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on the review of the EC legal framework in the field of copyright and related rights

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EXECUTIVE SUMMARY

This paper assesses whether any inconsistencies on the definitions or on rules on exceptions and limitations between the different Directives hamper the operation of the *acquis* (that is to say the body of Community law) or have a harmful impact on the fair balance of rights and other interests, including those of users and consumers. The provisions of the early copyright *acquis* are reviewed alongside each other and compared with the standard set by the Information Society Directive 2001/29/EC, which is the most horizontal measure in the field of copyright and related rights. The paper concludes that there is, for example, a need to make a minor adjustment to the definition of the reproduction right and extend the application of the exception for certain temporary acts of reproduction under Article 5(1) of the Information Society Directive to computer programs and databases.

There is also a need to analyse whether the Community legislative framework in the field of substantive copyright law still contains shortcomings which have a negative impact on the functioning of the Internal Market. However, given that there are no indications of any problems in practice, the paper does not at present envisage further harmonisation measures – except for the “points of attachment” i.e. the criteria used to determine the beneficiaries of protection in the field of related rights which, in addition to their Internal Market impact, are relevant to the adhesion of the Community and its Member States to the WIPO Performances and Phonograms Treaty.

The review of the Community copyright legislation is associated with the Better Regulation Action Plan and its objectives of simplifying and ensuring the quality of existing legislation.

This paper aims at taking stock of the discussions so far with a view to focussing the debate. It is envisaged that the review will be pursued with the aim of presenting, when and where appropriate, the necessary legislative proposals for amendments of the *acquis* and harmonising the points of attachment in the course of 2005.

1. INTRODUCTION

1.1. The objective of the review

The objective of the review is twofold: to improve the operation of the *acquis communautaire* in the field of copyright and its coherence; to safeguard the good functioning of the Internal Market.

Under the first aspect, the paper considers adaptations to the early Directives in this field (listed in the next paragraph) and measures to increase their consistency with one another and with Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter the Information Society Directive) which is the most horizontal measure adopted in this field. Under the second aspect, the paper addresses certain specific issues, which are currently not harmonised, in order to verify whether the lack of harmonisation has had an adverse effect on the good functioning of the Internal Market.

This paper aims at taking stock of the discussions so far with a view to focussing the debate; it does not pre-empt forthcoming reports on the application of a particular Directive in the field of copyright and related rights.

1.2. The scope of the review

The review of the Community copyright legislation concerns the provisions in the Directives adopted in the field of copyright and related rights between 1991 and 1996. These Directives are Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (hereinafter the Software Directive), 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 (the Rental Right Directive), Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (the Term Directive) and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (the Database Directive).

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (the Satellite and Cable Directive), which also forms part of the Community copyright acquis, is subject to a separate revision process. This process was launched in 2002 with the publication of a Report from the Commission on the implementation of the Directive¹, followed by two working sessions of interested parties in 2003, and is ongoing.

Due to the wide range and the multiplicity of issues covered by the review the present paper cannot claim to be an exhaustive presentation. The issues covered by it are selected based on their significance in relation to the objectives of the review.

In this framework, this paper addresses issues where the current acquis might call for adaptations both from a horizontal angle (below 2.1.) and more specifically regarding the acquis Directives (below 2.2.). Finally, it assesses issues, which are outside the acquis (below 3.).

1.3. Background

Community legislation, as well as any other legislation, should constantly be monitored and, where necessary, adapted. This is particularly true in the field of copyright and related rights where the technological development in recent years has opened up new ways of distributing, storing, marketing and using protected works and subject matter. The legal framework for copyright and related rights protection has had to match this challenge.

In this spirit, with seven directives in place, another directive on enforcement of intellectual property rights forthcoming and the issue of rights management gaining shape, the Commission considered appropriate to carry out a stocktaking and review exercise with a view to safeguarding and improving the coherence of the existing legislation. The first concrete step for this initiative was taken in 2002, when the fifth bi-annual International Copyright Conference organised by the Commission in co-operation with the Spanish

¹ COM(2002) 430 final, 26.07.2002.

Presidency in Santiago de Compostela, entitled "European Copyright Revisited", was mainly dedicated to the issue of updating and consolidating the *acquis*.

Moreover, the aspect of coherence was raised in the context of the negotiations on the Information Society Directive between 1998 and 2001. Several statements were entered in the Council minutes in connection with the adoption of this Directive reflecting some of the points raised which, however, could not be addressed at that time. In those statements attention was given to matters such as the exhaustion of rights and the possible need for an exception for certain acts of temporary reproduction to be applied to computer programs and databases.

