Issues of access and content regulation arising from the EU draft Directives on copyright in the Information Society and e-commerce

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Before examining access and content regulation issues arising in the EU context, it is essential to clarify what is meant by access regulation and content regulation. Taking access regulation first, we can say that, in its broadest sense, it covers any rules or policies which determine the availability of hardware, services or content by producers, their competitors or the public in their capacity as 'consumers' or, more accurately, the end users of material protected by copyright or related rights.

Bearing in mind the potentially huge expanse of regulatory activities which sit in the zone of convergence[1], the focus today will be on the control of access to content; in the main, this is achieved through the combined effects of the protection afforded by copyright and related rights, the scope of licensing (including permitted acts) and the use of contract. Latterly, however, the use of technological measures to track and control access has received official recognition and this, too, should be included.

Content regulation is, in one sense, much easier to define: those controls which affect the quality and/or quantity of content available in the digital medium. However, because of the huge variations in both the very existence and the scope of content regulation rules and policies as between countries, including differences between EU Member States, it can be very difficult to identify all those which are relevant; partly to resolve this issue, the Internet Law and Policy Forum's 1997 Working Group Paper on Content Blocking[2] suggested the following broad categories:

Regulated content categories:

1. Material that would be likely to be considered offensive under most industry or Government rating systems such as child pornography, material harmful to children, excessively violent material, or material that promotes, incites or instructs in matters of crime or violence.
2. Material that vilifies people on the basis of race, gender, sexual preference or disability or incites or promotes hatred on these bases.
3. Material produced by the improper use or disclosure of private or otherwise protected information (e.g. information covered by data protection laws).
4. Defamatory material.
5. Material that infringes IPRs.
6. Material that delivers false, fraudulent or misleading information to the consumer.
7. Material reflecting national or cultural attributes mandated by law or banned as contrary to national or cultural interests (e.g. religious content control).
8. Material emanating from regulated industries (e.g. gambling, investment advice).

On examination of the classification scheme, it is interesting to note the reference in category 1 to industry rating of content; this issue of 'self regulation' is one that will be picked up later on. The second point of interest is the reference to IPRs in category 5; in this, we can see the first point of overlap or, if preferred, convergence between access control and content control. Finally, it should be noted that, by their very nature, categories 7 and 8 are the most likely to vary as between Member States: thus, for example, we see France attempting to promote use of the French language *inter alia* on the Internet[3].

Aside from the groups of rules or policies falling within the categories listed above, there are the ever-present broad human rights such as issues of privacy and freedom of expression which have to be addressed; for present purposes, we can observe that, again, they bridge the divide between access and content regulation and that, in doing so, they overlap with the access issues arising from the use of encryption, content rating systems and content filtering systems. Whilst it may seem odd to discuss human rights in the business context, nevertheless there is official WIPO recognition that this is a public interest factor that cannot be ignored in IP policy making[4].

The role of the European Union in access and content regulation

The next matter to address is the role of the European Union in shaping the emerging access and content control framework. The first and most important thing to remember is the limitation on the EU institutions' activities imposed by the founding Treaties themselves: except where measures to regulate access or content can be demonstrated to fall within the proper province of single market measures, justice and home affairs or common foreign and security policy as defined by the Treaties[5], they remain matters for national laws of the individual Member States to deal with[6].

Nevertheless, this line of demarcation still leaves a large collection of access and content control issues within the EU's legislative and administrative competence. Indeed, even where it is unable to act directly, it may provide indirect assistance through research programmes and promotion of co-operation between Member States and other interested parties; a good example of this is the recent Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks[7] (see on).

A related issue is the division of roles between various European bodies: in particular, the European Convention on Human Rights (ECHR[8]) is the main European vehicle for dealing with human rights issues such as privacy and freedom of expression but, strictly speaking, it is not part of the EU Treaty framework. However, Article 6.2 of the Treaty on European Union mandates respect for the fundamental rights established by the ECHR, the EU institutions have co-operation programmes with the ECHR institutions and the fifteen EU Member States are all members of the ECHR family of nations.

In light of this relationship, it is unsurprising that many EU initiatives are linked to or derive from ECHR rules and policies; a typical example of this is the Council and Parliament Directive on Data Processing[9] which requires protection of fundamental rights and freedoms, including the right to privacy, in accordance with the provisions of the ECHR and the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data[10]. More recently, there has been a EC Commission and Council of Europe joint initiative on protection of privacy on the Internet[11].

