The University of Reading

School of Law

The Road to the EUCD

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Abstract

We review the development of European directives relating to copyright, and in particular the origins and development of the 2001 directive on harmonisation of copyright regimes for the "information society". We present evidence that initial tendencies to balance the rights of individual users were swept aside in efforts to comply with international treaties and commercial lobbying (which also influenced the treaty development) on behalf of vested interests of the current distribution industry.

In support of this thesis we present textual analysis of the development of copyright policy in the EU, beginning with the European Commission Green Paper issued in 1988, through a number of related directives, a further Green Paper in 1995 and the various stages of the development of the final directive enacted in 2001 following four years of discussion. We relate the European legislation to the international regime defined by the Berne Convention, the World Intellectual Property Organisation Copyright Treaty and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

A particular focus will be placed on the removal of balance in the areas of individual access to copying technology for the purpose of home copying, and of the rights of disadvantaged individuals (e.g. those with visual impairments) to access to material without severe hindrance by so-called "anti-piracy" measures.

Chapter 1

Introduction

1.1 The European Union Copyright Directive (EUCD)

Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society[53] was somewhat controversial when it was passed in 2001. Variously referred to as the EUCD/European Union Copyright Directive (which is how it will be referred to here) and the InfoSoc/Information Society Directive, it was one of the first EU Directives to be the subject of concerted lobbying from NGOs in the area of so-called "intellectual property". Allegations of inappropriate influence by the lobbying groups of major commercial organisations dogged its later stages, along with claims that the EU was either being pressured by the US government, or was simply following its lead, in implementing provisions very similar to the US' 1998 Digital Millennium Copyright Act[4], have persisted. Such claims are difficult, if not impossible, to substantiate given the opaque manner in which much EU legislation is drafted within the Commission. In this document textual analysis of various prior documents and the various drafts of the Directive will be used to gain insight into the development of the legislation from background discussion and initial inception to final form.

We will in particular present the view that the initial documents put forward by the European Commission (and some other European bodies such as the Economic and Social Committee and the Ministers for Culture meeting within the European Council) were aimed at balancing the rights of commercial exploitation by creators and middlemen and the rights of citizens in accessing and re-using cultural ma-

terial. However, the eventual legislation was so heavily biased towards stronger protection that instead of addressing the need for new balances in the digital era, the final legislation tipped the balance a great deal towards stronger and longer protection. The EUCD removed the traditional rights of users without strong evidence of the necessity of doing so to maintain a cultural market, but only with reference to maintaining and strengthening the monopoly grip of copyright middlemen over both creators and users of cultural material.

1.2 Continuing Controversy

The lobbying efforts by NGOs opposed to ever-strengthening IP rights law in the EU (and in the world at large) have continued after the adoption of the EUCD. It is at least partly due to the lobbying efforts of such organisations (which include the EFF[12], FIPR[15], EBLIDA[8] and many others) that the EU may be facing a constitutional crisis. This crisis is not that generated by the rejection of the proposed EU constitution by some Member States in referenda, but that caused by the intransigence of the Council and Commission in the face of strong opposition by the European Parliament to a proposed Directive[39] on "computer-implemented inventions" or "software idea patents" as their opponents call them. The intense lobbying of the European Parliament which led to a game of ping pong between the European Parliament and the Council (reminiscent of such occurrences between the two UK Houses of Parliament) has been claimed as a victory for democracy in Europe, but the final round has yet to be played as the European Parliament requires an absolute majority of members to overturn the second reading of the so-called "Common Position" (which is nothing more nor less than the original proposals rammed down the Parliament's throat by the Council without even significant debate itself, let alone any concessions).

Following the adoption of the EUCD itself, there have been two significant political developments about it. The first was a campaign aimed at Member States legislatures to encourage them to adopt the weakest possible version of the Directive into their national law, led by EDRi[11] overall and in the UK by the CDR[3]. The second is the recent call[18] for a radical overhaul of the Directive submitted to the Commission as part of its required review of the effect of the Directive in 2004. The review proposed by the Commission was squarely aimed at the minutiae of harmonisation and adoption, but led to a new wave of lobbying by NGOs opposed to its provisions, including an attack on another "flagship" European Intellectual Property Directive on a *sui generis* right of protection for databases[50].

1.3 Overview

The remainder of this document is split into four chapters covering first a timeline from initial EU discussions on copyright in Chapter 2, the legislative process of adoption of the EUCD in Chapter 3, and finishing with a discussion of the conclusions that can be drawn and the future directions of copyright legislation in the EU.

1.4 Technical Note

The most controversial aspect of the EUCD[53] was the provision regarding "anti-circumvention of technological protection measures". This is a rather unwieldy term and we will usually shorten this to "technical protection measures". A brief technical note is needed at this early stage to explain the problem the law aims to solve.

Digital material, whether it be text, music, still or video images, a computer program or a multimedia feature, is stored at its base as a set of ones and zeros on some medium (CD, DVD, floppy disk, solid state memory, computer hard drive etc). Unlike an analogue version of the same material (a book, a vinyl disk, an analogue audio or video tape etc) material in digital form can be copied without loss of information and transmitted across computer networks. It can also more easily be edited, merged and quoted from than analogue material (for instance where possible the quotations in this document were copied from digital sources of the material rather than re-typed). "Technical protection measures" involve using some form of encryption and/or watermarking of content (music files,video files, books) in order to allow certain hardware and software to access the material but not others. The hardware and software allowed to access the material is generally restrictive in what one may do with the material, for instance the Adobe Acrobat (full version and "Reader" version) will prevent copying of textual and image material onto the electronic "clipboard" of a computer thus preventing large scale copying of the text or images. Other methods of accessing the material are possible, such as taking "screen shots" and using optical character recognition. Many technical developers claim that technical protection measures can never be perfected without absolute control of the hardware that is used.

Chapter 2

From Concept to Initial Proposal

2.1 Background

Current copyright laws operate in an international sphere which has been growing slowly more homogenised since the first major multilateral convention was signed in 1886[1]. It is therefore impossible to claim any recent point as *the* starting point for the development of the EUCD. Since any work of this sort must start from somewhere reasonable, the 1988 Commission Green Paper on Copyright [32] will be the earliest text considered, since it was at that point that the idea of producing a harmonisation Directive first became a significant political possibility in the EU. The consultations launched by that Green Paper, and continued in a further Green Paper issued in 1995[37], were not the only major influences on the 1997 draft Directive. That same decade (1988-1997) saw the development and signature of the TRIPS agreement[56] and a new international treaty on copyright, the WIPO Copyright Treaty (or WIPO CT)[49]. Various EU Member States and the EU itself were represented in the international negotiations which led to these international treaties at the same time as a supposedly democratic consultation process was being carried out to decide upon suitable harmonisation of copyright law in the EU. Lobbying by NGOs during the passage from draft Directive to adopted law was often blocked by appeals to the EU's international obligations under these treaties. European enthusiasts often complain bitterly about the tendency of Member States' governments to push EU legislation through and then wriggle out of ensuing unpopularity by blaming the law on Brussels. The parallels in the Commission's protestations about international treaty obligations imposing unpopular strong copy-

right protection would be amusing if this area of law did not have such potentially serious impacts on culture, education and freedom of commerce [7].

In this chapter the 1988 Green Paper, the 1995 Green Paper and the official EU consultations will be discussed, along with the impact of TRIPS and the WIPO CT leading up to an analysis of the draft Directive issued in 1997.

2.2 The 1988 Green Paper

On 7th June 1988, the Commission of the European Communities issued a Green Paper[32] entitled "Green Paper on copyright and the challenge of technology — copyright issues requiring immediate action". The main thrust of the consultation is that changes in technology are driving not one but two coaches and horses through the national copyright regimes of Europe and the world. The first effect of technology was the development of ever-improving methods of reproduction of material, which placed home copying of mass-produced and broadcast material of high quality within the reach of almost every household. The second was the rise of new digital media which was seen even then as a destabilising force which could undermine the whole basis of copyright, which is that the best way of ensuring that creators are appropriately compensated for their work is by controlling the means of reproduction by law, economics and social pressures. The move to digital distribution of material (most obviously demonstrated by the replacement of vinyl records and analogue cassettes by audio compact discs in the popular music market) allowed not only initial copies to be made from original purchased or home-recorded copies, but for further copies to be made with no generational loss of quality.

This document was relatively even-handed in its approach, honestly reporting the incompatibilities between existing legislation and developing technologies. Section 3.7 "The views of interested parties" includes subsections on both the "demands for greater protection" [32, pp.120–122] and "opposition to demands for greater protection" [32, pp.122–125] as well as discussion of suggested solutions to ensuring continued revenue while allowing home copying.

The principle issues which later became highly controversial are raised in the Green Paper in Section 3.8[32, pp.125–126]:

> 3.8. The main issues for the Community
>
> 3.8.1. The main issues for the Community concerning audio-visual home copying at the present time appear to be the following.