Furthermore, the Commission is committed to updating and simplifying the *acquis communautaire* as announced in its Annual Policy Strategy for 2004 and in the Better Regulation Action Plan². The objectives of better and simple regulation form an inseparable part of the assessment this paper is built upon. Action of this kind is also in the interest of the accession process. The 10 new Member States will increase the diversity of legislation in the EU, making it all the more important to seek simple and efficient solutions at Community level. Initiatives to simplify the copyright and related rights *acquis* will ease the enforcement of these rules and the rapid transition of these countries to becoming fully competitive economies.

Finally, it should be noted that – in parallel to this initiative – the Commission is working towards its objective of completing the consolidation of the *acquis communautaire* in its most authoritative form – codification. The Commission is in the process of adopting new legal acts, which incorporate, into a single text without changing the substance, previous basic acts and their successive amendments. These new legal acts replace and repeal the previous basic acts. The easy accessibility of Community legislation depends on acts, that have been amended, being available in a single consolidated form. In the field of copyright and related rights, three acts are at present concerned by this codification, namely the Software Directive, the Rental Right Directive and the Term Directive.

2. UPDATING THE CURRENT LEGISLATION

2.1. Horizontal issues

2.1.1. Reproduction right

The definition of the right of reproduction has gradually evolved in the Community copyright legislation in the different Directives. In its most recent and explicit formulation, in the Information Society Directive it includes an express reference to "*direct or indirect*" acts of reproduction following the model of Article 10 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which is reiterated in Article 7 of the Rental Right Directive. However, the two sectoral Directives providing for the reproduction right, namely the Software Directive in Article 4(a) and the Database Directive in Article 5(a), do not have a similar reference although they too cover indirect reproductions. This difference in formulation might lead to difficulties where there are various subject matters in the same medium or platform calling for a simultaneous application of the rule

² COM(2002) 278 final, 05.06.2002.

under at least two directives (e.g. a DVD disc containing literary and artistic works as well as software).

In practical terms, however, formulations in different Directives mirror the often delicate compromise between conflicting interests found at the time of the negotiations for that particular Directive – the formulation in question may be a result of those deliberations. An identical formulation on the definition of the reproduction right could be achieved through extensive rewriting of the provisions in the Software Directive and the Database Directive but this might bring along wider consequences than the one intended which is to prevent confusion on indirect reproduction. In fact, only a rather modest **amendment aligning the terminology used in the different Directives in this respect would improve the existing situation without resulting in any unintended substantive changes to the reproduction right. The scope of reproduction right would thus remain unchanged.**

2.1.2. *Distribution right*

Similarly to what has been said about the definition of the reproduction right, the right of distribution³ is also defined in various ways in the different Directives depending on the category of work or subject matter in question. The Software Directive and the Database Directive refer to “any form of distribution to the public”, the Information Society Directive redevelops this by referring to “any form of distribution to the public by sale or otherwise” whereas the Rental Right Directive defines the distribution right as “the exclusive right to make available [...] to the public by sale or otherwise”.

In addition to the differences in the definition *per se*, there are also variations on how rental and lending rights are treated in connection with the rules on the distribution right. In general, rental and lending rights are governed by the Rental Right Directive. However, for example, the provision on the distribution right for computer programs in Article 4(3) of the Software Directive contains an explicit reference to rental thereby ousting the provisions of the Rental Right Directive as regards rental, based on the rule of *lex specialis*.⁴ The distribution right and its definition are therefore closely associated with the notions of rental and lending in the Community copyright acquis.

In this respect, the review of the definition of the distribution right would not only have to align the different formulations but would also have to re-address the notions of rental and lending throughout almost the whole of the copyright acquis. **It is doubtful whether the expected benefits in terms of better legislation and better readability would eventually justify the complete rework of all the provisions involved while there are no indications of any problems linked to the application of these provisions in practice.**

2.1.3. *Exceptions and limitations*

2.1.3.1. Overall approach

As mentioned earlier, in general, there is a need to analyse the provisions of the early copyright acquis vis-à-vis the most horizontal Directive, the Information Society Directive.

³ This part of the Communication addresses only the definition of the distribution right. The issue of exhaustion of the right, which can be seen as a limitation to the distribution right, is dealt with separately (below 3.5.).

⁴ There is a corresponding provision in Article 3 of the Rental Right Directive.