The draft digital copyright directive[12]

An overview of the draft directive

The draft Directive is intended to harmonise and update copyright and related rights to the extent necessary to allow the development of a European 'Information Society'; this is tied to the need to ensure that modern technological developments can be accommodated within the internal market framework[13] and the stated goal of implementing the WIPO Treaties[14].

The exclusive rights (Articles 2 – 4)

Subject to the EC existing copyright and related rights legislation[15], the draft Directive demands the provision by the Member States of three sets of exclusive rights: reproduction rights, rights of communication to the public including making available and distribution rights. Thus, we have the following provisions:

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 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;
e) for broadcasting organisations, of fixations of their broadcasts, whether those 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 perform ances;
   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;
   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.
4. The mere provision of physical facilities for enabling or making a communication does not in itself amount to an act of communication to the public within the meaning of this Article.

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.

Given the stated goal of WIPO Treaty adherence noted above, it is unsurprising that the exclusive rights envisaged largely mirror the exclusive rights provisions of the WIPO Treaties[16]: the main differences of any note are lack of provisions relating to rental (these being dealt with elsewhere[17]), the inclusion of coterminous protection for broadcasters and film producers, and the bringing together in Article 3 of (i) the rights of communication of works and (ii) the making available of phonograms and fixation of performances provisions. In themselves, the exclusive rights

are not objectionable from the point of view of producers, competitors or the end users of materials protected by copyright or related rights.

The exceptions to the exclusive rights (Article 5)

The more difficult area is the issue of exceptions to the exclusive rights; this is always a source of friction as between producers on the one hand and competitors or consumers on the other. Subject to what is said below, Article 5 goes further than the equivalent WIPO Treaty provisions[18] in that it defines a range of specific exceptions to the exclusive rights rather than merely permitting them; however, these are still subject to an interpretation requirement that the rightholder's interests should not be prejudiced and that normal exploitation of the work should not be interfered with[19].

Although the proposed legislation purports to recognise both the producers in interests in intellectual property, freedom of expression and the public interest in terms of access to content[20], it is strongly arguable that this portion the draft Directive is tipped far too much towards content producers at the expense of consumer and other public interests. The specific criticisms which can be levelled at the draft are that, having carved out very wide exclusive rights in Articles 2 through 4, the exceptions to the exclusive acts contained in Article 5 are structurally defective, weak, narrow and vague.

In terms of structural defect, the background problem is that the EC Member States do not have a harmonised sets of permitted acts in their copyright and neighbouring rights legislation; the incorrect response here has been to pick out an arbitrary subset for immediate use rather than making the Member States extend their existing rules into the digital domain as a temporary measure until a full programme of harmonisation of exceptions can be devised and executed.

The first weakness is the fact that, with the exception of Article 5.1's allowance for certain technically necessary acts (e.g. Web server caching of material protected by copyright), all the other permitted acts are optional in that Member States can decide whether to implement them or not. The point has been repeatedly made to the Commission that optional measures in harmonisation mean that there is no real harmonisation at all and that, indeed, such options could lead to distortion within the internal market. In short, both consumers and producers will suffer because of the varying net level of protection actually available across the Member States.

The nature and scope of the actual exceptions carved out gives rise to concerns both for producers and end users. Traditionally, there has been three way divide between (i) permitted acts which can be done without equitable remuneration, (ii) permitted acts which can be done with equitable remuneration; and (iii) those which require the authorisation of the rightsholder, whether on financial terms or otherwise. Here, the public interest has been damaged by the decision to apply equitable remuneration to activities that were previously fee-free and the expansion of the requirement of authorisation by narrowing the range of exceptions falling in either of the first two classes; for example, use by way of illustration for teaching purposes will now be covered by the requirement for equitable remuneration whereas, traditionally, it was not so covered in many Member States for, at least, short extracts[21].

The final problem is narrowness; this affects the public interest in two ways. First of all, the subset of exceptions to permitted acts is just that; it represents the lowest common denominator qualitatively and quantitatively of all the possible types of permitted acts that exist across the totality of Member State legislation. Secondly, the exceptions are narrow in themselves; thus in relation the exception to the reproduction and communication rights to allow uses for the benefit of persons with a disability at Article 5.3(b), we find not one, not two but three threshold requirements to be satisfied before the exception applies (i.e. in addition to non-commercial purposes, use directly related to the disability and to the extent required by the specific disability) making it virtually unusable.

