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**THE EUROPEAN UNION COMMISSION AND
RECENT TRENDS IN EUROPEAN INFORMATION
LAW**

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I. INTRODUCTION

This Article addresses several recent and emerging developments regarding the European Union's copyright and intellectual property ("IP") laws. Because not every significant issue can be discussed within this short survey, the Article will only address what the author considers to be the most significant developments. Specifically, this Article discusses: (1) recent European Union law relating to intellectual property infringements occurring on or via the Internet; (2) the patentability of computer-implemented inventions; (3) implementation of the Council Directive on the legal protection of computer programs—i.e., the "Software Directive"; (4) selected topics regarding contract law as applied to copyright infringement and copyright related matters; (5) recent developments regarding collecting societies; (6) compatibility of the European Union's copyright directives; (7) applying European Union legislation on design protection to graphical interface and icons; and (8) the development of the new ".eu" top-level-domain.

II. RECENT EUROPEAN UNION LAWS RELATING TO INTELLECTUAL PROPERTY INFRINGEMENTS OCCURRING ON OR VIA THE INTERNET

In the European Union ("EU"), several new legislative measures have been passed relating to cross-border IP infringements.

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Specifically, the legislature has addressed Internet infringement, as well as proper forum selection in infringement matters. In regard to issues of international jurisdiction, the recently enacted "Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters"¹ ("Brussels I Regulation") has replaced the Brussels Convention of 1968 for all Member States, except Denmark.² According to the general rule of article 2, number 1 of the Brussels I Regulation, a defendant, who is domiciled in a European Union Member State ("Member State"), may be sued in the courts of that Member State.³ Article 5, number 3 then provides for special jurisdiction in matters relating to a tort or delict, which includes IP infringements.⁴ Specifically, the relevant forum is the courts of the place "where the harmful event occurred or may occur."⁵ Therefore, the plaintiff has the option of suing in the state where the act or omission causing the injury occurred, or may occur,⁶ or alternatively, in the state where the harm occurred, or may occur.⁷

As applied to IP infringements occurring on or via the Internet, a copyright owner now has the ability to sue in any Member State where the infringing Internet activity can be accessed (assuming that accessibility is considered to be an IP infringing activity in that Member State).⁸ Indeed, Council Directive 2001/29 (the "Info-Soc Directive")⁹ will likely be interpreted to cover the mere availability of protected content on the Internet.¹⁰ Pursuant to article 5, number

1. Council Regulation 44/2001, 2001 O.J. (L 012) [hereinafter Brussels I Regulation].

2. Brussels I Regulation, *supra* note 1, recitals 21, 22.

3. Brussels I Regulation, *supra* note 1, art. 2.

4. Brussels I Regulation, *supra* note 1, art. 5, no. 3.

5. *Id.*

6. *Id.*

7. *Id.*

8. Pursuant to the principle of territoriality, the plaintiff must also demonstrate that the subject matter in dispute is protected under the IP laws of that state.

9. Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 [hereinafter Info-Soc Directive].

10. Info-Soc Directive, *supra* note 9, recital 25.

3, of the Brussels I Regulation, Member States had to enact the Directive by the end of 2002; therefore, the accessibility of copyrighted content in a Member State may result in granting special jurisdiction. Of particular significance, this may enable forum shopping, allowing the plaintiff to select the forum where he expects the highest damages or where the defendant has valuable assets.

The European Commission began negotiations in March 2002 to amend the Lugano Convention to address rules of international jurisdiction.¹¹ Essentially, the amendment would mirror the Brussels I Regulation to ensure that the concepts applied in the Brussels I Regulation would also be applied between the Member States.¹²

In addition to forum selection issues in cross-border disputes, the EU has recently addressed, both directly and indirectly, questions of private international law. In terms of indirect action, the E-Commerce Directive¹³ establishes a so-called "principle of the country of origin" or "internal market principle" under which a provider of Internet services is only bound by the laws of the country in which it is permanently established.¹⁴ In effect, this excludes the application of another Member State's laws, even if the service in question can be accessed in, or is directed to, other Member States.¹⁵

The E-Commerce Directive also addresses potential conflicts between Member States' choice of law rules. The E-Commerce Directive specifically states that such provisions "must not restrict the freedom to provide information society services" as established by the laws of the country of origin.¹⁶ Consequently, whenever a

11. See European Commission Press Release, Civil Judicial Cooperation: Commission Proposes Speeding Up Work with a View to Adopting the Lugano Convention (Aug. 4, 2002).