This is particularly true as regards the provisions on exceptions and limitations in view of the exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public provided for in this Directive. However, the horizontal nature of the Directive itself is not a sufficient argument for incorporating or extending the application of the list of exceptions as a whole to each of the other Directives that were adopted earlier.

The list of exceptions and limitations in Article 5 of the Information Society Directive is exhaustive – with the effect that Member States may not retain or introduce exceptions, which are not specified in the list. If this list were to replace the exceptions currently allowed in the other Directives, each of which was designed to meet the specificities of the protected subject matter in question, it would risk disrupting the balance between rights and exceptions in those Directives, as for example, the system of the Database Directive with its two-tier protection (i.e. copyright protection / *sui generis* right protection). Moreover, it is not evident that there would be even a theoretical need for certain exceptions listed in Article 5 of the Information Society Directive with respect to other Directives.

It appears preferable, therefore, to make a case by case assessment as to whether or not there is indeed a need for extending the scope of a specific exception contained in Article 5 to also cover the earlier Directives.

2.1.3.2. The case for temporary acts of reproduction

At this stage, the only exception which needs to be addressed horizontally seems to be the one provided for in Article 5(1) of the Information Society Directive. It requires Member States to introduce a mandatory exception with respect to certain temporary acts of reproduction. This exception differs to a certain extent from the other exceptions allowed under the Information Society Directive. Its purpose is to facilitate a technological process and to respond to the needs of modern information technology.

The exception under Article 5(1) does not apply to acts of reproduction of either databases or computer programs passing through the networks. Given that the purpose of this exception is to endorse new digital services by enabling efficient transmission where there is no prejudice to right holders, there is a need in this context to consider introducing it with respect to these categories of work.

As regards the Software Directive, it already contains a provision limiting the exclusive rights regarding computer programs for the benefit of the lawful acquirer. According to Article 5(1) of the Software Directive, acts of reproduction do not require authorisation by the right holder if they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction. However, this provision would not apply in the case of transient or incidental reproduction by intermediaries during transmission in a network because an intermediary would not in a normal case be considered as an acquirer of the program. **In order to provide legal certainty for the activity of intermediaries, it would appear opportune to introduce a new exception to cater for incidental copies by, for example, aligning the respective provisions of the Software Directive with Article 5(1) of the Information Society Directive.**

As regards the Database Directive, the situation is fairly similar to the Software Directive. An exception for temporary acts of reproduction in respect of a database protected by copyright is provided for in Article 6 for the benefit of a lawful user. However, it would depend on the interpretation of the term "lawful user" whether intermediaries would also be in a position to

benefit from this exception. With regard to databases protected by the *sui generis* right, no similar rule for the benefit of a lawful user exists implying thus that the temporary acts of reproduction would always require authorisation by the right holder. This might have the effect of hindering the efficiency of transmission in the networks. Also, in a situation where the right holder can rely upon both the copyright and *sui generis* right protection, it would seem inconsistent that a statutory exception regarding the copyright protection could be undermined by a claim based on the *sui generis* protection. **It would therefore appear opportune to consider also aligning the respective provisions of the Database Directive with Article 5(1) of the Information Society Directive.**

2.2. Vertical issues

2.2.1. Software Directive

2.2.1.1. Definition of computer program

The Software Directive does not define in explicit terms the notion of computer program. Some guidance is provided by Recital 7 and the Explanatory Memorandum to the initial Commission proposal of 1989. It also seems that the vast majority of Member States have implemented the directive without providing for an explicit definition of computer program.

In theory, a complete and exhaustive definition of the term computer program could provide greater legal certainty and increase the accuracy of the legislation. However, it should be noted that such a definition might not keep up with the pace of technology and would risk excluding new, presently unknown types of computer programs from the scope of protection.

The Report of 2000 from the Commission on the implementation of this Directive⁵ did not find any difficulties linked to this issue in practice. Since then, no new evidence on any such difficulties has arisen.

Taking into account the above-mentioned risk that a definition might not keep up with the technology and the fact that no difficulties seem to exist in practice, **there would not be any added value to inserting a definition of computer program in the Directive.**

2.2.1.2. Right of communication to the public

Computer programs are protected as literary works. As such, they should, in principle, enjoy similar protection and be subject to the same exceptions and limitations as other categories of works. But since the protection for computer programs in the Community has been harmonised in a tailor-made manner in a specific Directive, some differences between the protection for them and other literary works might exist, for example, concerning the right of communication to the public. Pursuant to the dominant opinion – and in line with the traditional view – authors of computer programs enjoy a right of communication to the public although it is not specifically regulated in the Software Directive or the Information Society Directive. Such an opinion is based on a wide interpretation of Article 4(c) of the Software Directive, which refers to "any form" of distribution to the public of the protected subject matter within the meaning of article 1 of the Directive. **However, in order to improve the legal clarity, a clear statement from the European legislator to this end would seem advisable.**

⁵ COM(2000) 199 final, 10.04.2000.