From the public's perspective, Article 5 is unacceptable: when taken as a whole, the exceptions to the permitted contravene the established boundaries of freedom of expression, in particular the right to receive information, as established by Article 10(1), ECHR. This is because, whilst recognising, as Article 10(2), ECHR does, that there have to be restrictions on freedom of expression in some circumstances, it cannot be right in the name of harmonisation to provide the users of material protected by copyright and related rights with more limited access than they previously would have enjoyed. In addition, the narrowness and weakness of the measures relating to the disabled and education undermine the goals of the revised European Social Chapter[22] to promote the educational interests of the disabled[23] and the young[24]. In short, harmonisation in this area should be to the widest extent and not to the narrowest, in the same way that producers obtained the benefit of the extension of copyright term under the Term Directive[25].

The issue of vagueness is a matter of concern both to industry and the public as end users; in particular whilst it is perfectly acceptable in the Berne Convention or the WIPO Treaties to talk in abstract terms of the need to prevent unreasonable prejudice to the author's legitimate interests and the allowance of normal exploitation as guiding factors in the development of permitted acts, placing such language in the Directive is an abnegation of the EU institutions' responsibilities to define with precision what a third party can and cannot do with material protected by copyright or related rights, placing the burden, instead, on industry and the public at large.

Finally, there is the related issue of licensing to consider because to the extent that the permitted acts have withered away, it is now more than ever up to the producer to determine the nature of access through licensing, usually carried out within a contractual framework. In this connection, it should be observed that the draft Directive contains no provisions to prevent abusive licensing policies, these being left to other provisions of Union or Member State law such as competition law. Furthermore, unlike the Software Directive[26], the draft Directive does not specifically say that the permitted acts themselves cannot be overridden or bargained away by contract[27]; bearing in mind the strong bargaining position of the rightsholder, this is unacceptable.

Obligations on technological measures and rights management information (Articles 6 and 7)

Article 6 and 7 are, again, clearly based on the WIPO Treaty provisions[28] but, because of the need to harmonise Member State law, they spell out key definitions such as 'technological measures', define prohibited activities in greater detail and extend coverage to the *sui generis* database content right created by the database Directive[29].

From a producer's perspective, the measures are unexceptional; they provide an additional means to protect economic interests in their materials. However, from the perspective of competitors and the public interest, there is the problem that the provisions assume that producers will be virtuous and responsible in exercising the new set of rights that they accrue: in particular, the parallel system of protection created by the technological measures and RMI does not provide express exceptions in the public interest in the same way that copyright has permitted acts, but merely allowing these to be created under Member State law, if desired, by virtue of the ability to give legal authority[30]

In the worst case scenario, producers could use the rights created under Articles 6 and 7 as a means to outflank the checks and balances of the copyright and related rights systems altogether; indeed, there is already a precedent for this in the case of the exception for private digital recording which is expressly overridden where effective technological measures such as encryption or scrambling exist[31]. Thus, there needs to be a specific express provision setting out those instances in which the technological measures and RMI provisions could or should be disapplied by law in the public interest; these should, at the very least, provide parallel coverage to the permitted acts and should, ideally, extend to illegal or harmful content.

The question of breaking technological measures or RMI rules in the public interest gives rise to a wider point about the relative lack of interaction between copyright and content control: the Directive assumes, like most copyright laws, that content is both sacred and good, and so there are no restrictions of rights or remedies for copyright or related rights material which is also illegal or otherwise harmful. In short, save for material which infringes IPRs, the content control issues raised by category in the introduction do not arise in the draft Directive.

A final criticism which has been raised by Dusollier[32] is that there is an unnecessary area of overlap between these provisions with the Directive on the legal protection of conditional access services[33]; this legislation was intended to prevent the circumvention of gateway devices controlling access to services such as pay-TV, video on demand and electronic publishing. However, many electronic rights management systems serve the dual purpose of controlling access to such services and, in addition, controlling use of the content, a matter within the technological measures provisions. In addition, the convergence of these services with Information Society services means that the protection afforded by the conditional access legislation may already be unnecessary.