12. *Id.*

13. Directive 2000/31/EC of the European Parliament and of the Council on Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, In The Internal Market, 2000 O.J. (L 178) 1 [hereinafter E-Commerce Directive].

14. E-Commerce Directive, *supra* note 13, art. 3, no. 1.

15. See E-Commerce Directive, *supra* note 13, art. 3, nos. 1, 2.

16. E-Commerce Directive, *supra* note 13, recital 23.

Member State's private international law rule determines that the law of a country, other than the country of origin, is applicable, that provision is overruled by the internal market principle.¹⁷

According to the E-Commerce Directive, the country of origin rule does not apply to fields referred to in the Annex of the E-Commerce Directive.¹⁸ Therefore, the E-Commerce Directive excludes copyright and industrial property rights from the scope of the internal market principle; while competition law, on the other hand, is still governed by this principle.¹⁹

In May 2002, the European Commission published a preliminary draft proposal for the "Council Regulation on the Law Applicable to Non-Contractual Obligations" (the "Rome II Draft").²⁰ The purpose of the draft proposal was to consult interested parties and launch a public debate on the issue.²¹ Article 3, number 1, of the Rome II Draft provides a general rule for non-contractual obligations deriving from a tort or delict; stating that the applicable law is that "of the country in which the loss is sustained."²² Further, article 3 excludes the law of the country "in which the harmful event occurred" and where "the indirect consequences of the harmful event are sustained."²³

Because none of the special tort related choice of law rules from the Rome II Draft apply, it is unclear whether and how the general provisions of article 3 address IP infringements. First, one might argue that article 24 of the Rome II Draft, which determines the Member States' relationship to international conventions, functions to exclude copyright infringements from the scope of the Rome II Draft instrument.²⁴ Indeed, article 24 aims to ensure the continued

17. See E-Commerce Directive, *supra* note 13, art. 3, no. 1.

18. E-Commerce Directive, *supra* note 13, art. 3, no. 3.

19. E-Commerce Directive, *supra* note 13, annex.

20. Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations, at http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm (last visited Jan. 4, 2002) (on file with the Rutgers Computer & Technology Law Journal) [hereinafter Rome II Draft].

21. *Id.*

22. Rome II Draft, *supra* note 20, art. 3, no. 1.

23. *Id.*

24. See Rome II Draft, *supra* note 20, art. 24.

application of "choice of law rules to non-contractual obligations" set forth in international conventions.²⁵ With respect to copyright law, one could argue that article 5, section 2, of the revised Berne Convention precludes the application of article 3 of the Rome II Draft by stating that "the extent of [copyright] protection . . . shall exclusively be governed by the laws of the country where protection is claimed."²⁶ Article 5, section 2, of the Berne Convention may be interpreted as a reference to the international private law principle of the country of protection, which governs the applicability of national IP laws. However, others deny that the provision can be characterized as a choice of law rule. Therefore, the answer to how the Rome II Draft applies to IP infringements depends on whether article 5 of the Berne Convention is considered a choice of law rule within the meaning of article 24 of the Rome II Draft.

Presuming that copyright and other IP infringements are not excluded by virtue of article 24, the general rule of article 3, number 1, applies to online IP infringements; therefore, the national IP laws²⁷ of the country in which the copyright holder suffers a loss are applied.²⁸ From this, one has to determine the meaning of "loss": does it refer to the injuring result of the infringing conduct²⁹ or to the economic loss suffered due to the infringement? The phrasing of article 3 suggests the latter.³⁰ Therefore, the law governing non-contractual obligations arising from an infringement of *economic* IP rights would typically be the

25. *Id.*

26. See Rome II Draft, *supra* note 20, art. 3. This rule stems from the principle of territoriality and has to be understood to call upon the laws of the country from which protection is sought.

27. See Rome II Draft, *supra* note 20, art. 19. Renvoi is excluded by virtue of Article 19 of the Rome II Draft. *Id.*

28. See Rome II Draft, *supra* note 20, art. 3, nos. 1, 3.

29. This may be the equivalent of the place of effect jurisdiction rule found in article 5, number 3, of the Brussels I convention. Brussels I Regulation, *supra* note 1, art. 5, no. 3.