2.2.1.3. Decompilation

The objective of Article 6 on decompilation is to ensure the ability of two or more computer hardware devices or software components to connect, exchange information and work together, including those of different manufacturers. This is of key importance for competition, innovation and market entry in the software market. The implementation and effects of this provision were reviewed by the Commission in its above-mentioned Report on the implementation of the Software Directive. The Report concludes that "the Directive and in particular the decompilation provisions were the result of intensive debate among all interested circles and the balance found then appears to be still valid today".

However, more recently it has been argued that the scope for decompilation is in practice too limited and does not sufficiently meet the objectives of the provision and, in particular, the current market demands. On the other hand, as yet there is no jurisprudence to support these claims; nor is there any other evidence to suggest that there would be a need for revision. **As a result, amendments to the provisions on decompilation are not envisaged in this paper but there is a need to reflect on this issue in the light of the evolution of computing networks.**

2.2.1.4. Protection of technological measures

It was indicated in the Report on the implementation of the Software Directive that Article 7 of the Directive, in particular the protection of technical measures, should be re-assessed at a later stage when the WIPO Copyright Treaty (WCT) will have entered into force and the Information Society Directive will have been adopted. Both conditions are now fulfilled.

The starting point for a re-assessment of the protection of technological measures under the Software Directive is Article 11 of the WCT. This provision requires Contracting Parties to provide adequate legal protection against circumvention of technical measures. Unlike Article 11 WCT or Articles 6(1) to 6(3) of the Information Society Directive, Article 7 of the Software Directive, which predates the WCT, does not provide explicitly for protection against acts of circumvention. The approach chosen in Article 7 was originally based on a balance between the objectives of protection against circumvention of technical devices on the one hand and exceptions to the exclusive rights applicable to computer programs on the other. If – under one possible option – the Community were to introduce for computer programs a provision similar to Article 6(1) of the Information Society Directive, this might in practice inhibit or prevent the application of the exceptions in the Software Directive. In such a case, introducing a mechanism to ensure the availability of exceptions similar to that established in Article 6(4) of the Information Society Directive would also have to be considered. In particular, it would have to be made sure that any further protection against circumvention of technological protection measures cannot be used to block decompilation to achieve interoperability.

However, it may also be argued that the term “adequate protection” used in Article 11 of the WCT provides Contracting Parties with a sufficient degree of flexibility. It has not been contested that relying on this flexibility and refraining from amending Article 7 of the Software Directive would be the alternative option of how to provide for a meaningful protection of technological measures regarding computer programs while safeguarding an appropriate balance with exceptions and limitations to the rights. **This appears to be the preferable option, at least until more experience has been gained from the application of article 6 of the Information Society Directive.**

2.2.2. *Rental Right Directive*

2.2.2.1. Derogation from the public lending right

As indicated in the Report on Public Lending Right⁶, only partial harmonisation of the public lending right has been achieved and the legislative measures applied by Member States still vary to a large extent, in particular as regards the application of the derogation contained in Article 5. It allows Member States to derogate from the exclusive public lending right provided that at least there is a right to remuneration for authors. To remedy at least the most striking imbalances of transposition, the Commission has already launched infringement proceedings against several Member States in breach of their obligations. The Commission will follow up on the infringement procedures with a view to improving the level of harmonisation.

Apart from the poor implementation record to which the Commission has reacted through proper proceedings, at present, there are no indications of a need to modify the provisions on the public lending right. The question of alignment with the new horizontal directive is not relevant with respect to the public lending right either. However, as the Commission has outlined in its Report on Public Lending Right, both the media market and the role of libraries are undergoing profound changes, as new services are being introduced with the help of digital technology. From these perspectives, **the paper does not foresee a need for immediate action. However, the technological developments in the market place and the lending institutions should be continuously observed and examined.**

