Such systems allow for the automatic identification of protected material disseminated on networks and for the control of copying of such works. Whilst leaving the private sector to develop and standardise such systems, the Commission accepted, in its Follow-up to the Green Paper, the need for Community legislation to cover: *manufacture, possession in the course of business, putting into circulation, distribution, importation and circumvention/deactivation* of such systems. Such proposed legislation must also, however, ensure the right to privacy with regard to the processing of personal data. Appropriate sanctions and penalties for liability in relation to infringement may have to take account of possible legitimate defences to civil liability and limitation to restricted acts and users' rights.

4. Distribution Rights (and Exhaustion Principle)

The right of distribution entitles the author of a work or holder of a related right to require his consent for any distribution of copies of that work. Although, at present, all Member States recognise this right, the scope of, and limitations to, such a right differ from state to state, particularly in relation to the main limitation: *exhaustion* of the distribution right. (This occurs when copies of a work are put into circulation with the consent of the rightholder.) Some Member States provide for *no exhaustion*, whereas others apply *exhaustion* even when the first legal act of distribution occurs *outside* the Community.

In addition to the differing treatment of this right in Europe, there is still no international instrument or regulation governing the right of distribution and, although both WIPO Treaties mentioned in the *Introduction* recognised the right, they have left it to national legislation to determine the effect of *exhaustion*.

The Green Paper and Follow-up propose that the right of distribution should be harmonised for all categories of works, with exhaustion only at a Community level. Thus, the first sale in the *Community,* by or with the consent of the rightholder, would exhaust the distribution right and the rightholder could no longer restrict distribution to another Community country following the first sale in any Community country. Exhaustion would apply only to *goods* and not to the *provision of services*, especially not of on-line services. Such measures would enhance legal certainty across the Community.

Other Issues Requiring Further Evaluation

1. Broadcasting Right

Existing EU Directives have established *broadcasting* as "the initial transmission by wire or over the air (including by satellite) in un-encoded or encoded form, of . . . programmes (including television or radio, in analogue or digital form) intended for reception by the public (excluding individual services on demand)".

Digital broadcasting allows broadcasts to be made to a large number via a digital network. The quality of such digital works is so high that is has the potential of undermining existing markets for the works (e.g. the sale of compact discs).

However, although responses to the Green Paper showed a majority in favour of a distinction being made between acts of *broadcasting* and *digital on-demand* delivery, no distinction should be made in copyright law between **digital** and **analogue** broadcasting.

Notwithstanding the above, the Commission determined that, as digital broadcasting and, in particular, multi-channel broadcasting is in its infancy, further evaluation of the relevant market developments was required before any precise legislative changes would be considered.

2. Applicable Law

Digital transmission dramatically increases the ease with which works may be reproduced, distributed and exploited across international boundaries. While this development certainly promotes the full exploitation of works, it carries with it the risk of multiple infringements in different countries with different legal systems.

In the past, the rules on applicable law and jurisdiction have been relatively simple to apply. Technological progress now makes it imperative that clearly defined and uniformly applicable rules are developed which are appropriate to the new problems. Subject to the extended use of certain provisions of the Brussels and Lugano Conventions, which, in limited circumstances, permit the courts of one country to assume

jurisdiction in commercial cases arising in another country, the current position is that it is the law of the country in which the infringement occurred which applies. Of course, matters relating to the first ownership, transfer of rights and eligibility for protection continue to be governed by the law of the country in which copyright is claimed.

Differences in the legal treatment of intellectual property need to be minimised now more than ever as a result of digital transmission. The failure to provide a degree of coherence and uniformity may lead to owners of intellectual property rights restricting the use of their works because of fears of infringement. This would create an undesirable and unnecessary barrier to trade and the development of new services. In addition, and perhaps more urgently, litigation of cross border infringements in one jurisdiction needs to be encouraged and made easier, so that dealing with multiple infringements (eg by publishing over the Internet) can be dealt with without prohibitive expense.

The Commission, prompted by the complexity of the current situation, is considering issuing a clarifying Communication, which will address issues relating to applicable law as well as those concerned with the enforcement of rights. The Communication will also cover areas such as liability for copyright infringement and dissemination of illegal or harmful material on digital networks.

3. Rights Management

A proper balance has to be maintained between the ease of access to copyright works for users and the exclusive rights and the right to equitable remuneration for rightholders, especially in digital multimedia works on a network. Rights management must be re-assessed in the light of this new environment.

At present, authors, publishers, producers and other rightholders manage their respective rights by contract and/or through collecting societies (organisations which manage or administer copyright or related rights, as their sole or main purpose). Some legislation, e.g. the Satellite and Cable and Rental Rights Directives, makes express reference to collecting societies.

However, in multimedia works in particular, the ‘creator/organiser’ must obtain the authorisation of every rightholder whose work is to be introduced. In order to facilitate such authorisation, collecting societies must become less industry specific and more representative of multimedia rightholders. Proposals include a centre for rights management and an alliance of collecting societies, which would then <pool= their databases of rightholders. This would ease identification and simplify the process of obtaining authorisation and payment of fees.

Notwithstanding the above, the Commission, in the Follow-up to the Green Paper, decided to leave this area, for the time being, for the market to develop. They undertook, however, to continue to study the need to define rights and obligations of collecting societies, particularly in relation to the methods of collection, calculation of tariffs, supervision mechanisms and the application of competition rules to collecting societies and collective management.

4 Moral Rights

The opportunities to abuse the rightholder's entitlement to object to unauthorised modification of his work or to claim authorship of it (the principle of *moral rights*) is much greater in a digital environment. Despite this, the Commission, in the Follow-up to the Green Paper, determined that further study of the developing market was required, in particular to consider whether existing differences in national legislation constituted a significant barrier to the exploitation of protected works.

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