30. See Rome II Draft, *supra* note 20, art. 3, no. 1. Specifically, article 3 states that the applicable law "shall be the law of the country in which the loss is sustained, irrespective of the country or countries in which the harmful event occurred and irrespective of the country in which the indirect consequences of the harmful event are sustained . . ." *Id.*

law of the country where the infringing activity interferes with the copyright holder's utilization of the protected subject matter in question.³¹ In any instance, due to the principle of territoriality in IP Law, a precondition to a successful infringement claim is that the country grants protection to the subject matter in question under its national IP laws.³²

In matters of unfair competition, article 6 of the Rome II Draft provides a special choice of law rule, designating the governing law to be that of the country where the practice affects competitive relations or the collective interests of the consumers.³³ In regard to acts of unfair competition committed online, the Rome II Draft ensures that the conflicting principle of the country of origin set forth in the E-Commerce Directive is not overruled.³⁴

Significantly, article 23, number 2, treats unfair competition that occurs online differently from unfair competition occurring offline. In the online world, an Internet service provider is bound merely by the laws of the country of origin. Alternatively, the applicable laws for unfair competition committed offline are those of each Member State where an individual's practice affects competitive relations or the collective interests of consumers.³⁵

In light of this inconsistency, it is imperative that European lawmakers begin addressing choice of law and jurisdictional aspects of online IP infringements directly, instead of excluding them,³⁶ or merely relying on general rules governing torts.³⁷

III. PATENTABILITY OF COMPUTER-IMPLEMENTED INVENTIONS

Software development has been growing in recent years and substantially contributes to the GDP and to employment. In 1998, the value of the packaged software market in Europe was about

31. *Id.*

32. See generally Rome II Draft, *supra* note 20.

33. Rome II Draft, *supra* note 20, art. 6.

34. See Rome II Draft, *supra* note 20, art. 23; see also E-Commerce Directive, *supra* note 13, recital 23.

35. See Rome II Draft, *supra* note 20, art. 23, no. 2.

36. See *id.*

37. See Brussels I Regulation, *supra* note 1; see also Rome II Draft, *supra* note 20.

€39 billion.³⁸ Indeed, in 1999, the packaged software industry was responsible for 1,009,000 jobs in Europe.³⁹ It is expected that the number of packaged software workers in Western European countries will grow by a rate of between 24 percent and 71 percent from 1999 to 2003, with an average growth of 47 percent.⁴⁰

According to article 52 of the European Patent Convention ("EPC"), a patent may be granted to an invention that is "new"—i.e., it does not form part of a state of the art, it involves an inventive step, and it has an industrial application.⁴¹ Although computer program methods for doing business, presentations of information, and aesthetic creations are not patentable inventions under Member States' patent law and the EPC, thousands of patents for computer-implemented inventions have been granted by the European Patent Office ("EPO") and by national patent offices.⁴²

Because national courts are not bound to follow the decisions of the EPO Board of Appeals, there are differences between the case law of the EPO and the national courts of the Member States. These differences are particularly apparent within the courts of Germany and U.K. As a consequence of different treatment, a computer-implemented invention may be protected in one Member State, but not in another.

Recently, the EPO Board of Appeal confirmed that the indispensable requirement of a patentable invention having a technical effect is not met by the regular physical interaction between software and hardware that takes place in every computer.⁴³ The Board stated that: "A computer program product

38. Booz Allen & Hamilton, *The Competitiveness of Europe's ICT Markets*, Ministerial Conference, Mar. 2000, at 10.

39. Datamonitor, *Packaged Software in Western Europe: The Economic Impact of the Packaged Software Industry on the Combined Economies of Sixteen European Countries*, at http://www.Microsoft.com/Europe/newsletter/docs/issue9_datamonitor.doc (last visited Jan. 4, 2003) (on file with the Rutgers Computer & Technology Law Journal).

40. *Id.*

41. Convention of the Grant of European Patents (European Patent Convention), Oct. 5, 1973, art. 52(1) [hereinafter EPC].

42. EPC, *supra* note 41, arts. 52(2)-(3).

43. *Two Landmark Cases of the EPO*, at

or a computer program claimed by itself is not excluded from patentability . . . if, when it is run on a computer it produces a further technical effect which goes beyond the 'normal' physical interactions between program (software) and computer (hardware)."⁴⁴ In order for software to be patentable it must have a further technical effect. This further technical effect may "be known in the art" and thus does not have to be novel.