2.2.2.2. Communication to the public

Article 8(1) of the Rental Right Directive provides for an exclusive right to authorise or prohibit the communication to the public of (live) performances whereas Article 8(2) provides a right to receive equitable remuneration if a phonogram is used for a communication to the public. This distinction between an exclusive right and a remuneration right is not to be found in Article 3(1) of the Information Society Directive, which harmonises the right of communication to the public for authors as an exclusive right. **However, to similarly upgrade Article 8(2) of the Rental Right Directive into an exclusive right does not appear to be justified, as it would touch upon the very nature of the structure of the right of communication to the public in the field of related rights.**

Moreover, Article 3(2) of the Information Society Directive introduces the right of making available for the right holders of related rights (performers, phonogram producers, film producers and broadcasting organisations) in line with the WIPO Performances and Phonograms Treaty and thus already reinforces their rights in the digital environment.

2.2.3. *Term Directive*

2.2.3.1. Duration of related rights

The duration of copyright and related rights protection was harmonised in the Community by the Term Directive in 1993. The term of protection for authors' rights was set to run until 70 years after the death of the author, and the term of protection for related rights until 50 years after the event which triggers the term running (such as the date of the performance).

⁶ COM(2002) 502 final, 12.09.2002.

There has been a call from certain circles to extend the term of protection of related rights and align it to that of an author since performances are claimed to provide a similar element of creativity. There has also been a specific concern expressed when the performer is also the author of the music as this results in the same person's performance falling into the public domain before the work itself. Moreover, in view of the recent changes to the term of protection under the US Copyright Act, it has been argued by some stakeholders that it would be advisable to align the term of protection of phonogram producers in the Community with the new, extended protection of 95 years from the year of first publication for sound recordings in the USA. Otherwise, according to the proponents of change, European music producers and music industry might be at a disadvantage as compared to their US equivalents.

Strong views have also been expressed in support of maintaining the *status quo*. It is feared that an extended term of protection would only tend to diminish the choice of music on the market by enforcing the flow of revenues from few best-selling recordings, while at the same time not providing any real new incentives for creation of new recordings or motivating new investment. It has also been pointed out that practically all developed countries, with the exception of the USA, apply the term of protection of 50 years. As to the need to achieve parity between the EU and the USA, it has been argued that the same term of protection would not result in equal economic benefits for the right holders in these two territories. On the contrary, due to a different approach to which uses of phonograms are remunerated, US right holders already benefit from a better protection of their recordings in Europe, and the extension of the term would only aggravate this divide.

From the point of view of the Internal Market, the term of protection for phonogram producers does not cause particular concern since the term has been harmonised in the Community and also been incorporated by the 10 new Member States. Moreover, it seems that public opinion and political realities in the EU are such as not to support an extension in the term of protection. Some would even argue that the term should be reduced. **At this stage, therefore, time does not appear to be ripe for a change, and developments in the market should be further monitored and studied.**

2.2.3.2. Criteria for calculating the term of protection in the musical sector

In the absence of a harmonised rule, in some Member States co-written musical works are being regarded by the law as works of joint authorship and are subject to the rule on the term of protection for such works under Article 1(2) of the Term Directive (calculated from the death of the last surviving author with respect to all co-authors). In some other Member States such works are categorised as collective works (the lyrics and the composition are distinct parts of the same musical work, results of individual forms of creativity) with the result that the lyricists and the composer both enjoy copyright protection with respect to their own contribution for an individually calculated period of time.

Consequently, there are cases where either the lyrics or the composition⁷ of the same musical work has already entered into public domain in some Member States whereas in others – in the case of joint authorship – the musical works still enjoys protection *in toto*. This leads to a situation where, for example, the successors in title of the first deceased author of a musical work are entitled to their share of royalties for the exploitation of the work in some Member

⁷ If the composer dies years before the lyricists, the music will enter the public domain that many years before the lyrics of the musical work, and vice versa.

States but not in others. Such differences are of a nature to hamper the proper functioning of the Internal Market.

The question is also whether co-written musical works really differ from e.g. film works⁸ to such an extent that they should not benefit from the same method for calculating the term of protection, i.e. by relation to the last surviving author. **In conclusion, for the Internal Market to function properly, it would seem appropriate to clarify the criteria for calculating the term of protection in the musical sector for example by considering the introduction of a similar rule as for film works via an amendment to the Term Directive.**

2.2.3.3. Critical and scientific publications

Article 5 of the Term Directive provides Member States with the possibility to protect critical and scientific publications of works which have fallen into the public domain. This Article is extremely flexible in that not only is this form of protection optional for Member States but also the term of this protection can be anything up to 30 years from the time of first lawful publication. The result within the EU is varied: few Member States have allowed for this type of protection and for a different number of years. **There should be a continued monitoring of the application of this Article and the consequences for the good functioning of the Internal Market.**

2.2.4. Database Directive

The Database Directive will be subject to a separate report pursuant to its Article 16(3), which establishes an obligation for the Commission to submit such a report. This report will be submitted by summer 2005 and will deal with a number of substantive issues relating to the functioning of the Directive, beyond the points listed below.