The draft E-Commerce directive[34]

An overview of the Directive

The draft e-commerce Directive is intended to remove a range of legal obstacles to the online provision of electronic commerce services in the internal market[35] and, subject to existing measures on public health and consumer protection[36], to extend the Community law applicable to Information Society services as defined in Article 1.2 of Directive 98/34/EC[37] as amended[38] (i.e. 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'[39]) in order to establish a real internal market in the same[40]

An overview of the substantive provisions

These are found in Chapter 2 of the draft Directive and are divided into four sections covering:

- Establishment and information requirements (Articles 4 and 5, section 1)
- Commercial communications (Articles 6 through 8, section 2)
- Electronic contracts (Articles 9 through 11, section 3)
- Liability of Intermediary Service Providers (Articles 12 through 15, section 4)

The aims of the sections are as follows:

- The aim of section 1 is to ensure that there is unfettered access to Information Society service provision activity and that service recipients[41] and the national authorities can obtain the business details of the provider[42].
- The aim of section 2 is to ensure that recipients of commercial communications as defined[43] are provided with full information on their origins[44], to provide specific marking and opt-out provisions for unsolicited commercial communications by e-mail[45] and to facilitate the provision of Information Society services by regulated professions such as accountants and lawyers[46].
- The aim of section 3 is to ensure that, subject to certain exceptions[47], contracts may be concluded electronically[48], to ensure that, subject to the ability of professionals to agree otherwise, the contracting process is transparent[49], the moment of contract formation is delayed until the reception of acknowledgement of receipt of acceptance[50] and that mechanisms exist to correct errors and accidental transactions[51].
- The aim of section 4 is to ensure that, subject only to the possibility of prohibitory injunctions being issued, Information Society service providers are liable neither under criminal or civil law in respect of defined activities necessary for their work; these are acting as a mere conduit, caching and hosting respectively[52]. In addition, the draft Directive makes clear that subject to certain exceptions[53], there should be no general legal obligation on Information Society service pro-

viders to monitor the information they store or transmit or to seek out illegal activity[54].

The overriding provisions of the draft Directive are that Member States must ensure compliance by Information Society service providers established on their territory with those national rules and policies implementing the Directive[55] and that Member States may not restrict the freedom to provide Information Society services from another Member State[56].

The commentary below deals with Article 7 in section 2 and with section 4, although in relation to the e-contracts provisions under section 3, the following brief observations should be made:

- there is a general convergence interest here in so far as these provisions will affect the creation of IPR licences by electronic means;
- the combined effect of the section 2 and Section 4 provisions will make the drafting of online contracts considerably quicker because of the smaller number of liability issues to be addressed; but
- Section 3 will not displace the bulk of Member State rules on validity, enforcement and discharge of contractual obligations

Section 2, Article 7 considered

Article 7 – Unsolicited commercial communication

1. Member States shall lay down in their legislation that unsolicited commercial communication by electronic mail must be clearly and unequivocally identifiable as such as soon as it is received by the recipient.
2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC [*the data protection in the telecommunications field Directive*], Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by e-mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

The marking requirement in paragraph 1 is unobjectionable but the measures on unsolicited commercial communications by e-mail in paragraph 2 is a much more contentious issue: is it enough to ensure privacy within Article 8 to make IS service providers check and respect opt-out registers or should there be a complete ban on such communications? This is a very weak restriction compared to proposed anti-spamming measures in the US which envisage compulsory 'opt-out on remove' provisions and regulatory powers for the FTC[57].

Section 4 considered

In the absence of harmonisation, the position of ISPs and IAPs operating in Europe is difficult: for example, whilst Germany has lead the way in promoting information societies measures, the limitations on liability imposed by the Information and Communication Services Act 1997 only deal with criminal law, thereby leaving ISPs and IAPs open to defamation and IP infringement claims[58]. The conduit, caching and hosting immunities of IS service providers under the draft e-commerce Directive are therefore key planks in balancing access and content control against the fundamental need to allow the Internet to operate.

In designing these provisions, a balance has had to be struck between allowing those activities necessary for IS services to operate on the one hand and protecting the public from illegal or harmful content on the other. The narrow definitions and preconditions for enjoyment make it clear that IS service providers do not have a blanket immunity under which they can just wash their hands of issues relating to access or content control: outside the zone of protection, they are liable under general legal provisions in just the same way as any other natural or legal person.

Article 12 – Mere conduit

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by the recipient of the service, or the provision of access to a communication network. Member States shall provide in their legislation that the provider of such a service shall not be liable, otherwise than under a prohibitory injunction, for the information transmitted, on condition that the provider:

   (a) does not initiate the transmission;
   (b) does not select the receiver of the transmis sion; and
   (c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

Article 13 – Caching

Where an Information Society service is provided that consists in the transmission in a communication network of information provided by a recipient of the service. Member States shall provide in their legislation that the provider shall not be liable, otherwise than under a prohibitory injunction, for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;
(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner consistent with industrial standards;
(d) the provider does not interfere with the tech nology, consistent with industrial standards, used to obtain data on the use of the informa tion; and
(e) the provider acts expeditiously to remove or to bar access to the information upon obtain ing actual knowledge of one of the following:

- the information at the initial source of the transmission has been removed from the network;
- access to it has been barred;
- a competent authority has ordered such removal or barring.

