

OPINION OF THE ECONOMIC AND SOCIAL COMMITTEE on the ' Green Paper - Copyright and related rights in the information society'

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Opinion on the 'Green Paper - Copyright and related rights in the information society'

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On 27 July 1995, the European Commission decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Economic Community, on the 'Green Paper - Copyright and related rights in the information society'.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 10 January 1996. The Rapporteur was Mr Moreland.

At its 332nd Plenary Session (meeting of 31 January 1996), the Economic and Social Committee adopted the following Opinion unanimously.

1. Commission document

1.1. This Green Paper is a general consultative document relating to possible further Community harmonization measures which may be needed as a result of the development of the 'information superhighway'.

1.2. The information superhighway, in essence, means the spread of computer networks as means of performing, displaying, distributing, exchanging and storing works and information in digital form. This means of transmitting information, cultural works and entertainment is becoming more and more important as more and more information and cultural material is capable of being carried digitally than ever before.

1.3. This is a request for the feedback on certain legal questions which arise from the spread of this advanced technology.

2. The Commission's general questions

2.1. First the Commission asks some preliminary general questions. They include:

2.1.1. What is the most appropriate level for dealing with intellectual property in the information society, national, Community or international?

2.1.2. Should the existence of multimedia products (e.g. CD-ROMs) require special legislation to take account of the necessity to protect the cultural heritage?

2.1.3. How is the overall economic value of copyright and related rights, which protect the works to be provided on the superhighway, to be measured?

2.1.4. There is a request for specific economical or statistical data relating to activities on the superhighway, and the economic consequences of intellectual property protection for products and

services distributed on the superhighway, particularly relating to SMEs and the effect on employment.

2.2. The Green Paper then discusses some specific issues and, again, raises certain issues by way of questions.

3. The Commission's specific questions

3.1. Intellectual property rights are territorial, and it will be difficult to assess where an act of intellectual property infringement is taking place. The Commission seeks views on whether a 'country of origin' rule along the lines of the Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Cable and Satellite Directive) may be a way to solve this problem. In other words, the law of the State in which the transmission of the relevant material takes place would govern the whole transaction.

3.2. Views are sought on the question of international exhaustion of rights (the right to import into the EU products placed on the market with the consent of the intellectual property right holder for dissemination in States outside the EU).

3.3. It is asked whether the digitization of works should constitute reproduction and hence be an infringement of copyright if carried on without the consent of the right holder.

3.4. The Commission seeks views on transmission for private use and in what circumstances transmissions should be regarded as transmissions to the public at large.

3.5. The Commission asks whether there should be a specific right belonging to the copyright holder to control digital dissemination.

3.6. Digital broadcasting would allow many more broadcasts of a higher quality of sound and vision on the same frequency and considerably more cross-border broadcasting. If more is broadcast, then more is copyable. Views are sought on whether performers and other holders of 'related rights' should have an exclusive right to prevent their performances, etc., being broadcast.

3.7. An author's moral rights are his or her right to acknowledgement of authorship; not to have works altered without consent; and not to be subjected to derogatory treatment. Views are sought on whether moral rights laws in the Community should be harmonized; whether consent to digitization should be deemed a waiver of moral rights, should there be collective agreements dealing with moral rights between authors and publishers?

3.8. The Commission asks questions on the exploitation of rights, in particular whether there should be a centralized scheme for rights clearance for multimedia products and whether the Community should lay down rules for the central management of such things.

4. General comments

4.1. The Committee welcomes the Green Paper, particularly because the rapid development of technology means the constant reevaluation of the legal rules which govern it.

4.2. The most appropriate level for dealing with questions of intellectual property in the information society must be at the international level in the long term: the information society is reducing the significance of national boundaries. At the least, therefore, initiatives in this field should be at Community rather than national level and the emphasis must be on achieving an agreed position for the EU. This will be particularly important in the light of conclusions reached by the US Government in its recent White Paper on this subject.

4.3. Although the Commission is to be congratulated on the legislation, on which it has so far managed to achieve Council agreement, this is a slow and complex process and must have due regard to national and

European cultures. It is important to have a sense of priority based on tackling those issues which are most damaging to the European industry and for the EU's possibilities of exploiting its cultural heritage in competition with the rest of the world and where there are clear problems related to barriers to trade in a single market.

4.4. In the Committee's view the main priorities are (in the order in which they are mentioned in the Green Paper):

4.4.1. the question of defining which law applies to cross-border transactions within the Community and to and from third countries;

4.4.2. the harmonization of the law of exhaustion of rights;

4.4.3. to ensure that the right to restrict digitization as part of the reproduction right is fully protected;

4.4.4. the harmonization of Member States' laws concerning (and/or defining) when works disseminated over the information highway are to be made available to the general public.

4.4.5. the harmonization of moral rights laws in the Community, which differ widely.

4.5. The solution to these needs to be given taking into account the balance of interests between 'authors', producers and consumers.

5. Specific comments

5.1. General questions

5.1.1. What is the most appropriate level for dealing with intellectual property in the information society, national, community or international? The most appropriate level for dealing with questions of intellectual property in the information society must be at the international level (see general comments above).

5.1.2. The Legal Protection of Data Bases Directive is sufficient to protect most multimedia products. In addition, there is a case for strong moral rights' legislation at the EU level.

5.1.3. The Committee believes that the overall economic value of copyright and related rights which protect the works to be provided on the superhighway is not easily measurable. As to the effect on SMEs, the Committee believes that the Software Directive balances the rights of the small developer against the rights of the larger enterprise. Something analogous may be appropriate here. Sometimes a balance between absolute prohibition and a compulsory licence must be struck. Also, the Committee considers that the employment effect of copyright law should not be underestimated and justifies the considerable attention that should be given to the subject of intellectual property at the EU level.