2.2.4.1. Exception for the benefit of disabled

Member States may adopt in their legislation an exception for the benefit of people with a disability under Article 5(3)(b) of the Information Society Directive. Allowing for such an exception has been deemed necessary in order to make sure, for example, that visually impaired people can put material into an alternative, accessible format at no extra cost.

The question arises whether a similar exception would be allowed under the Database Directive. If not, people with a disability might face a situation where the statutory exception from which they benefit regarding most categories of works, could be undermined by invoking database protection on the basis that certain material might be classified and protected simultaneously as a database as well as a literary work of a different category, for example an encyclopaedia. The Database Directive does not contain an explicit provision allowing this exception, and the respective provisions of the Information Society Directive cannot be invoked as the list of exceptions permitted under Article 6 of the Database Directive is exhaustive. It may be held that use for the benefit of people with a disability is already permitted through a broad interpretation of Article 6(1) of the Database Directive, which permits certain acts by the lawful user, if this is necessary for the access to the contents of a

⁸ Cinematographic and audiovisual works are subject to the special rule under Article 2(2) of the Term Directive by which the term of protection for such works shall be calculated from the death of the last person to survive among the principal author, the author of screenplay, the author of dialogue and the composer of the film music.

database or constitutes normal use. Such an interpretation, however, is subject to uncertainty. In any event, possible divergent views on this issue among Member States may hamper the proper application of the Database Directive in the framework of the Internal Market.

From these perspectives, it would seem logical to provide a similar possibility of an exception also explicitly set out in the Database Directive. In order for it to fulfil its purpose, such a provision should apply with respect to databases protected by copyright as well as those covered by the *sui generis* right.

2.2.4.2. Exception for the benefit of libraries

Libraries claim that there is a need to introduce a specific exception regarding acts of reproduction similar to Article 5(2)(c) of the Information Society Directive. In order to make sure that they could perform certain restricted acts e.g. for preservation purposes, they want to benefit from an exception under both regimes. Some products in digital or analogue form, which are currently used by libraries, may qualify as a database as well as a literary work of a different category. **However, the need for a further exception to the reproduction right under the copyright chapter of the Database Directive for the benefit of libraries should be further considered.**

2.2.4.3. Alignment of the exceptions

The Database Directive proposes a two-tier scheme of protection for databases (copyright protection and the *sui generis* right protection). With respect to the exceptions that apply it has been claimed that the two regimes are not totally on a par with each other. In particular, it has been suggested that there is an inordinate difference in the scope of the exception for the purposes of teaching or scientific research in the *sui generis* right chapter of the Directive as compared to that in the copyright chapter. In addition, the point has been made that the regime does not favour the creation of a uniform playing field as far as research is concerned, in particular cross-border R&D projects.

It is in the logic of the two tier scheme of protection that the exceptions may differ under the two chapters in terms of terminology and scope. Since the object of protection and the rights enjoyed by the right holder are different under each chapter, it is logical that the exceptions differ correspondingly. **However, this issue will be further examined in the above mentioned separate report.**

3. ASSESSMENT OF ISSUES OUTSIDE THE CURRENT ACQUIS

As already stated, the present staff working paper is not an exhaustive presentation of copyright policy. Nevertheless, certain issues which have not been harmonised have continually been the subject of discussion and merit some consideration in this paper, without prejudice to the examination of other issues, where appropriate.

3.1. Originality

The notion of originality is one of the key concepts in copyright law and forms part of the underlying justification for the statutory system of copyright protection for authors. Originality corresponds to the independent creativity of the author as reflected in his or her literary or artistic creation.

Up to now, the notion of originality has not been addressed in Community legislation in a systematic manner. It has been referred to only in Article 1(3) of the Software Directive in respect of computer programs, in Article 6 of the Term Directive in respect of photographs and in Article 3(1) of the Database Directive in respect of databases. On these occasions, the Community legislator has considered it necessary to take account of the special features or the special technical nature of the category of work in question. These special cases aside, Member States remain free to determine what level of originality a work must possess for granting it copyright protection.