The following case indicates the jurisprudential disparity with respect to computer-implemented inventions. In the *Pension Benefit Systems Partnership* case,⁴⁵ which addresses a computer-implemented business method, the Board held that "[m]ethods only involving economic concepts and practices of doing business are not inventions . . ."⁴⁶ Based on this holding, computer-implemented inventions can be granted only if the invention makes a technical contribution and not merely a contribution in the business field.⁴⁷

Under U.K. jurisprudence, as seen in the case *Merrill Lynch Inc's Application*,⁴⁸ a computer program related invention—e.g., a method of doing business or a mental act—is non-patentable even if a technical contribution can be found.⁴⁹

The Supreme Court of Germany, however, has changed its position by affirming that the correct approach is the one adopted by the EPO Board of Appeal.⁵⁰ In *Logic Verification*, the German

http://www.softwarepatente.de/news_uk/04_1999_uk.pdf (last visited Jan. 17, 2003) (on file with the Rutgers Computer & Technology Law Journal).

44. *Id.*

45. Case No. T 0931/95 (Sept. 8, 2000).

46. *Id.*

47. However, the same invention has received patent protection by the U.S. Patent and Trademark Office. U.S. patent law does not have a list of items explicitly excluded from patentability like computer programs or business methods. See *State Street Bank & Trust Co. v. Signature Fin. Group Inc.*, 149 F.3d 1368 (Fed. Cir. 1998). In *State Street Bank & Trust*, the court held that "the transformation of data . . . by a machine through a series of mathematical calculations into a final share price, constitutes a practical application of a mathematical algorithm, formula, or calculation, because it produces a 'a useful, concrete and tangible result' . . ." *Id.* at 1373.

48. [1989] R.P.C. 561 (U.K.).

49. *Id.* at 569.

50. *Landmark Decision of the German Federal Supreme Court on the Patentability of Computer Software*, at

Supreme Court held that "a computer program is patentable if technical considerations are necessary for developing the program."⁵¹ Due to this decision, business method patents are available in Germany, as well as within Europe, if "they are embodied in a computer program."⁵²

To resolve these legal uncertainties, the Commission of the European Communities recently presented a proposal for a directive on the patentability of computer-implemented inventions.⁵³ The proposal is intended to harmonize the jurisprudence across the Member States concerning computer-implemented inventions on the basis of the EPO's current patent practice.⁵⁴ Interestingly, the proposal is nearly identical to a draft written by a lawyer from the Business Software Alliance ("BSA"), which is a lobby group of the major software companies (e.g., Microsoft and IBM).⁵⁵ Therefore, it is not ironic that article 3 of the proposal states that a computer-implemented invention belongs to a field of technology, and is therefore patentable.⁵⁶

Article 1 of the proposal defines the Directive's scope as providing patentability of computer-implemented inventions.⁵⁷ The term "computer-implemented invention" is defined in article 2(a) to mean any invention that uses a programmable apparatus (i.e., a computer) to perform and has one or more *prima facie* novel features, in whole or part, by means of a computer program.⁵⁸

http://www.softwarepatente.de/news_UK/03_2000_UK.pdf (last visited Jan. 17, 2002) (on file with the Rutgers Computer & Technology Law Journal).

51. *Id.*

52. *Id.*

53. Proposal for a Directive of the European Parliament and the Council on the Patentability of Computer-Implemented Inventions, COM (2002) 92 final, [hereinafter Proposal Regarding Patentability of Computer-Implemented Inventions].

54. Proposal Regarding Patentability of Computer-Implemented Inventions, *supra* note 53, recital 5.

55. See *Tauss 2002-03-12, Germany Must Say No to CEC/BSA Proposal and Epo Practise*, at <http://swpat.ffii.org/papers/eubsa-swpat0202/tauss020312/tauss020312.en.pdf> (last visited Jan. 17, 2003) (on file with the Rutgers Computer & Technology Law Journal).