5.2. Specific questions

5.2.1. Applicable law

In principle, the Committee agrees that, as the Commission suggests, the solution to the difficulty presented by frequent transfer of data between countries may be a 'country of origin' rule along the lines of the Cable and Satellite Directive. Care should be taken, however, that people do not disseminate works from those Member States with lower levels of protection or enforcement capability. It is appropriate that the law of the country in which a server or other disseminator of works is situated should govern the uploading of the works on the server and its dissemination from the server. But any such legal provision must ensure that the right holder has the right to enforce his rights in the territory into which the download takes place. There is also need to harmonize and strengthen and practise enforcement rules on an EU level.

5.2.2. Exhaustion of rights

This is a complex issue. The basic question is whether electronic or physical imports incorporating intellectual property rights from outside the Community are subject to the control of the intellectual property right holder when they enter the Community. This depends upon the form in which the protected work or related matter is exploited. Existing Community legislation provides that the principle of exhaustion of rights only applies when these are incorporated in physical products, not, however, to its distribution in electronic form. Consequently, an intellectual property right holder would retain all control over electronic imports from outside the Community and their further distribution. In general, the Committee's view is that this should also apply to the import of works and other protected matter when being incorporated in physical products when they enter the Community. But in circumstances where a third country has adequate intellectual property right protection, and the intellectual property right holder has authorized the distribution of products in electronic form, this general principle may be varied. In those limited circumstances, the intellectual property right holder should not have the automatic right to restrict importation into the EU. An example of this latter limitation is the very common practice of downloading files and documents from a server in the USA to a computer in one of the Member States of the EU. It is practically impossible to police such activity. In these circumstances, in the Committee's view, it is just that a downloader in an EU Member State should have exactly the same rights - no more and no less - as a downloader in the US.

5.2.3. Digitization

It is asked whether the digitization of works should constitute reproduction and hence be an infringement of copyright if carried out without the consent of the right holder. The digitization of a work (permanently or temporarily) is the same as any other method of copying and in principle should be treated in the same way; to the extent that this is not a principle common to all Member States, harmonization measures should ensure that it is. A second and related question is whether the right of the copyright owner relating to digitization should be the right to exclude others from digitizing the work without consent; or whether it should simply be a right to receive remuneration for digitization, which subject to the payment of that remuneration would be authorized. Granted that digitization is no different from other means of copying, the Committee sees no reason to depart from the basic principle that the right of the copyright holder to prevent it should be an exclusionary one.

5.2.4. Private copying

Although it is not the case that private copying should be treated as automatically permitted, the priority should be to ensure that unlicensed copying for commercial purposes should clearly be forbidden. Special attention merits the copying for education and scientific use. So far as private, non-commercial copying is concerned, priority should be given to issues which clearly have a detrimental effect on rightholders.

5.2.5. Technical protection

The question is raised as to whether Member States should make provision for legal measures which guarantee compliance with technical systems for protection against copying. This question breaks down into two sub-questions, namely whether manufacturers should be bound to incorporate technical protection into their hardware; and whether it should be made the equivalent of infringing copyright or other rights in products which are the subject of technical protection to produce or sell hardware which circumvents that technical protection. In the Committee's view, it is not appropriate to impose upon right owners or manufacturers the obligation to follow any particular regime of technical protection but, if one is followed, then it should be unlawful to assist in circumventing it.

5.2.6. Digital broadcasting

The principles set out under 5.2.3 above indicate that the rights of 'related right' holders in principle be exclusive ones, not merely rights to equitable remuneration and that there should be no distinction in this regard between analogue and digital broadcasts.

5.2.7. Digital dissemination or transmission right

The question is put by the Commission as to whether it is appropriate to extend the Rental Right Directive to electronic point-to-point transmission. The Committee does not consider this appropriate; such an extension would be artificial (transmission is not 'rental' in any meaningful sense of the term) and unnecessary (the rental right was introduced in part to compensate for the exhaustion of the right holder's rights in physical copies of the work and, as has been pointed out above, absolute exhaustion of rights in respect of electronic transmissions is not appropriate). In the Committee's view, however, transmission should be covered by the exclusive rights of the right holder, including the exclusive right to make works available to the general public. One simple method could be to ensure that the right to prevent point-to-point transmission is part of the right to prevent reproduction. An alternative, favoured by the US Government in its White Paper, would be the creation of an exclusive transmission right as part of the distribution right. The former is simpler.

5.2.8. Moral rights

Moral rights are important to authors. The increased cross-border traffic in works means that there is a stronger case for harmonization than there has been before. The ease with which digital works can be altered means that the case for strong moral rights, at least at the level provided by the Berne Convention is, in the Committee's view, made out. However, a waiver of the use of these rights in explicit cases should be permitted.

5.2.9. Management of rights

There are also questions on acquisition and management of rights and on technical systems of protection, in particular as to whether there should be a centralized scheme for rights clearance for multimedia products and whether the Community should lay down rules for the central management of such schemes. In the view of the Committee, it is premature to consider centralized management of rights in this way; if authors want to licence their rights collectively, there is no reason to suppose that they will not band together to do so without intervention at EU level, as has happened in the past in the Member States.

5.3. Other issues - Computer generated works

The Committee has referred to this problem in previous Opinions (e.g. its Opinion on the draft of what is now the Directive on the legal protection of computer programmes (91/250/EEC). The Green Paper does not touch upon the question of the protection of computer generated works, that is to say works which have been directly created by a computer programme. The progress of technology has increased the number and quality of such programmes and the issue should, in the Committee's view, be reconsidered. The Committee welcomes the Commission's stated intention to study the problem further.

Done at Brussels, 31 January 1996.

The President

of the Economic and Social Committee

Carlos FERRER