> 3.8.2. First, to what extent should it be concluded that home copying adversely affects the legitimate exploitation of certain audio-visual works and, if so, which ones? How do the latest technical developments appear likely to affect the position?
>
> 3.8.3. Second, if such adverse effects can be established, what legislative response at Community level, if any, seems preferable? In this connection, is there a role to be played by Community rules either on levies on recording media, on mandatory technical protection devices or a pay-at-source approach?
>
> 3.8.4. Third, if any of these solutions are retained, how far can they be applied consistently with the spirit of the Berne Convention (Article 9(2)) and in fairness to all interested parties?

Given the details of the Directive that eventually emerged from European discussion, the initial 1988 Green Paper is surprisingly balanced.

2.3 European Copyright Papers 1988–1995

Between 1988 and 1995 the European Council (joined during this period by the European Parliament in responsibility for issuing directives under the co-reper regime) issued three Directives on copyright issues, with a fourth in 1996 (see below §2.4). In addition to the direct discussions leading to these Directives, various consultations and discussions[1] about the general subject of harmonisation of aspects of copyright in the EU took place. Throughout this period the normal practice of MEPs addressing specific questions to the Commission was in place but there are too many such questions and answers to include within the scope of this document.

Economic and Social Committee (ESC) Opinion January 1989 The Economic and Social Committee (ESC) issued an opinion[9] on the 1988 Green Paper[32] in 1989. In response to the section on home copying quoted above, the ESC opinion is equally even-handed in presenting the case for a balanced approach to regulating private copying (excerpts from [9, §3.2.1.6]):

> a) In principle, technology is a benefit to society and the public should not be denied the use of the facilities it makes available to them.
> ⋮
> d) No action should be taken that is detrimental to specially disadvantaged people, such as the blind who rely heavily on home taping.

[1] One non-European Document is included here: the conclusions of a 1995 G7 Summit held in Brussels and including G7 Ministers and representatives of the European Commission[19].

Follow-Up to the Green Paper, January 1991 In January 1991 the final version of the Commission "Working programme of the Commission in the field of copyright and neighbouring rights" was published[33]. In particular it reported on public consultations held in 1988 and 1989 in order to "make a proper assessment of the interests affected, that it to say the interests of authors, artists, the cultural industries, and consumers, and to identify the areas to which priority should be given." [33, Introduction]. There are no published proceedings of these consultations other than the Commission report.

Home copying is covered in [33, §3], and within this the question of technological measures to prevent home copying under certain circumstances were raised and the results of the consultations given. The question raised by the Commission for feedback was[33, §3.2.2]:

> 3.2.2 As regards digital audio recordings the Commission asked for comments on the following propositions:
> (a) digital audio tape (DAT) recorders should be required to conform to technical specifications which prevent their use for unlimited acts of audio reproduction;
> (b) the manufacture, importation or sale of machines which do not conform to the specifications should be prohibited;
> (c) the measures outlined in (a) and (b) should apply to all DAT machines for recording audio;
> (d) the manufacture, importation or sale of devices intended to circumvent or render inoperable the measures outlines in (a) and (b) should be prohibited;
> (e) possession of machines intended for professional or specialist use and not conforming to the specifications for home use outlined in (a) should be made dependent upon a licence to be delivered by a public authority and the maintenance of a register or registers in respect of licensed equipment.

The response following the hearings to these proposals were[33, §3.3]:

> 3.3.2 . . . a large majority opposed any prohibition on home copying.
> ⋮
> 3.3.3 . . . authors, performers and the producers of phonograms and videograms . . . insisted that . . . [a system of remuneration for home copying] must be generalized in all the Member States in order to safeguard their rights. Other groups, including consumers and the manufacturers of magnetic tape, were opposed to any system of levies [on blank recordable media].
> 3.3.4 Finally, as regards technical protection systems, there was a broad consensus in favour of a system to regulate DAT recording, which was supported by right holders, equipment and carrier manufacturers, and consumers. This system, the Serial Copy Management System (SCMS), permits copies to be made from the original work but not from other copies. The holders of rights in protected works would accept this system only if a right of remuneration was also ensured.

We see in these sections the early stages of what has become a major battleground between rights holders (who in particular industries such as music recording are almost always the distribution com-

panies rather than the actual artists themselves) and consumers: the question of whether the original balance between initial sale income and free individual usage thereafter is correct or whether attempts should be made to charge for every "copying" occurrence wherever and however it occurs. We also see that consumers were not set against legally enforceable technological copy-protection measures, providing they allowed ordinary individual usage (one copy from a digital original but not serial copies). Rights holders, however, suddenly expected remuneration for something on which they previously had received nothing (initial copies were previously reasonable under analogue equipment but serial copying involved too much degradation to be worthwhile for most users) without the breakdown of the "copyright bargain".

Ministers for Culture, meeting within the Council, June 1991 Much of the discussion on copyright in the modern world takes a purely economic approach to its worth: assuming that copyrighted material has only a monetary value to society and that it is solely economic efficiency which should be considered in setting copyright policy. Occasionally, unfortunately only occasionally, the cultural and educational effects of copyright policy are raised. An example of this is the short communiqué[17] issued by the Ministers for Culture meeting within the Council in June 1991:

> REQUEST that in connection with the harmonization of copyright and neighbouring rights and while respecting the provisions of the Treaty of Rome, the capacity of Member States to preserve the balance of creative and artistic activity, particularly in limited geographical or linguistic distribution areas, should not be jeopardized,

Growth, Competitiveness, Employment In 1993, the Commission issued a White Paper[34] to stimulate broad discussion about the future of the EU as a successful economic area. One section of this paper was the presentation of the concept of the "Information Society", an important idea in Europe (and for this work) reflected by the inclusion of the term in the title of the EUCD[53] and in the reorganisation of the Commission to include a Directorate-General for the Information Society.

One obvious aspect of the "Information Society" is the question of who, if anyone, has the right to restrict access to certain information (whether that restriction is by prohibition or by setting an economic threshold).

European Council meeting, Brussels December 1993 The European Council responded to the challenges regarding copyright issues in the 1993 Commission White Paper[34] in its report following the

Council meeting in Brussels in December 1993[44]. The Brussels Meeting requested[44, p.12]:

> that a report be prepared for its next meeting by a group of prominent persons fully representative of all relevant industries in the Union and of users and consumers, designated by the Council and the Commission, on the specific measures to be taken into consideration by the Community and the Member States in this sphere. The report should cover the following aspects:
>
> - development and inter-operability of networks for facilitating the dissemination of information;
> - trans-European basic services (databanks, electronic mail, interactive video, etc.);
> - new applications. On the basis of this report, the Council will consider an operational programme defining the precise procedures for action and the necessary means.

The Bangemann Report According to the wishes of the European Council, the "High-Level Group on the Information Society" was convened by Martin Bangemann (a European Commissioner). The membership and affiliation[2] of this group was:

- Enrico Cabral da Fonseca (Campanhia Comunicaaoes Nacionais)
- Peter Davis (Reed Elsevier)
- Carlo de Benedetti (Olivetti / ERT)
- Pehr Gyllenhammar (Volvo / ERT)
- Lothar Hunsel (T-Mobil)
- Pierre Lescure (Canal+)
- Pascual Maragall (Mayor of Barcelona)
- Gaston Thorn (Cie. Luxembourgeoise de Telediffusion — CLT)
- Cndido Velzquez-Gastelu (Telefnica / ERT)
- Peter Bonfield (ICL)
- Etienne Davignon (Socit Gnrale de Belgique / ERT)
- Jean-Marie Descarpentries (Bull)

[2] In 1994. Six member of the group were also members of the European Roundtable of Industrialists (ERT).

- Brian Ennis (IMS)
- Hans-Olaf Henkel (IBM Europe)
- Anders Knutsen (Bang & Olufsen)
- Constantin Makropoulos (Hellenic Information Systems)
- Romano Prodi (IRI)
- Jan Timmer (Philips Electronics / ERT)
- Heinrich von Pierer (Siemens / ERT)

As can be seen the group was drawn almost entirely from the ranks of computer/telecoms industrial concerns. Other than the Mayor of Barcelona and Bangemann himself, none of these could be seen as having any real credibility in representing the concerns of the ordinary user in setting the right balance of protection and rights in the area of copyright. It is particularly of note that not a single academic or lawyer was included on this panel, which made far-reaching recommendations on copyright law development at European level (and may well have influenced the negotiations on the WIPO CT[49] which were underway at the time and included EU negotiators as well as those from Member States). The salient section of the report[48] is Chapter 3, section 1:

> The Group believes that intellectual property protection must rise to the new challenges of globalisation and multimedia and must continue to have a high priority at both European and international levels.
>
> In this global information market place, common rules must be agreed and enforced by everyone. Europe has a vested interest in ensuring that protection of IPRs receives full attention and that a *high level of protection is maintained*. Moreover, as the technology advances, regular world-wide consultation with all interested parties, both the suppliers and the user communities, will be required.
>
> Initiatives already under way within Europe, such as the proposed Directive on the legal protection of electronic databases, should be completed as a matter of priority.
>
> Meanwhile, in order to stimulate the development of new multimedia products and services, existing legal regimes - both national and Union - will have to be re-examined to see whether they are appropriate to the new information society. Where necessary, adjustments will have to be made.
>
> *In particular, the ease with which digitised information can be transmitted, manipulated and adapted requires solutions protecting the content providers.* But, at the same time, flexibility and efficiency in obtaining authorisation for the exploitation of works will be a prerequisite for a dynamic European multimedia industry.