56. Proposal Regarding Patentability of Computer-Implemented Inventions, *supra* note 53, art. 3.

57. *Id.*

58. Proposal Regarding Patentability of Computer-Implemented Inventions,

According to the above Directive, the Member States are instructed to ensure that a computer-implemented invention is patentable so long as it is of industrial application, new, and involves an "inventive step."⁵⁹ To satisfy the inventive step requirement, a computer-implemented invention must make a "technical contribution" meaning a "contribution to the state of the art in a technical field which is not obvious to a person skilled in the art."⁶⁰ The proposal provides that "[t]he technical contribution shall be assessed by consideration of the difference between the scope of the patent claim considered as a whole, elements of which may comprise both technical and non-technical features, and the state of the art."⁶¹

The potential effect of this regulation on patentability is far reaching. Under the proposal, it is possible that an invention that would normally be non-patentable under the EPC because it is not novel or original, will be patentable. Patentability of such an invention is possible if it has non-obvious technical contribution, particularly in the form of computer-implemented software. Under this regime, Internet-based business methods would be protected. As always, however, if there is no technical contribution, meaning computer implemented or technical, there is no patentable subject matter.

IV. THE IMPLEMENTATION OF THE SOFTWARE DIRECTIVE

On May 14, 1991, the European Council adopted Directive 91/250, which relates to the legal protection of computer programs (the "Software Directive").⁶² By defining a minimum level of protection, the Software Directive was intended to harmonize Member States' legal provisions regarding the legal protection of

supra note 53, art. 2(a).

59. Proposal Regarding Patentability of Computer-Implemented Inventions, *supra* note 53, art. 4, no. 1.

60. Proposal Regarding Patentability of Computer-Implemented Inventions, *supra* note 53, art. 2.

61. Proposal Regarding Patentability of Computer-Implemented Inventions, *supra* note 53, art. 4, no. 3.

62. Council Directive on the Legal Protection of Computer Programs, 91/250, 1991 O.J. (L 122), [hereinafter Software Directive].

computer programs.⁶³ Before the implementation of the Software Directive, there was a disparity among Member States' laws protecting the IP rights of computer programs.⁶⁴ In seven out of the then twelve Member States, no legislation expressly protected computer programs.⁶⁵

To achieve its aim of creating uniformity in copyright protection of computer programs, the Software Directive includes the following principles:

- (1) computer programs are considered literary works and, as such, are provided with copyright protection;⁶⁶
- (2) a protected person (or persons) is (are) specified (determination of authorship was largely left to the EU Member States);⁶⁷
- (3) authorization from the copyright holder is required for restricted acts;⁶⁸ and
- (4) special measures of protection (e.g., remedies) against restricted acts are provided.⁶⁹

Although only three Member States—Denmark, Italy, and the U.K.—met the January 1, 1993 implementation deadline, all have now adopted the required domestic laws, regulations, and administrative provisions.⁷⁰ The last to implement the required domestic laws was Luxembourg, on April 14, 1995.⁷¹ Since the Software Directive's adoption, Western Europe has witnessed a reduction in the piracy of computer programs from an average rate

63. *Id.*; see also Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, COM (2000) 199 final at 8, at http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000_0199en01.pdf (last visited Jan. 17, 2003) (on file with the Rutgers Computer & Technology Law Journal) [hereinafter Report on Effects of Directive 91/250].

64. See Report on Effects of Directive 91/250, *supra* note 63, at 5.

65. *Id.*

66. Software Directive, *supra* note 62, art. 1.

67. Software Directive, *supra* note 62, arts. 2, 3.

68. Software Directive, *supra* note 62, arts. 4, 6.

69. Software Directive, *supra* note 62, art. 7.

70. Report on Effects of Directive 91/250, *supra* note 63, at 7.

71. *Id.*

of 78 percent in 1990⁷² to 34 percent in 2000.⁷³ Following its success, the Software Directive has been used as a model in a large number of Central and Eastern European States as well as in Hong Kong, the Philippines, and Australia.⁷⁴

The most remarkable aspect of the Software Directive is the requisite level of originality it sets for copyright protection. The Software Directive synchronizes the level of originality necessary for a specific category of copyrightable work at the community level.⁷⁵ Specifically, a computer program "shall be protected if it is original in the sense that it is the author's own intellectual creation."⁷⁶ This uniform level has required twelve Member States to lower and three Member States to raise their threshold for granting protection.⁷⁷ For instance, German jurisprudence has abandoned its prior standards to determine the patentability of software, and currently applies the same criteria as the EPO.⁷⁸