Article 14 – Hosting

1. Where an Information Society service is provided that consists in the storage of information provided by a recipient of the service, Member States shall provide in their legislation that the provider shall not be liable, otherwise than under a prohibitory injunction, for the information stored at the request of a recipient of the service, on condition that:

   (a) the provider does not have actual knowledge that the activity is illegal and, as regards claims for damages, is not aware of facts or circumstances from which illegal activity is apparent; or
   (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

The basic principle of Articles 12 through 14 is that, provided the IS service in question falls within the definition given and provided the other specified preconditions are met, IS service providers acting in an intermediary capacity are immune from both criminal *and* civil liability including copyright, patent or trade mark infringement suits or civil or criminal liability in respect of the content control categories set out in the introduction. The important thing to note is that the definitions do not cover all the technical activities which might be described under the heading of 'caching', etc. but merely that subset which has been deemed legally acceptable; likewise, the preconditions are detailed and have to met in full.

Finally, Article 15 prevents liability from arising indirectly on the basis of failure to monitor or actively pursue illegal or harmful content. The derogation at paragraph 2 appears to be sufficient to ensure respect for the rights to private life under Article 8, ECHR. One issue that the draft does not address directly is choice of law and jurisdiction where liability does arise; apart from setting out rules which determine the place of establishment for the purposes of the Directive, these matters are still dealt with under general international law.

The Community Action Plan

Following on from a 1996 Commission Communication on illegal and harmful content on the Internet and the Green Paper on the protection of minors and human dignity in the audiovisual and information services[59], the EU institutions wished to contribute to resolving these issues.

In respect of illegal content, it was recognised that the main efforts had to come from the Member States at national level or through legal co-operation agreements because the nature of the material and the legal framework for the relevant content control meant that, in most cases, it was outside the competence of the EU institutions; this was certainly true for material relating to or involving national security, economic security, abuse of minors, pornography, defamation and breach of privacy. However, the EU recognised that it could play a supporting role by promoting industry self-regulation as a tool in the fight against the circulation of illegal content.

Harmful content, by contrast, represented that category of material which, whilst not illegal per se, was subject to restrictions on circulation or, if not restricted, could be offensive to some users; in this case, the aim was to promote technological methods of restricting circulation based on content rating and filtering tools.

Article 1 and Annex I of the Council Decision sets up an initial four year action plan with a budget of E25 million. The plan has four action lines:

1. Creation of a safe environment though a European network of alert hot lines, encouragement of self-regulation and codes of conduct in relation to illegal or harmful content.
2. Development of internationally operable rating and filtering systems through demonstrating the effectiveness of filtering and rating through independent testing and facilitation of international agreement.
3. Encouraging awareness actions amongst parents and teachers about the benefits and drawbacks of Internet usage though a phased bank of action campaigns.
4. Support actions to assess other questions relating to Internet content or use, provide co-ordination with international efforts and evaluation of the impact of the other action line programmes.

The Commission has responsibility for implementing the Action Plan, assisted by a Committee with Member States representatives and chaired by a Commission representative[60]. The Council decision also provided for evaluation procedures for the work programmes and for participation by organisations operating in specified non-EU European countries[61].

How does the Action Plan with its emphasis on self regulation compare with efforts elsewhere? As de Zwart has pointed out[62] the trend is also towards industry self regulation in the US, although for different reasons. There, as we have seen, the problem has not been the inherent inability to act but the smothering of direct control because of issues of freedom of expression and privacy: thus we have seen the main content control provisions of the Communications Decency Act struck down as unconstitutional in *Reno v ACLU*[63]. However, de Zwart also notes that one country

which has clung more closely to direct content regulation is Australia; this is, in part, because of generally weaker constitutional guarantees on privacy and free speech and also because the constitutional relationship between states, territories and Federal government allow perhaps even greater ability to apply community standards than in the US itself. Thus, although there are moves towards self regulation for service providers, Victoria and Western Australia have directive legislative control of on-line content; the former has the Classification (Publication, Films and Computer Games) Act 1995 which makes it an offence to use an on-line service to publish or transmit objectionable material[64] and to make unsuitable material available to minors[65]. Moreover, Federal-level draft legislation shows that broadcast-type content controls will be applied.