(Emphasis added.)

It would seem that this was the point at which the debate shifted towards appeasing the various industrial concerns (manufacturers of ICT equipment, distributors, production companies) and when the voices of individual artists, writers, readers and viewers were lost to the process. After the Bangemann Report further consultations focussed on such industrial concerns until after the draft version of the EUCD[51] was published, when NGOs such as EBLIDA raised concerns alongside the nascent digital rights movement.

European Council meeting, Corfu June 1994 The Bangemann Report[48] was considered by the European Council at their Corfu meeting in June of 1994. [45, §4]:

> The European Council considers that the current unprecedented technological revolution in the area of information opens up vast possibilities for economic progress, employment and the quality of life, while simultaneously representing a major challenge. It is primarily up to the private sector to respond to this challenge, by evaluating what is at stake and taking the necessary initiatives, notably in the matter of financing. The European Council, like the Commission, considers that the Community and its Member States do however have an important role to play in backing up this development by giving political impetus, creating a clear and stable regulatory framework (notably as regards access to markets, compatibility between networks, *intellectual property rights*, data protection and *copyright*) and by setting an example in areas which come under their aegis.

(Emphasis added.)

The European Council demonstrate at the same time their acquiescence to the setting of copyright law priorities by industrial concerns, and their ignorance of the area by including the phrase "intellectual property... and copyright". It might seem pedantic to criticise a minor semantic error such as this, but the Presidency Conclusions should be well crafted documents considering their power in setting the tone for the work of the European Commission.

Europe's Way to the Information Society Shortly after the European Council meeting in Corfu, the Commission produced an "Action Plan"[35] for following up on the proposals on the "Information Society" from the 1993 White Paper[34]. The section on "Intellectual property rights (IPRs)" included:

> A Green paper on IPRs in the information society will be prepared in the coming months and give the opportunity for extensive consultations with interested parties.
>
> The proposal for a Council Directive on the legal protection of databases is critical to the development of an appropriate regulatory environment for networks. The Council is invited

to adopt it as a mater of urgency.[3]

In the field of private copying, the commission will shortly present a proposal for a Directive.

So, we see that despite proposals to hold "extensive consultations with interested parties" that private copying was deemed to be sufficiently understood for a Directive to be produced shortly, despite the fact that technology had moved on significantly since the discussions reported in [33] and that even then there was significant difference between the parties on the nature of restrictions to home copying that were acceptable and on the recompense demanded by rights holders for private copying.

July 1994 Commission Hearings In July of 1994 the European Commission held hearings on consultations on "Copyright and Neighbouring Rights in the Information Society". The hearings were a follow-up to a circulated request for feedback to which written submission were also requested. Most of the written submissions were published in [36] (although the introduction does not that not all submitters were willing for their submission to be published. There is no publicly available record of the hearings, so the only conclusions which can be drawn about the meeting are those of the documentary evidence. Rather than quote extensively from the many submissions, we will simply consider the list of organisations with representatives at this meeting [36, p.XII]. Despite representing a larger number of groups than the High-Level Group which produced the Bangemann Report[48] the hearings were once again dominated by commercial concerns involved in manufacturer of ICT equipment, distribution or production of music, television and motion pictures. A small number of groups representing individual artists and collecting societies were also present as well as a couple of groups representing "institutional users" of copyright material, namely the British Library and EBLIDA[8]. The claim that the request for submission was circulated widely does not answer the charge that the majority view of the diffuse general population was not represented at such meetings. In a representative democracy, the elected representatives of the people are supposed to consider their needs, but as Litman argues[28] the lack of individual involvement in the issues dealt with by copyright law by ordinary members of the population in the nineteenth and most of the twentieth centuries led legislators to abandon their responsibility to represent the people's interest in such matters, delegating authority to the commercial concerns to drive the process into compromises they could deal with, usually to the detriment of the rights of the public.

[3] The Directive was adopted in 1996 as [50].

European Council meeting, Essen December 1994 The communication[46] of the following meeting of the European Council also mentioned the development of intellectual property regimes in a purely "economic" setting[46, §5]:

> The European Council asks the Ministers for Industry and Telecommunications to ensure coordination of further measures. It requests the Council to create rapidly the legal framework conditions — in areas such as market access, data protection and the protection of intellectual property — that are still necessary.
>
> The European Council welcomes the G7 Ministerial Conference on the global information society to be held in February 1995 in Brussels.

G7 Information Society Conference The conclusions[19] of the conference mentioned above were published soon after it ended. It is quite a short report (eighteen pages of text in a large font as distributed) but manages to attempt to be all things to all people without making any attempt to answer the inconsistencies of the goals it sets out for the world's major industrialised nations. The following selection of quotes should serve to demonstrate these inconsistencies. No relevant discussion of incompatibilities between these quotes have been elided.

> The knowledge-based economy demands greater openness and creativity in schools and universities, and the acquisition of new skills and adaptability through life-long training.
>
> ⋮
>
> G-7 partners. . . committed themselves to:. . .
> Serve cultural enrichment for all citizens through diversity of content
>
> ⋮
>
> Providing high levels of legal and technical protection of creative content will be one of the essential conditions to ensure the necessary climate for the investment needed for the development of the Information Society. Thus, there is a need for internationally recognised protection for the creators and providers of materials that will be disseminated over the Global Information Infrastructure.
>
> ⋮
>
> Measures will be developed through national, bilateral, regional and international efforts, including in the World Intellectual Property Organisation, which will ensure that the framework for intellectual property and technical protection guarantees that the right holders enjoy the technical and legal means to control the use of their property over the Global Information Infrastructure.
>
> ⋮
>
> Electronic Libraries - to constitute from existing digitisation programs a large distributed virtual collection of knowledge of mankind, available to a large public, via networks. This includes a clear perspective toward the establishment of the global electronic library network which interconnects local electronic libraries.
>
> ⋮

Electronic Museums and Galleries - to accelerate the multimedia digitisation of collections and to ensure their accessibility to the public and as a learning resource for schools and universities.

2.4 European Copyright Legislation 1988–1996

Three European Directives[41, 42, 43] on copyright issues were enacted between the issuing of the 1988 Green Paper[32] and the 1995 Green Paper[37], while another[50] was debated in this period and enacted in 1996.

Rental Right and Lending Right The Directive[41] imposes a requirement on Member States to harmonise their approaches to the rights of copyright holders to prohibit rental or lending of copies of their work, including the issue of mandated public lending.

Satellite Broadcasting and Cable Retransmission The Directive[42] imposes a requirement on Member States to require the cable re-broadcast of satellite transmissions from neighbouring states to be subject to copyright agreements for the material rebroadcast. This applies whether the material re-broadcast has copyright held by the original satellite transmitter or by third parties with whom the satellite transmitter has a suitable contract.

Harmonizing the Term of Protection of Copyright The Directive[43] imposes a requirement on Member States to harmonise their terms of protection for copyright and related rights. This harmonisation included the somewhat controversial increase of the length of copyright from "life+50"[4] (the required minimum at the time of the Berne Convention (as amended in 1971) to "life+70". The rationale of this was twofold: that some Member States (in particular Germany) had already extended the term of copyright to "life+70" in recompense for the loss of exploitation opportunities during and following the Nazi regime 1933-45; and that the original "Berne" rationale of providing for the lifetime of the author plus those of two further generations of their family was no longer served by "life+50" because lifespans had increased.

These two arguments are interesting in that they are both motivated solely by retroactive extensions. Those disadvantage by the Nazi regime were rapidly approaching the end of their term of protection,

[4] That is, the lifetime of the author plus fifty years.

but the overall extension applied to all works even those produced well after this period. Since the life of an author must be (on average) extending as well as the lifetimes of their descendants then only those who had died before these expected longevity extensions had become the norm had any justification for the extension.

Legal Protection of Databases The Directive[50] imposes a requirement on Member States to recognise and implement a new *sui generis* right of protection for databases, separate from the copyright that subsists in some or all of the material collected in the database.

2.5 TRIPS

The forerunner of the World Trade Organisation (WTO), the General Agreement on Tariffs and Trade (GATT), signed the TRIPS[56] agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) in 1994 as the final act of the Uruguay Round of trade negotiations. Amongst many other issues this brought the WTO into existence. Drahos and Braithwaite in [7] present compelling evidence and argument that the agreement was driven through by US trade negotiators under the influence of a relatively small number (fewer than one hundred) large US firms on the basis of bilateral and small group multilateral negotiations inside and outside the main GATT negotiating regime.

As Drahos and Braithwaite report[7, ch.7], the Director-General of WIPO, Arpard Bogsch, argued that GATT was not a suitable forum for international agreements on intellectual property issues[2]. The increasing power of developing countries in WIPO since the 1980s stymied US attempts to push for harmonisation worldwide with its ever-increasing terms of copyright protection[5] and with its "financier's copyright" regime (see [7, p.177]). The major relevance to our discussions of TRIPS are its linking of general trade issues with *minimum* protection for intellectual property rights holders.