Article 4 of the Software Directive establishes an exclusive distribution right to a computer program, subjecting it to Community exhaustion if sold in the Community.⁷⁹ Member States are not free to provide for such exhaustion with respect to computer programs since no provision in the Directive provides that a first sale outside the Community defeats the exclusive distribution right.⁸⁰ Denmark, Finland, the Netherlands, and Portugal have not implemented this implicit restriction of parallel imports of computer programs into the Community.⁸¹

Nine Member States have implemented verbatim, or in near

72. *Id.*

73. Sixth Annual BSA Global Software Piracy Study 2000, at 5, at <http://www.bsa.org/resources/2001-05-21.55.pdf> (last visited Jan. 17, 2003) (on file with the Rutgers Computer & Technology Law Journal).

74. Report on Effects of Directive 91/250, *supra* note 63.

75. *Id.* at 6.

76. Software Directive, *supra* note 62, art. 1, no. 3. The Software Directive states that "[n]o other criteria shall be applied to determine the eligibility for protection." *Id.*

77. See Report on Effects of Directive 91/250, *supra* note 63, at 8-9.

78. See *Landmark Decisions of the German Federal Supreme Court on the Patentability of Computer Software*, *supra* note 50.

79. Software Directive, *supra* note 62, art. 4.

80. See *id.*

81. See Report on Effects of Directive 91/250, *supra* note 63, at 11.

verbatim, all the mandatory provisions concerning the exceptions to the restricted acts contained in article 5 of the Software Directive.⁸² Article 5, section 1, provides that in the absence of specific contractual provisions, the restricted acts, with the exception of distribution and rental, do not require authorization by the copyright holder when using the computer program.⁸³ Most Member States have interpreted outside contracting to be permitted by article 5, section 1.⁸⁴ However, Member States vary with regard to the meaning of "lawful acquirer." Several Member States have transposed this notion by using the term "lawful user," defined as a person having a right to use the program.⁸⁵

All Member States permit individuals to make back-up copies of computer programs for their personal use.⁸⁶ Although private copying of computer programs was excluded from the scope of permissible exceptions by the Community legislator, some Member States have not expressly repealed their private copying exceptions. However, there is no evidence of major practical problems emanating from this omission.⁸⁷

The Member States have implemented article 6 of the Software Directive exception concerning the de-compilation.⁸⁸ Only six Member States omitted article 6, which is the only exception to be omitted thus far.⁸⁹ The possibility of de-compiling a program to make it interoperable with other programs was the subject of an intense debate, resulting in a pragmatic compromise. The compromise requires that the information for establishing interoperability be made available. To date, most licensing agreements reflect an acceptance of the Software Directive's de-compilation requirements.⁹⁰ However, there are licence agreements from some U.S. and European sources that are inconsistent with

82. *Id.* at 12.

83. Software Directive, *supra* note 62, art. 5, no. 1.

84. Report on Effects of Directive 91/250, *supra* note 63, at 12.

85. *Id.*

86. Software Directive, *supra* note 62, art. 5, no. 2.

87. See generally Report on Effects of Directive 91/250, *supra* note 63.

88. See *id.* at 13.

89. The six Member States are Austria, Denmark, Finland, Netherlands, Sweden and the U.K.

90. Report on Effects of Directive 91/250, *supra* note 63, at 15.

articles 5, 6, and 9 of the Software Directive.⁹¹

The duration of protection in article 8 of the Software Directive was repealed by article 11 (1) of Directive 93/98, which aimed to harmonize certain copyright protections laws ("Directive on Harmonizing Terms of Protection").⁹² The standardized copyright term is now 70 years *post mortem auctoris*. All Member States have complied with the terms of the Directive on Harmonizing Terms of Protection.⁹³

V. CONTRACT LAW AND COPYRIGHT IN THE EU

The application of contract law to copyright law and copyright related conflict has not been a central concern of European lawmakers. As the Commission states: "Contract law in the field of Intellectual Property rights has been left to national legislative provisions to a large extent."⁹⁴ Thus far, the European Community has adopted seven directives in the field of copyright and related rights. However, licensing contracts and contractual relations concerning copyright have not been subject to overall standardization within the European community.⁹⁵

Nevertheless, the first directives have affected copyright administration and licensing, as well as collective management. First, provisions of the Council Directive 92/100/EEC on rental and lending rights⁹⁶ refer to contractual relationships between performers, authors, and film producers.⁹⁷ The Directive on Harmonizing Terms of Protection does not address contract law as

91. *Id.*

92. Council Directive 93/98 of 29 October 1993 Harmonising the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9 [hereinafter Directive on Harmonizing Terms of Protection].