Whether the requirement of originality should be harmonised regarding all types of works remains a debated issue. In theory, divergent requirements for the level of originality by Member States have the potential of posing barriers to intra-Community trade. In practice, however, there seems to be no convincing evidence to support this. The Community harmonisation was needed, and has been enacted, with respect to technology-related categories of works, notably computer programs and databases. However, there are no indications that the lack of harmonisation of the concept of originality would have caused any problems for the functioning of the Internal Market with respect to other categories of works, such as compositions, films or books. **Therefore, legislative action does not appear necessary at this stage.**

3.2. Ownership

Despite the number of international conventions in the field of copyright and neighbouring rights protection, the initial ownership of rights has until now not been subject to systematic international regulation. Also at Community level, rules on initial ownership exist only in respect of cinematographic and audiovisual works as well as computer programs and databases.

One of the reasons for the scarcity of international and Community rules governing the initial ownership is the sensitivity of the issue and the fact that it is so closely associated with the foundations of copyright and the objectives of the copyright regime in a given country. Vital national interests and subsidiarity reasons are often invoked to contest the need for further harmonisation. Inside the EU, different concepts regarding ownership exist. However, the need for harmonisation has been absent so far because – despite the different concepts – the actual allocation of ownership in practice very often follows a fairly similar path in all Member States.

From the point of view of the functioning of the Internal Market, perhaps the most significant uncertainty regarding the ownership of rights in cross-border situations arises from differences in rules on the ownership of works created in the course of employment. Regarding such cases, harmonisation would not be a straightforward copyright issue but would also bear relevance to labour law and the economic relationship between the parties of an employment contract. In this respect, Member States hold fairly divergent views on the need for harmonisation, and often point at severe political difficulties in agreeing a harmonised line.

At this point, it would seem advisable to analyse the issue further and, in particular, identify specific situations where harmonisation would yield added value and address Internal Market needs.

3.3. Definition of the term “public”

Community law has so far not defined the term “public” for the purposes of the right of communication to the public or making available to the public. This concept has not been defined at the international level either, although the Berne Convention and the new WIPO Treaties make use of it. It is understood that “public” may be very small, consisting only of a few persons or sometimes only a possibility to access a work by individual members of the public. On the other hand, given the ordinary meaning of the word, it is also generally accepted that the immediate family circle and the closest social acquaintances do not make up a public audience.

During the negotiations for the Information Society Directive it was understood that this term should be left to interpretation at the level of Member States. On the one hand, there was no need for a redefinition of the traditional concept for the purposes of the digital environment and, on the other hand, there had been no indications of Internal Market problems.

At this point, there does not seem to be any need to re-assess the line taken so far and the term “public” should remain a matter determined by national legislation and jurisprudence.

3.4. Points of attachment

States grant their own nationals copyright protection for their works. Contracting States of international copyright conventions grant, on the basis of national treatment, the same level of protection to authors of another Contracting State as they grant their own nationals. The relevant connection with another Contracting State is determined by using criteria, such as nationality, which are often called points of attachment and laid down in international conventions.

The relevant points of attachment for the protection of authors and performers have been established at the international level with no margin for choice for the Contracting Parties. Under the Berne Convention, the protection for authors applies to works by nationals of one of the Contracting States and to works first published in a Contracting State; under the Rome Convention, protection for performers is to be granted for performances which take place in a Contracting State or which are incorporated in a protected phonogram or a broadcast.

As regards the points of attachment for the protection of producers of phonograms, the Rome Convention provides three different criteria, namely nationality, first publication and first fixation, and leaves Contracting States with some choice regarding their application. They may make notifications with the effect of excluding the application of certain criteria or even apply the criterion of first fixation only. There is similar flexibility with respect to the protection of broadcasting organisations. The possibility to choose between different criteria continues to exist under the WTO/TRIPS Agreement and the WIPO Performances and Phonograms Treaty. As a result, and in the absence of Community legislation in this respect, a variety of rules exist on the points of attachment among the EU Member States both as concerns producers of phonograms and broadcasting organisations.

Divergent national rules on the points of attachment concerning these two categories of right holders mean in practice that the protection for them differs from one Member State to another. **In view of the harmful effect of this situation to the good functioning of the Internal Market, it is necessary to arrive at a harmonised approach on such points of**

attachment, i.e. to harmonise them for the protection of producers of phonograms and broadcasting organisations in the *acquis communautaire*. This will also bear relevance to the adhesion of the Community and its Member States to the WIPO Performances and Phonograms Treaty.