2.6 The 1995 Green Paper

In 1995, the European Commission issued a further Green Paper[37] on copyright issues. The consultations it stimulated led directly to the production of the initial proposal version[51] of the EUCD. We

[5] US copyright terms were retroactively extended once in the first hundred years of US copyright, once more in the next fifty years and eleven times since 1962[26, p.107].

will deal with the Green Paper according to its own framework, considering the two chapters separately for detailed discussion, and then considering its impact as a whole.

2.6.1 Concerning Chapter One

The first chapter of the Green Paper contains discussion of the context of copyright law in relation to economic, social, cultural setting and the policy aims (specifically the "Information Society" concept) of the European Union. Within this, there are a number of assumptions about the necessity for strengthening (rather than re-working) copyright protection, such as the statement [37, p.3]

> "the creation of new works and services requires substantial investment. . . [which is] only worthwhile and will only be made if works and other matter are adequately protected by copyright and related rights in the digital environment."

Although the introduction to the Green Paper does include an assurance[37, p.5] that "A wide-ranging process of consultation is accordingly needed" and "measures will be proposed only to the extent that they are absolutely necessary", it is clear that the Commission had already been convinced that the answer to the development of digital technology was *stronger and wider* copyright protection rather than *more appropriate* protection.

For example on [37, p.11] within the section devoted to protection of the European cultural heritage in the information society, we have the statements that:

> In addition to its intrinsic worth, that culture has an economic value which makes it subject to market forces. It is therefore necessary for the economic recovery to benefit the cultural sector of the community.
> ⋮
> It is absolutely necessary to find the right balance between protection of the European cultural heritage and intellectual property law, and its exploitation in economically workable conditions, in order to ensure that the information society and the European culture develop in harmony.

Such statements deny the possibility of a living, developing culture that requires free (in all senses of the word) access to prior work in order to create new work. One classic example of where free access to existing work (which itself is freely derived from prior work) is in "folk music", as explained in [25]. The dangers of such a "cultural lock-down" approach are explained at length by Lessig[27].

The Green Paper reports the results of the July 1994 hearings and consultations discussed on page 13 noting[37, p16,§34] that

> The participants were very interested in the question of effective protection of rightholders' interests. Nonetheless, it was recognised that a balance ought to be preserved between the rights accorded to holders, of whom certain categories could find themselves with augmented rights, and the interests of users such as public libraries, whose functions must not be hindered.

It is now clear that the Commission had abandoned its earlier even-handed view (see §2.2 and §2.3) that the rights of individual users should be given equal weight (and in particular that they must be represented by the Commission given their overwhelming right to representation but their diffuse nature making equal lobbying impossible). We shall see later that the view that public libraries' functions as accessible repositories and archival storehouses were not even properly protected in the final Directive (being left to Member States to implement as optional elements).

2.6.2 Concerning Chapter Two

The second chapter of the Green Paper contains detailed discussion on specific legal issues. It takes the approach of considering current law and how a "least change" regime can make the old law compatible with current technology. While this may seem a reasonable approach for a small number of iterations, this has already happened any number of times in the twentieth century. The cumulative incremental steps has led current copyright law to be radically out of step with the original basis of copyright law as of benefit equally to society at large and the people actually performing the creative labour. In the US in particular it has led to the "financier's copyright" regime (see [7, p.177]). This is partly due to the reductionist tendencies of some lawyers (particularly those engaged in legislative drafting) and partly due to strong lobbying on behalf of interested parties who find that a reductionist view tends to benefit them economically, at least in the short run, in the development of new copyright law. So, for instance, [37, Section III: Reproduction Right] considers the right to make a photocopy of an analogue piece of written work or an image to be allowed without specific payment to the creator to simply be a facet of the impossibility of enforcement of such a payment. However, this reductionist logic is not followed through to the fact that copyright is not a "natural right" but a time-limited monopoly granted by the state for a purpose. if it were regarded as a "natural right" it would be perpetual, but it is not and never has been. If it were regarded as a "natural right" it would be entirely inalienable (it is impossible for one person to "sell" their right to life or to an education to another person, yet it is possible to sell one's copyright almost entirely). Only attribution and moral rights are inalienable and these are mostly

non-financial in their effect. So, for example the Green Paper states[37, p.51]:

> As regards the definition of "reproduction" right in a digital environment, the *fundamental* importance of the reproduction right suggests that a Community response may be needed.

(Emphasis added.)

The question of "technical protection measures" for attempting to undermine the essential nature of digital material (the facility with which it may be copied, edited and distributed without loss of quality) while maintaining its use as a distribution mechanism for originators or commercial distributors is addressed in Section IX of the Green Paper. Discussion in this section on "The present legal context" notes that copyright conventions at the time do not cover technical anti-copying measures, but note that the questions have been raised in discussion at WIPO [37, p.81,§2.1]:

> The international conventions do not at present cover these questions. But they have been raised in the negotiations going on in WIPO on a possible protocol to the Berne Convention and a possible new instrument for phonogram producers and performers, at least in part.

It goes on to note that the "Computer Programs Directive"[40] includes elements of protection against the distribution of:

> any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program

(Quote from [40] contained in [37, p.81,§2.2].)

2.6.3 Impact of the Green Paper

The tone of the 1995 Green Paper[37] moved considerably from the tone of the 1988 Green Paper[37]. Whereas in 1988 the tone was even-handed and presented the Commission as searching for a balance between the rights of copyright owners and the rights of the end users, the tone has become that of minimising damage to the rights of end users but only where this is compatible with increased protection for rights holders. Nowhere is this more striking than in the assumption that private copying is a loophole in copyright law rather than a right not to be removed. It is also present in the assumption that all acts of copying should generate revenue for the creator, rather than attempting to identify ways of ensuring appropriate levels of recompense. The note about technical protection measures being under discussion at WIPO shows that the discussions within the EU were taking place alongside discussion at

a more international level and that the supposedly democratic processes of the EU were subjugated to the outcome of international treaty negotiations in which the EU was a major player.

2.7 WIPO and the WIPO CT

The World Intellectual Property Organisation (www.wipo.int) became a UN body in 1974. Its remit is to enable international regimes for intellectual property. It is effectively the descendant of the dispute resolution and negotiation bodies related to the Berne convention on copyright[1] and related agreements on patents, trademarks etc. The first major treaty on copyright developed under its auspices was the WIPO Copyright Treaty (WIPO CT)[49] of 1996.

The EUCD[53] was presented as the required implementation of the WIPO CT. The most controversial aspects of it are the articles pertaining to technological protection measures (Article 11) and rights management information (Article 12):

> Article 11
> Obligations concerning
> Technological Measures
>
> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

> Article 12
> Obligations concerning Rights
> Management Information
>
> (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
>
> (i) to remove or alter any electronic rights management information without authority;
>
> (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.
>
> (2) As used in this Article, ”rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

The main difference between this wording and the questions raised in the Commission's 1995 Green paper[37] is its generality. More specifically, the Green Paper raises the possibility of enabling legal action in the spirit of the Computer Programs Directive[40] which bans technical devices (hardware or software) only where the "sole purpose" is to bypass or remove valid anti-copying measures, and not where legitimate uses are also at stake. This should be compared with the famous 1984 VCR case,[6] which set the US precedent that technologies with substantial non-infringing uses should not be banned simply because they may also be used for infringing purposes.

2.8 Consultations

The consultations by the Commission on the 1995 Green Paper[37] attracted "more than 350 written contributions"[31]. As a final step the DG XV (Internal Market and Financial Services) of the European Commission organised a conference in Florence in June 1996, just before the European Council meeting also held in Florence. We will consider the published proceedings of this conference and the consequent communication from the commission[38].

2.8.1 Florence Conference Proceedings

The conference included "250 participants from 28 countries"[31] whom it is claimed[31] included "authors, performers, phonogram and film producers, broadcasters, publishers, collecting societies, academics, representatives of governments and international organisations". The proceedings of the conference[6] consist of 122 pages and are the written submissions of the fourteen keynote speakers. Unfortunately, the proceedings do not include a list of participants at the conference, nor is there a publicly available record of the list of authors of the 350 submissions received by the Commission, so without extensive investigation work it is impossible to gauge the direct influence of these consultations on the draft Directive. We are therefore restricted to considering the contents of [6]. We present a brief consideration of each presentation, and then an analysis of the list as a group with reference to their representativity of interests.

[6] Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984)

John F. Mogg, Director-General, DG XV Internal Market and Financial Services Mogg introduces the questions for the conference, including[6, p.4]

> Economic considerations and the challenges of new technology are at the origin of any copyright legislation.

Although he begins by talking about culture, Mogg is wedded to the idea that economics are all that matter in drafting copyright legislation. At no point does he present any issue which tries to balance individual access rights against economic arguments.

M. Paul Waterschoot, Director, DG XV/E intellectual Property Waterschoot describes the panels of the conference (of which there is unfortunately no record in the proceedings) in his section of the proceedings [6, pp.14–15]:

> The four subjects are:
> Legislation and digital transmission;
> reproduction rights;
> broadcasting;
> Administration of rights.
> ⋮
> These speakers are rights holders, representatives of the industrial sector, of the academic world, or high government officials.. . . [Their] experience. . . should make it possible to obtain a comprehensive vision of the different subjects under discussion.