Concluding comment

Given that the main legal basis for action in preparing the draft Directives is the development of the internal market, it is perhaps not surprising that, save in the industry special case of IS service providers, producer interests have dominated at the expense of the public interest; this is noticeable throughout the draft digital copyright Directive and at Article 7 of the draft e-commerce Directive. However, there is still time to attempt to rebalance the legislation to the standard set by the US and it is to be hoped that the opportunity to do so will be taken.

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NOTES

1. See the Convergence Green Paper COM(97) 623 and the Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 'The Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation' COM(1999) 108
2. Available at http://www.ilpf.org
3. See Law No 94/665 of 4 August 1994 relating to the use of the French language and 'Policy on the use of French and multilingualism on the Internet', Section 1, Part II, 1998 Report on the Law to the French Parliament (available at http://www.culture.gouv.fr/culture/dglf)
4. C.f. the WIPO Panel Discussion of 9 November 1998 (Update 98/40)
5. See, for general guidance on EU competence, Art 4, EC Treaty and Art 2, Treaty on European Union
6. See, for an express example of delimitation, Art 5, EC Treaty
7. Decision No. 276/1999/EC of the European Parliament and of the Council of 25 January 1999 (OJ 1999 L033/01)
8. Council of Europe European Treaty Series No 5, Rome, 4 September 1950 (available with related Conventions at http://www.coe.fr)
9. Directive 95/46/EC (OJ 1995 OJ L281/31)
10. Council of Europe European Treaty Series No 108, Strasbourg, 28 January 1981
11. See, for background information, EC Bull. 1/2-98/1.3.210 and EC Bull. 3-98/1.2.135
12. Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(1999) 250 final, 21 May 1999
13. Recital 2
14. Recital 11
15. Including the legal protection of computer programs and databases; see Art 1.2
16. Compare these provisions with Arts 6–8, WCT and Arts 7–14 of WPPT
17. Under Directive 92/100/EEC on rental and lending right (OJ 1992 L346/1); to ensure complete compatibility with WCT and WPPT, the draft proposes slight amendments to this (see Art 10.1)
18. Compare with Art 10, WCT and Art 16, WPPT
19. See Art 5.4 main text below
20. Recital 2bis
21. E.g. Belgium, Germany and Greece (note, however , that all illustrative uses were subject to equitable remuneration under Dutch law); see the (now) historical survey in 'Intellectual property laws of Europe', ed Metaxas-Maranghidis, Wiley, New York, 1995
22. Council of Europe European Treaty Series No 163, Strasbourg, 3 May 1996
23. Cf Art 15
24. Cf Art 17
25. Directive 93/83/EEC
26. Directive 91/250/EEC
27. Compare with Art 9.1, Software Directive
28. Arts 11–12, WCT and Arts 18–19, WPPT
29. Directive 96/9/EC
30. Recital 30 makes clear that authorisation can come from the rightholder or be given by law
31. See Art 2(b)bis
32. 'Electrifying the fence: the legal protection of technological measures for protecting copyright' [1999] EIPR 285
33. 98/84/EC (OJ 1998 L320/54)
34. Amended Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM(1999) 427 final, 1 September 1999
35. Recitals 4 through 5a
36. See Recital 14 and Art 1.3
37. This now deals with the provision of information on technical standards, technical regulation and Information Society service provision
38. By Directive 98/48/EC
39. The last three elements are further defined at Art 1.2
40. Recital 2a
41. Art 4
42. Art 5
43. 'any form of communication designed to promote, directly or indirectly, the goods, services, or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a liberal profession': Art 2(e)
44. Art 6
45. Art 7
46. Art 8
47. E.g. contracts requiring notarisation
48. Art 9
49. Art 10
50. Art 11.1
51. Art 11.2
52. Arts 12–14
53. Relating to national security, the prevention of crime, etc.
54. Art 15
55. Art 3.1
56. Art 3.2
57. See, by way of example, s2(d) and 4 of Senate Bill No. 759, the Inbox Privacy Act of 1999
58. See, for a summary, Schaefer et al., 'Liability of on-line service and access providers for copyright infringing third-party contents' [1999] EIPR 208
59. COM(96) 483 final: see also Council Recommendation 98/561/EC
60. Arts 3 through 6
61. E.g. EFTA countries: see Art 7
62. 'The future of the Internet: content regulation and its potential impact on the shape of Cyberspace' [1998] Ent LR 86
63. 117 S Ct 2329 (1997)
64. Section 57
65. Section 58