3.5. Moral rights

The protection for moral rights has not been harmonised in the Community. The moral rights which Member States are required to introduce for authors under Article 6*bis* of the Berne Convention include the right to be identified as the author (the right of paternity) and the right to object to modifications and other derogatory treatment of a work (the right of integrity). Article 5 of the WIPO Performances and Phonograms Treaty now requires certain moral rights to also be introduced for performers.

Although disparities in moral rights protection do exist, in the traditional (analogue) environment there has been no evidence that they would have had a negative impact on the good functioning of the Internal Market. In the digital environment new forms of communication provide further possibilities to extract and combine information as well as integrate existing texts, sounds and graphics from various sources, or to modify them by means of digital imaging or colour manipulation. Functions such as linking and framing are very often relevant to the right of paternity and right of integrity of those authors whose works are being integrated into and then used in a different context from the original one. A divergent approach to these functions by the Member States under the national rules on moral rights protection may theoretically harm the proper functioning of the Internal Market where content is passing through networks and exploited across borders.

In practice, however, the international legal framework seems to provide an adequate level playing field for the markets to operate taking into account the protection for moral rights. No evidence exists in the digital environment either that the current state of affairs does affect the good functioning of the Internal Market. This was also the conclusion of an independent study carried out for the Commission by external consultants in 2000. **On the basis of these arguments there is no apparent need to harmonise moral rights protection in the Community at this stage.**

3.6. Exhaustion of rights

The current Community legislation on copyright and related rights provides for the principle of Community exhaustion as a limitation to the right of distribution. This means that the distribution right cannot be invoked to restrain the free movement of goods which were put on the market with the consent of the right holder within the EU, but that Member States are not allowed to prevent right holders from using it to restrain the entry of such goods into the EU. An alternative rule to this, the principle of international exhaustion, would mean that the flow of goods into the EU could not be restrained by such rights, i.e. the right of distribution would be exhausted by the marketing of the product with the consent of the right holder anywhere in the world.

In the Community, the issue of exhaustion and a possible change from the current regime to international exhaustion has been discussed at some length in recent years, mainly in the field of trademark rights. The exhaustion regime was also one of the issues discussed during the negotiations of the Information Society Directive. Since the principle of Community exhaustion was upheld in this context, some Member States inserted a statement in the

Council minutes at the time of the adoption of the common position asking the Commission and the other Member States to reconsider their position.

The Commission has consistently argued that if any adjustment were to be considered, it would have to take place within a wider context of copyright and industrial property rights. Changing the exhaustion regime for copyright only would produce little effect given that many products are covered by a number of intellectual property rights. In this regard, it is worth pointing out that the reflections on the exhaustion regime in the field of trade marks have not brought up any new evidence in support of change in the regime. Rather, the conclusions have been almost the opposite.

The exhaustion regime should be considered also from the viewpoint of its likely impact on creativity, investment and product range as well as on retail prices, all of which are important for the consumers. Without similarity of market conditions at international level, however, impact may be distorted by differences regarding trade conditions in different countries such as labour costs. As there are no developments regarding market conditions or other trade-distorting factors at international level, with a change in the regime EU right holders might face competitive disadvantage.

From the perspective of the above-mentioned arguments, it would not be appropriate to propose changing the copyright exhaustion regime at this stage.

4. CONCLUSIONS

As far as the consistency of the existing *acquis* is concerned, only minor adjustments seem to be necessary at the moment. This paper envisages aligning the definition of the right of reproduction throughout the *acquis* and clarifying the definition of the right of communication to the public with respect to computer programs, as well as extending the exception for temporary acts of reproduction to computer programs and databases, harmonising the criteria for calculating the term of protection for co-written musical works and adding a new exception for the benefit of disabled persons for databases. On the aspect of further harmonisation, further legislative action at Community level is at present considered for the most part unnecessary for various reasons except for the points of attachment used to determine the beneficiaries of protection for producers of phonograms and broadcasting organisations. The economic impact of the question of points of attachment will be analysed in more detail when preparing the legislative initiative.

This paper aims at taking stock of the discussions so far with a view to focussing the debate. It is envisaged that the review will be pursued with the object of presenting, where and when appropriate, the necessary legislative proposals amending the existing Directives and harmonising the points of attachment in the course of 2005. This should not affect the forthcoming reports on the application of a particular Directive which will be supported by proper assessment of their respective impact and of any substantive change envisaged.