The concept that a combination of "representative of the industrial sector, of the academic world" and "high government officials" between them can provide a "comprehensive vision" is ludicrous, particularly given that the academics who made presentations confine themselves to technical legal detail rather than questions of the social appropriateness of proposals for new law.

Mauro Masi, Head of the Information and Publishing Department, Presidency of the Italian Council of Ministers Masi is a strong proponent of very strong moral and economic rights of authors and artists, as can be seen by part of his statement [6, pp.24–25]:

> An author cannot commit himself to creating new works if he has inadequate guarantees that the integrity of his work will not undergo alterations, modification, or worse, corruption of the product, or if he has inadequate protection of his economic rights. He must be protected from the misappropriation of his efforts, which would constitute real theft, and intolerable exploitation in a society which claims to respect human rights.

André Lucas, Professor, Faculty of Law, University of Nantes Lucas concentrates on the issue of divergence of national rules from international schemes, specifically including the split between US and continental copyright frameworks. His reading of copyright law is that "fair use" and "fair dealing" are "exceptions to economic rights"[6, p.32,§I.2] rather than competing rights. When starting from this point of view, authorial and distributor rights are the natural "winner" in any change in the law with regard to new technological facilities. Lucas regards culture as something produced by individuals, and distributed only for a fee. The concept of the "intellectual commons" or of citizens providing their own, or public domain, information for free[21] does not impinge on his analysis.

Bruno Lamborghini, Vice Chairman, Olivetti Lamborghini follows Lucas' view that culture is something created *ex nihilo* by individuals and only in return for economic value, and that this economic value must be maximised for each individual creator in order to produce the "Global Information Society", claiming[6, p.40]

> Content is the most strategic element, where most of the added value and new business will be created. Content creation is the core value of the Information Society, a value that has to be enhanced and safeguarded against all forms of abuse and piracy.

Like Lucas, the concept of common resources such as the Wikipedia[59] are either deliberately ignored, or so far outside the world-view of such presenters that they cannot conceive of their existence. The largest single business transaction to date owing its existence solely to the web is the IPO of the search engine Google (www.google.com). Google exists, and is so useful, because of the huge range of information freely available on the web, despite and not because of the strong protections claimed as an absolute necessity by industrialists such as Lamborghini.

Mihály Fiscor, Assistant Director General, WIPO Fiscor, as might be expected of a representative of WIPO which, until recently had the principle stated aim of "increasing protection" for "intellectual property", is highly in favour of expanding rights as far as possible. In the area of technical protection measures, he makes very strong claims[6, p.61]

> So far, I have mainly spoken about the rights to be recognized in the respect of storage and transmission of works and objects of neighbouring rights in digital networks. It is obvious, however, that those rights may only be duly exercised in such networks if they are supported by technological measures of protection (such as encryption systems I have referred

> to in connection with the "software envelopes") and by appropriate rights management information (identification numbers and the like). At this conference, it is hardly necessary to elaborate on why such measures and such information are needed.

Fiscor regards the need for legal protection of technological protection measures to be an already agreed concept by the time of this conference, despite its inclusion in the 1995 Green Paper[37] as a question still to be answered.

Maureen Duffy, author Duffy, as an author, argues passionately on behalf of creators for a strong creator's copyright system:

> What creators ask for is not charity by 'equitable remuneration', in the phrase that has made such a welcome appearance in recent directive on copyright harmonization.
> ⋮
> You will have noticed that I used there the French droit d'auteur instead of the English copyright.
> ⋮
> The copyright system as regulated by the Berne Convention is a kind of intellectual united Nations. It allows the greatest freedom to create and invent to the greatest number because it sanctions the holding of rights by thousands, millions of otherwise powerless individuals, giving them a share int he exploitation of what they have created, encouraging creativity and diversity.

Unfortunately, Duffy has fallen into the same trap as Lucas in believing that creators create in a vacuum of prior work and that stronger protection is the way to ensure "equitable remuneration", ignoring the fact that the more technological the means of distribution have become, the more the middlemen are the ones controlling the remuneration.

Roberto Barzanti, MEP Barzanti, the elected representative of the citizens, the only one to speak at this conference, restricts himself to a reductionist legal approach to the subject. Rather than use his mandate to press for a balance of the rights of creators and the rights of consumers (with the rights of distributors protected where it does not interfere) he presents a case in favour of strong protection, including int he area of technological protection measures[6, p.73]

> On *Technical systems of protection and identification*
> ⋮
> After lengthy consultation, and a pause for reflection and study, it is time for Europe to take action toward protecting copyright and related rights. But caution in the face of such a mobile panorama does not imply indifference or inertia. There are huge interests at stake.

(Emphasis in original.)

Hannu Wager, Legal Affairs Officer, WTO Wager presentation is entirely explanatory with regard to the relationships of TRIPS[56] to Berne[1] and proposed European legislation. As such, it might be regarded the proper provenance of a bureaucrat, explaining the regulatory regime in which proposed new legislation will sit.

Richard Constant, General Counsel, PolyGram International As might be expected of the legal counsel of a major middleman in the dissemination of culture, Constant portrays the entirety of cultural creation as at risk if stringent new laws protecting *their business model* are not enacted[6, p.87]:

> Denying a company the right to control the commercial usage of its product has the same effect as taking away it assets.
> ⋮
> The history of European entertainment business has been characterised by industries struggling to secure laws that will ensure that the product of their efforts is not stolen; and history has shown that legislation has always lagged behind the protection which our industries need.

Constant here is conveniently ignoring the fact that the modern recording companies grew out of the "piano roll" producers[26, p.108] who were precisely able to gain a place at the bargaining table in US copyright act negotiations precisely because of the financial benefits they had gained from the court decision holding that this use of sheet music to create a piano roll did not constitute making a "copy".[7]

Sergio Ciulli, Artis Geie Ciulli beings with enthusiasm for modern technology[6, p.95]:

> From an artist-performer's point of view, the information society represents a considerable opportunity for the public to have access to performed works.

but he quickly descends into hyperbole,[6, p.97] making the same mistake as Duffy in assuming that creators are a small group all acting *ex nihilo*, and not building on the work of others in ways sometimes easy to define and identify and at others in more difficult to define way:

> An actor's work or performance belongs only to that actor and nobody should be allowed to manipulate that work without fear of legal repercussions. Here, as elsewhere, the users must be made aware of this.

[7] White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908)

Were this attitude to be adopted by society for artistic work in general, much of the work of celebrated artist Andy Warhol would have been impossible for him to legally produce. It is a plea for draconian claims of originator's integrity that are used to justify the need for extensive technological protection, but which are themselves unrealistic and ignore the constant re-use inherent in all artistic endeavour[27].

Claus D. Ahlermann, Professor, Institute of Universitair Européen, and Thomas Kaufmann, Director General IV of the European Commission Ahlerman and Kaufmann's presentation is, like Wager's, entirely procedural in nature, dealing with the interplay of copyright and competition law.

Jean-Loup Tournier, President, GESAC [8]

Tournier begins by denying his authority[6, p.111] as a representative of authors and composers or even the organisation of which he was president (see discussion below on whether the interests of collecting societies and authors are truly in general agreement):

> The ideas I express are not necessarily those of GESAC

Tournier's presentation is rather confused and lacks a central point. It is a sequence of individual notes rather than a coherent argument. Its conclusion is simply that he desires a world with[6, p.115]

> a high level of protection in the context of the development of reproduction and communication technology

Heinz Zourek, Deputy Director General DG XV, Internal Market and Financial Services Zourek is one of the few who even bothers to mention general users of copyright material but he immediately follows a general statement of the need for balance with a conclusion about increased protection[6, p.119]

> The new digital environment will require some "adjustment of the scope of the existing rights and of the exceptions and limitations to them.
>
> This should be done to the benefit of both rightholders and users... strong and effective rights for authors and neighbouring rightholders are needed. At the same time, these rights have to be appropriately balanced against the legitimate interests of their users.

In rounding up the conclusions of the discussions of "Management of Rights and Control over Works in the Digital Era"[6, p.122] he reveals:

[8] Groupement Européen des Sociétés d'Auteurs et Compositeurs

> There is no strong call for mandatory technical control systems.. . .
> There seems to be support for providing appropriate remedies against abusing or circumventing access-control, anti-copying and similar devices.

The lack of a strong definite statement regarding technical measures — "there *seems* to be support" — indicates a much weaker position than is taken in the draft Directive.

Analysis of List of presenters There were fourteen presentations contained in the proceedings with fifteen presenters/authors listed. Of these fourteen, seven are bureaucrats (four from the Commission, one from Italy and two from international organisations: WIPO and the WTO), two are academics, two represent major distributors, one is an elected representative of the citizenry, one represents collecting societies and two are actually creative talents (one author and one artist). One could be charitable and believe that collecting societies represent the interests of creators, although there is the opposing view that they are bureaucracies interested primarily in their own continuation which depends on a complex system of rights payments needing a supporting organisation. Neither of the academics makes an effort to present any claims for the rights of the end user, nor of the potential knock-on effects on areas such as software development in introducing the technological circumvention measures. The MEP confines his remarks to technical legal effects. Not one of the presenters puts the view of the ordinary user or the non-commercial artist. Thus the claims to legitimacy of representation made because of the scale of the response to the Commissions requests for comments ring somewhat hollow. Not even the potential problems of institutional and archival organisations are include in the proceedings. Whether such questions were raised in the panel discussions is not on an accessible record, but the provisions in the draft Directive do not reflect such concerns, and so one doubts there were any such strong voices raised, or if there were they appear to have been ignored.

2.8.2 Follow-up to the Green Paper

In November 1996, the Commission produced its conclusions[38] regarding the consultations prompted by the 1995 Green Paper[37]. This communication set the basis for the draft Directive which was produced just over a year later in December 1997. It begins with the usual claim about balance[38, p.2]:

> a fair balance of rights and interests between the different categories of rightholders and between rightholders and rightusers must be ensured

Note that there is, however, a subtle change in language here, where "users" are now referred to as "rightusers". Since the "rights" referred to are "copyright and neighbouring rights" the implication is that other human rights such as freedom of speech, the right to education etc are no longer of concern in drafting copyright law, only the details of the balance between protecting rightholders and allowing "rightusers" some scraps from the table to keep them sweet.

The communication constantly refers to the necessity for "harmonising" rights across the Community (a constant theme in many justifications for directives (the harmonisation imperative can be likened to the US' Federal Commerce Clause as the source of much of the centre's power in the different federal authorities). As we shall see when considering the drafts and final versions of the EUCD, the multitude of optional measures undercut claims for harmonisation.

On the subject of "technical protection measures" the Commission do report on the concerns of "a minority of respondents"[38, p.16] that the:

> widespread use of such devices might result in a *de facto* creation of new information monopolies and could entail serious problems in terms of the protection of the right to privacy and personal data.

(Emphasis in original.)

On the scope of proposals to legislate regarding tools to circumvent technical protection measures, the Commission reports[38, p.16]:

> A minority argues for rules along the lines of Article 7 of the Computer Programs Directive.[40] Most interested parties suggest, however, that legal protection should be more far reaching, covering also those products and services whose primary purpose or effect it to avoid, bypass, remove, deactivate or otherwise circumvent the copyright protection system. Others believe that prohibited acts relating to the devices should also include use and import. They submit that these acts should not be restricted to those carried out for commercial purposes as such acts can cause extensive harm to rightholders.

(Citation added.)

There is no discussion of placing duties upon the developers of technical protection measures concomitant with the wide ranging nature of proposed legal sanction. There is no discussion of the cultural need for public collection and archiving exemptions or the rights of disadvantaged citizens for equal access to material if such draconian measures are enacted. As we shall see later some very weak measures along these lines were introduced, mostly due to lobbying on behalf of institutional user groups (e.g. EBLIDA[8]) or ordinary citizens.

These conclusions to the Commission's consultations were issued in November 1996, and the WIPO CT was signed in December 1996. Opportunities for further lobbying were obviously undercut by the coincidence of such legislative acts. Unlike the US, where Congress must approve international agreements, the EU and many of its Member States allow executive authority to sign international agreements and are highly loathe to revoke signature even if there is considerable public outcry when the details are disseminated to the public. We will return to this discussion in the conclusion §4

2.9 The Draft Directive

Technological Protection Measures? In December 1997 the Commission formally issued the first draft of a *Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society*[51]. As with all draft Directives, the paper includes justificatory and explanatory material as well as the proposed text of the legislation. We will analyse this text first, before selectively quoting the legislative text for further consideration of its development through the legislative cycle.

2.9.1 Explanatory Text

The introduction to the proposal claims[51, p.3]:

> Action is considered necessary... on the technological side, by developing adequate systems allowing for electronic rights management and protection.... legal protection of the integrity of technical identification and protection schemes...

The justification for stronger rights protection put forward by the industry of copyright middlemen (music publishers, book publishers, movie distributors etc) is often based on claims that they are an important industry whose economic value is under threat from new technology, frequently ignoring the immense rises in profits that they make from new technologies at almost every turn, sometimes against their initial desire to ban the new technology. Such claims are reflected in the first principle chapter of the draft Directive[51, p.4, Chapter 1: The Economic, Social and Cultural Dimension of the Market in Copyright and Related Rights]:

> 1. ...Output and added value in the areas protected by copyright and related rights have both grown considerably in recent years, often at a rate higher than that of the economy as a whole.

> 2. Recent growth has been fuelled by the further spread of digital technology, and by the emergence of new distribution channels.... The evolution towards convergence of the audio-visual, telecommunications and information technology sector will add to this growth potential.

Considering the most controversial aspect of the draft Directive, the issue of measures preventing circumvention of technological protection measures, the explanatory text explains that the proposed Directive goes much further than required by the WIPO CT[49] agreed the previous year . The WIPO text merely requires signatories to enact measures to prevent "circumvention of technological measures" whereas the proposed Directive:

> covers any activity, including preparatory activities such as the manufacture and distribution, as well as services, that facilitate or enable the circumvention of these devices. This is a fundamental element because the real danger for intellectual property rights will not be the single act of circumvention by individuals, but the preparatory acts carried out by commercial companies that could produce, sell, rent or advertise circumventing devices.

Any claims made thereafter that the precise provisions in the Directive for technological protection are due to international obligations must therefore be closely considered since it has been admitted here that the provisions in the draft Directive are must stronger than those required by the WIPO CT. It should also be noted at this stage that the earlier stress by the Economic and Social Committee[9] (see §2.3) that the rights of disadvantaged people be considered, is no longer mentioned in any way, not are considerations of the public access or archival needs of organisations such as libraries, despite the involvement of the British Library and EBLIDA in earlier consultations.

2.9.2 Text of the Proposed Directive

The proposed text of the Directive also includes "justification" as do all such texts, forming the principle "travaux préparatoires" in interpretation of a directive by the European Courts. The section justifying the "technological protection measures" article is[51, p.42, Paragraph 30]:

> Whereas technological development will allow rightholders to make use of technological measures designed to prevent and inhibit the infringement of any copyright, rights related to copyright or *sui generis* rights provided by law; whereas the danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures; whereas, in order to avoid fragmented legal approaches that could potentially hinder the functioning of the Internal Market, there is a need to provide for harmonized legal protection against any activity enabling or facilitating the circumvention without authority of such measures; whereas such a

> legal protection should be provided to technological measures that effectively inhibit and/or prevent the infringement of any copyright, rights related to copyright or *sui generis* rights provided by law; whereas such legal protection should respect proportionality and should not prohibit those devices which have a commercially significant purpose or use other than to circumvent the technical protection;

This explanatory section provides no basis for implementation in national law allowing the development of circumvention measures on the basis that:

- There are significant *non-commercial* legitimate uses for the technology.
- The technological protection measures are being used in a way which, as well as preventing copying, are being used to abuse market position or interfere with free trade (except for free trade within the Common Market) such as regionalisation of material.
- There are significant cultural or educational issues at stake.

The Article of the draft Directive [51, Art 6] is similarly free of caveats:

> **Article 6**
> **Obligations as to technological measures**
>
> 1. Member States shall provide adequate legal protection against any activities, including the manufacture or distribution of devices or the performance of services, which have only limited commercially significant purpose or use other than circumvention, and which the person concerned carries out in the knowledge, or with reasonable grounds to know, that they will enable or facilitate without authority the circumvention of any effective technological measures designed to protect any copyright or any rights related to copyright as provided by law or the *sui generis* right provided for in Chapter III of European Parliament and Council Directive 96/9/EC.
>
> 2. The expression "technological measures", as used in this Article, means any device, product or component incorporated into a process, device or product designed to prevent or inhibit the infringement of any copyright or any rights related to copyright as provided by law or the *sui generis* right provided for in Chapter III of European Parliament and Council Directive 96/9/EC. Technological measures shall only be deemed "effective" where the work or other subject matter is rendered accessible to the user only through application of an access code or process, including by decryption, descrambling or other transformation of the work or other subject matter, with the authority of the rightholders;

Again, the only possible measures that the draft Directive considers grounds for allowing circumvention measures to be allowable are those with substantial commercial benefits.

Chapter 3

From Initial Proposal to Directive

3.1 Lawmaking in the EU: Procedures for Directives

There is a difference in title between [42] and [50] indicating that [42] was a "Directive of the European Council" whereas [50] was a "Directive of the European Parliament and of the Council". This reflects the change in status of the European Parliament brought about by the Maastricht Treaty and the replacement of the Cooperation Procedure with the Codecision Procedure. As we shall discuss below in §4 the Parliament does not have the same kind of powers associated with national Parliaments in terms of instigating or amending legislation. Following the adoption of the Codecision process, however, it had a greatly enhanced status in the process and its lack of a veto was required for the final adoption of the Directive.

Instigation of legislation is primarily the purview of the Commission, hence the decade of discussions we have covered so far in this document. The passage of the EUCD to law was a relatively lengthy one, taking four years. It is far from the longest passage required by a Directive, but for some directives it is far shorter. For example the directive on rental rights[41] took only two years (admittedly under the old Cooperation procedure). A detailed consideration of every stage of the process of adoption of an EU Directive is beyond the scope of this document, so we will concentrate on the effects of three different elements of the process, two formal and one informal. The formal elements we will consider are the Economic and Social Committee Report and the adoption Codecision procedure of the Parliament and Council. The informal process is the lobbying that accompanies any significant legislation in any major

legislature.

3.2 Economic and Social Committee (ESC) Report

The European Economic and Social Committee (ESC) is not a committee of the European Parliament but a body of the European Union. It is made up of nominated representatives from "Organised Civil Society" around the EU. Its role is primarily advisory but it is generally seen as quite influential. It is mandatory for the opinion of the ESC to be sought on proposals for directives on a variety of matters (including the EUCD) and the Commission will routinely (but not universally) seek the opinion of the ESC on Green and White Papers and various other discussion documents. So, for instance, we have already covered the response of the ESC[9] to the Commission regarding their 1988 Green Paper. The required opinion[10] of the ESC on the draft EUCD[51] was produced in December 1998.

The ESC in particular raise the problem of the harmonising element of the Directive, since significant elements of implementation are left to the discretion of Member States[10, §1.4]:

> The central issue for debate is the extent to which certain exceptions to the harmonized copyright and related rights should be left to the interpretation of individual Member States. In other words, Member States are, in the current draft, left a considerable degree of discretion with regard to the precise level of these exceptions. These exceptions cover, inter alia, photocopying, non-commercial uses for the blind and deaf, news reporting and the provision of libraries and similar public information stores. The Commission's approach is essentially to strike a balance between ensuring that there are no barriers to trade on the one hand, and non-interference with different Member States cultural diversities on the other.

As regards the controversial "technological protection measures" in Article 6 of the EUCD, despite the strength of the earlier committee opinion[9] that the public should not be denied the extra facilities technology brings, nor should disadvantaged members of society be further disadvantaged by legal measures, the ESC in 1998 regarded the provisions in Article six to represent[10, §3.8 Article 6] a

> balance between the desire on the part of the rightholders to control more closely any device which principally or incidentally enables the circumvention of technological measures
> ⋮
> [which] has been struck correctly.

3.3 Codecision Procedure

After a proposal for a Directive from the Commission has been agreed by the European Council (which it usually is without significant change since the Commission liaises with the Council quite closely in preparing proposals) and after the issuing of the ESC opinion, it is transmitted to the European Parliament. The Parliament will typically refer the proposal to one or more of its committees for detailed scrutiny before returning an opinion to the Commission (possibly with suggested amendments). In the case of the EUCD the first reading by the Parliament included scrutiny by four specialist committees:

- Economic, Monetary, Industry
- Environment, Health, Consumer Affairs
- Culture, Youth, Education
- Legal Affairs, Citizens' Rights

Again, detailed consideration of all four committee reports would exceed the limitations of this document, so only the contribution[47] of the final committee will be studied, which includes approving or modifying the recommendations of prior scrutinising committees. The Committee reports were accepted by the Parliament and an amended version of the proposal[52]. In respect of Article 6, the Committees' recommended amendments:

> 2. Member States shall provide adequate legal protection against any activities, including the manufacture or distribution of devices, products or components or the provision of services which:
> (a) are promoted, advertised or marketed for the purpose of circumvention, or
> (b) have only a limited commercially significant purpose or use other than to circumvent, or
> (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any technological measures designed to protect any copyright or any right related to copyright as provided by law or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC.

However, at its first reading the Parliament differed from the committees, addressing the point regarding significant non-commercial legitimate usage by recommending somewhat different changes and returned a different from of Article 6(2)(b):

> (b) have circumvention as their sole or principal purpose or as their commercial purpose, or

In response to these proposals by the European Parliament, the Commission referred back a new wording for Article 6(2), which was accepted for a first reading by the Parliament[13] in October of 1999:

> Member States shall provide adequate legal protection against any activities, including the manufacture or distribution of devices, products or components or the provision of services, carried out without authority, which:
> (a) are promoted, advertised or marketed for the purpose of circumvention of, or
> (b) have only a limited commercially significant purpose or use other than to circumvent, or
> (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,
> any effective technological measures designed to protect any copyright or any right related to copyright as provided by law or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC.

Over a year later in December 2000, the Council adopted the so-called "Common Position"[1] [14]. What happened in this year? We will present some indications in the next section on lobbying. At this stage the relevant paragraphs of Article 6 looked like this:

> 2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
> (a) are promoted, advertised or marketed for the purpose of circumvention of, or
> (b) have only a limited commercially significant purpose or use other than to circumvent, or
> (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of
> any effective technological measures.
>
> 3. For the purposes of this Directive, the expression technological measures means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject- matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed 'effective' where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

We see that once again non-commercial but legitimate purposes are no longer grounds for defining circumvention devices as legitimate in this draft.

[1] Note: the name is rather misleading, as we have discussed earlier regarding the current debate on the proposed directive on software-implemented inventions. The "Common Position" is that adopted by the Council taking into account amendments proposed by the Parliament in its first reading, rather than a truly agreed document.

3.4 Lobbying

Various groups are known to have been involved in lobbying the European Commission, Council and Parliament during the progress of the EUCD from initial draft to adopted law. Some of these groups are quite open about their involvement, although few have retained the public repositories of their activities. other groups are know about only by the references of these known groups to their "opposition" or "agreement" with these other groups. In this section we will briefly consider the intent and apparent effect of these lobbying effort, as much as is possible without a significant research project involving interviewing individuals directly involved.

3.4.1 Libraries and Archives

As mentioned above, the British Library and a European libraries' association (EBDLIDA[8]) responded to the pre-draft Directive consultations of the Commission. Their remit, of course, is only to represent the interests of libraries in fulfilling their mandated functions of public access to material and archiving of material. In this respect they strongly put forward the case for a blanket exemption from certain elements of the proposed directive. In particular the libraries were very concerned with overly broad definitions of what constituted effective technical protection measures, and of law which would ban circumvention technologies themselves or the use of circumvention technologies even where the application was for purposes which would ordinarily be non-infringing. There were two concerns raised by libraries and archives. The first concerns their role as providing public access to material. consider the role of the British Library as the "inter-library loan" source of "last resource" for academics, journalists and members of the public seeking difficult or expensive to obtain material. The British Library, partly due to its role as a copyright deposit library and partly as a direct remit, hosts a significant archive of material which is not available elsewhere, either because it is not commercially viable to maintain it for sale, or because it is prohibitively expensive to obtain for the average member of the population. Material is provided (for a fee which includes a suitable payment to the author). The material thus provided is generally a photocopy of the material desired and licensing terms deny the authority to produce further copies of the photocopy to others. This is done on a non-commercial basis: the library approximately covers its costs in doing so, but does not aim to make a "profit" (or even the non-profit organisation equivalent of a "surplus"). Their second activity is that of maintaining an archive

of material published in the UK. The question of whether they should or could maintain an archive of electronic materials is still a live question to this day. certainly they attempt to archive eBooks available in the UK with an ISBN. Other online material is archived on a more ad hoc basis at present. One of the major functions of an archive for physical material is to preserve both the original copies, where possible (and economically feasible), and the informational content. So, for example, not only is the original document of the Domesday Book (a unique historical record of life in 11th Century Europe) preserved by the London Records Office (see www.domesdaybook.co.uk) but the information in it has been scanned and is available from them in a high quality image format.

Both of these activities of libraries and archives were threatened by overly strong protection of technological protection measures, particularly the concept that any circumvention device or use of such a device would be made illegal. It should be noted that preservation of the content of, and ability to access, digital material is not as simple as it might at first appear[24]. for example, the BBC's Domesday Project, an attempt in 1986 to produce a modern equivalent of the original Domesday census, is now unreadable due to degradation of the digital discs on which it was produced and distributed, and loss of the hardware and software on which t was designed to run (see The Observer march 3^{rd} 2002 or online at observer.guardian.co.uk/uk_news/story/0,6903,661093,00.html for further information). It was claimed to the author in personal contact with a representative of EBLIDA that the changes proposed by the European Parliament during progress of the Directive through its readings to include substantial non-infringing non-commercial circumvention measures as lawful were in large part due to lobbying by EBLIDA and the British Library. They were, unfortunately, less successful in lobbying the Commission and Council on this point.

3.4.2 Free, Libre and Open Source Software (FLOSS) Proponents

The Free Software Foundation (www.fsf.org) and similar European organisations devoted to promoting the development and distribution of non-proprietary software were very concerned by both the European draft EUCD and the proposals for the US' Digital Millenium Copyright Act [4]. They felt that technological protection measures that allowed access to copyrighted material on computers would be incompatible with the development of FLOSS programs as platforms for such access. In addition, the monopoly enjoyed by Microsoft (and to a lesser extent Apple Corp) in proprietary software would be both sued by copyright holders to restrict access to material on FLOSS platforms, and at the same

time reinforce those monopolies by denying access to copyright material on FLOSS platforms. Most worrying is the "legislative risk" of potentially finding oneself in contravention of such measures in developing FLOSS platforms, which may exert a "chilling effect" on software development. The case of Jon Johansen,[2] eventually freed by the Norwegian courts after four years of court cases for distributing a method of accessing the content on DVDs (it was entirely possible to copy DVDs in their entirety, just not to access their contents on a FLOSS platform nor copy sections of their content) is a good example of this. The Free Software Foundation joined forces with the EFF (see below) and libraries to press for changes to the technological circumvention measures aspects of the draft Directive.

3.4.3 (Digital) Civil Rights Organisations

The Electronic Frontier Foundation (EFF[12]) is probably the best known civil rights organisation with specific concerns about people's rights in respect of computer- and internet-related topics. As primarily a US-based organisation (although it has been broadening the scope of its activities in recent years to include links with sister organisations in other countries) it was more concerned in 1997 and 1998 with attempting to oppose the passage of the DMCA[4] through the US Congress than in lobbying in Europe. However, they did coordinate their activities with FLOSS organisations such as the FSF and EBLIDA, and provided advice on nascent organisation setting up in Europe in response to the perceived lack of democratic representation in developing the EUCD.

There now exist a number of organisations in Europe specialising in lobbying for citizen's rights in respect of digital information issues, such as patents on software (the "Foundation for a Free Information Infrastructure/FFII, European Digital Rights/EDRi[11] and the UK Campaign for Digital Rights/CDR[3]). The UK CDR was set up once the EUCD had passed into law, to press for the weakest possible interpretation of the EUCD in UK law. EDRi was similarly founded in 2002, form the ashes of the various individuals and less formal lobbying groups which coalesced around a late attempt to push for changes to the draft EUCD.

3.4.4 The US Government's Trade Representatives

As documented in *Information Feudalism*[7], the US Trade representatives are heavily influenced (some might even say "in the pocket of") certain US corporate players. in particular they are heavily influenced

[2] Norway v. Jon Lech Johansen 02-507 M/94 Oslo's first instance court (2003)

by representatives of copyright middlemen such as the RIAA[30] and the MPAA[29]. Although there is no documentary evidence of the influence of the US government and their trade representatives, the fact that the US DMCA and the EUCD are so close (despite efforts by European lobbying groups sch as EBLIDA and even the European Parliament to introduce less extreme measures) strongly implies influence, probably at the level of the Council, and possibly within the Commission.

3.4.5 Major Commercial Copyright Middlemen

US national bodies such as the RIAA[30] have their international counterparts both in other countries and at international level. For example the IFPI[22] with headquarters in London is the international equivalent of the RIAA. IFPI have made submissions to many of the consultation the European Commission has run on copyright issues, and there are well-reported instances of strong lobbying on specific issues, even the details of legislation, that they have carried out. Such organisations, and their members, feature heavily in the list of respondents in documents such as [36].

3.4.6 Other Rightholders' Organisations

In addition to the copyright middlemen such as IFPI, the collecting societies (e.g. GESAC) also engage in lobbying efforts above and beyond taking part in conferences such as that reported in [6]. Their accounts report significant sums spent in lobbying both for the continued legislative legitimacy of collecting organisations and on behalf of their members.

3.5 The EUCD as Adopted

Final Version of Article 6:

> Obligations as to technological measures
>
> 1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.
>
> 2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial

purposes of devices, products or components or the provision of services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures.

3. For the purposes of this Directive, the expression ”technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed ”effective” where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3) (e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regard-

ing the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply mutatis mutandis.

As can be seen, the fight to include substantial non-infringing non-commercial uses of circumvention measures as grounds for allowing the production and/or distribution of a device failed to be included in the final version of the Directive.

Chapter 4

Conclusions

This document has analysed the development of European Copyright legislation from the 1988 Green Paper[32] to the adoption of the EUCD[53] in 2001. We have concentrated on one of the most controversial aspects of it, Article 6 on "technical protection measures" article. This article, of course, has significant interactions with other elements of the text and in particular the sections on exemptions (optional or mandatory) to Article 6, including permission for reproduction for teaching and research purposes, archival purposes, and news gathering purposes. It is clear from the progress of the various texts considered in this document that the final version of the Directive was heavily influenced by commercial concerns and that the rights of the general public were not properly balanced in the discussions or in the law that resulted.

This reinforces the views of commentators such as Litman[28], Vaidhyanathan[57] and Lessig[26, 27] that not only are current copyright laws (international treaties, European directives and national legislation) broken, so too is the current process for developing new versions.

4.0.1 Related Work

This document is not the only one to examine the development of the EUCD[53] or the state of European copyright law. Most appear to be as critical of the EUCD, and the process of its development as this piece, although there is an occasional "voice in the wilderness" claiming that the EUCD is not strong enough. Thus we have Perritt[54] who claims:

> Overall, the aims of the Directive[53] in the area of technological protection are commendable.
> ⋮
> Concerns that the Directive is too far-reaching and gives too much control to right holders have yet to be proven

(Citation to [53] added.)

This is in stark contrast to an article[23] on the state of British copyright law before the adoption of the EUCD which concludes:

> Perhaps the time has come when we should look again at the underlying assumptions on which this monopoly [copyright] is based.

During passage of the directive through the European institutions, some voices were raised in concern over the lack of harmonisation effects of the draft Directive, such as those of Rennie[55]:

> Once again, Member States remain free to apply in their own country whichever of the non-mandatory limitations and exceptions which they have applied to the right of reproduction, to this right of distribution. This again will prevent the achievement of harmony of laws within the European Union.

During the final stages of passage of the Directive, Gerhart raised questions concerning the lack of democratic accountability in the development of international agreements on copyright law[20]:

> One can also see the influence of producer interest in the international agenda that is guiding work on a global system.
> ⋮
> if . . . the incentives for generating new knowledge are already socially optimal, then healthy international institutions would couple a more efficient system with a decrease in intellectual property rights along some other dimension. So far, this has not been suggested.

Following the adoption of the EUCD, Foged analysed the effects of the DMCA[4] and EUCD in terms of their effects on the rights previously enjoyed by the general public over access to copyrighted material and found that they had been seriously eroded by the legislation[16]:

> Limited public rights is a basic concept recognised by democratic societies consistently for many years, not only in a copyright context, but within the intellectual property field more generally, and even in a real property context as illustrated by the example of the laws granting the public access to beaches and forests, There is no reason why limited public rights should not be continued as a value in democratic societies as they enter the digital age.

There are of course, many other articles covering the development and effects of a major piece of legislation such as the EUCD. Those covered here are simply a small sample.

4.1 Corporate Power

It is clear that from the very beginning of the debate over copyright in the digital age and its European dimension, that the concerns of commercial players have been taken seriously by the Commission, Council and Parliament. protestations of doom to the contrary, the music, moviemaking and book publishing industries have not collapsed, despite the inclusion of some exemptions to the harsh elements of the EUCD.

Advisory groups such as the High Level Group on the Information Society[48] were clearly dominated by those with strong commercial interests in stronger, broader and more-=encompassing copyright and neighbouring rights. The Proceedings of the Florence Conference[6] and the Replies[36] to the Action Plan[35] on Europe's Way to the Information Society again demonstrate the overwhelming voices of the commercial interests in discussions. It is no surprise that the final state of the EUCD is regarded by citizen's rights groups as very unbalanced. As Litman argued in [28], the complexity of copyright law has often led to lawmakers abrogating their responsibilities for finding a balance to commercial concerns finding compromises between themselves, up to and including the development of the WIPO CT[49] and the DMCA[4]. Litman's thesis referred solely to the US regime, but we have demonstrated here that it has been true in Europe as well.

4.2 Representation of the People: Accountability and Democracy

The development of lobbying groups other than those of the commercial interests in the area of intellectual property is a relatively new phenomenon in European politics. The moves by the European Parliament to amend the EUCD, although fragile and often overturned or weakened, demonstrated a willingness by MEPs not only to listen to non-corporate lobbying, but to act upon it. As we have discussed above, the attempt by the Council to push through a Directive[39] on software idea patents against the wishes of the Parliament shows a growing disillusionment by certain members of both the European public and their elected representatives with the current state of the checks and balances within the European Union.

4.3 International Trade and Subsidiarity

Without the principles of Supremacy[1] and Direct Effect[2] the European Union would be more akin to the WTO than the US. Given these principles, now explicitly stated in the treaties governing the Union, and presented even more explicitly in the proposed (though unlikely to be ratified) Constitutional Treaty[5]. Growing protests about the lack of democratic accountability of bodies such as the WTO and WIPO, combined with concerns regarding a "democratic deficit" in the European Union [58] raise profound concerns about the state of democracy in the modern world. While paying lip-service to the rule of law and democratic accountability European governments and the US federal government are constantly engaged in negotiating international treaties containing provisions which they know would never be acceptable to their citizens if imposed as purely national law. Sometimes these are regarding issues where sole action by one state would be damaging to its people but where concerted action by many or all in the international community brings benefits without the problems of "defection" in a "Prisoner's Dilemma". However, many others are agreements which are manifestly against the interests of a large proportion of individual citizens, such as the ever-increasing scope of intellectual property laws. Unless the lobbying efforts by still-nascent groups such as EDRi[11], the EFF[12] et al can bring democratic legitimacy and balance to the activities of organisations like WIPO, these international regimes run the risk of cataclysmic collapse should the lack of balance finally leads to a backlash in democratic elections.

[1] Internazionale Handelgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel ECH 1125 (1970)
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