93. Report on Effects of Directive 91/250, *supra* note 63, at 15.

94. Communication from the Commission to the Council and the European Parliament on European Contract Law, 2001 O.J. (C 255) 1 [hereinafter Communication to the Council on European Contract Law].

95. *Id.*

96. Council Directive 92/100 of 19 November 1992 On Rental Rights and Lending Rights and on Certain Rights Related to Copyright in the Field of Intellectual Property, 1992 O.J. (L 346) [hereinafter Council Directive on the Field of Intellectual Property].

97. Council Directive on the Field of Intellectual Property, *supra* note 96, art. 2, nos. 4-7, art. 9, no. 4.

it relates to copyright.⁹⁸ As discussed above, the Software Directive affects contractual relationships by granting minimum rights to users.⁹⁹ For example, the right of any lawful user to make a back-up copy is non-waivable. Furthermore, program observation, study, or testing cannot be proscribed by contract.¹⁰⁰ Article 6 of the Software Directive renders any contractual provisions contrary to the de-compilation exception null and void.¹⁰¹

The Database Directive¹⁰² addresses contractual relationships by stating that the *sui generis* right may be transferred, assigned, or granted under contractual license.¹⁰³ Furthermore, article 8 of the Database Directive contains a provision similar to the user contract provisions found in the Software Directive.¹⁰⁴

Council Directive 93/83, which relates to satellite broadcasting and cable retransmission, states that broadcasting and cable retransmission rights should only be acquired by agreements, and stipulates mandatory administration by collecting societies.¹⁰⁵

The Artist's Resale Rights Directive addresses contractual matters by allowing the administration of rights to be entrusted to collecting societies.¹⁰⁶

The goal of the recent Info-Soc Directive¹⁰⁷ is not to provide for contract law in copyright disputes. Article 9 states: "This Directive shall be without prejudice to provisions concerning in particular . . .

98. See Directive on Harmonizing Terms of Protection, *supra* note 92.

99. Report on Effects of Directive 91/250, *supra* note 63, at 12.

100. Software Directive, *supra* note 62, art. 5.

101. Software Directive, *supra* note 62, art. 6.

102. Council Directive 96/9/EC of 11 March 1996 On the Legal Protection of Databases, 1996 O.J. (L 077) [hereinafter Database Directive].

103. Database Directive, *supra* note 102, art. 7, no. 3.

104. Database Directive, *supra* note 102, art. 8.

105. Council Directive 93/83 of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, arts. 3, 8, 9, 1993 O.J. (L 248).

106. Council Directive 2001/84 of 27 September 2001 on the Resale Right for the benefit of the Author of An Original Work of Art, art. 6, no. 2, 2001 O.J. (L 272) [hereinafter Artist's Resale Rights Directive].

107. Info-Soc Directive, *supra* note 9 (citation omitted).

the law of contract."¹⁰⁸ Recital 30 clarifies that the rights referred to in the Directive "may be transferred, assigned, or subject to the granting of contractual licenses, without prejudice to the relevant national legislation"¹⁰⁹

Nevertheless, the exemptions within the Info-Soc Directive, as well as the Software Directive and the Database Directive, raise questions regarding the interrelationship between contract law and copyright limitations. For instance, the exemptions do not clarify whether the terms of licenses can override the statutory limitations imposed upon copyrights. It should also be noted that the Info-Soc Directive does not touch upon contractual modifications of copyright exceptions, and there are no provisions against standard-form "buy out" contracts.¹¹⁰

In the near future, new provisions regarding general European action on contract law will be discussed. For example, still forthcoming is the Commission's Communication on Contract Law, a discussion about European contract law involving European Parliament, Council, and stakeholders.¹¹¹ Although copyright law is not expressly mentioned, European action on contract law may be included. For example, the appendix contains explanations on the 'acquis communautaire.'¹¹² The European Commission has asked Professor Hugenholtz of the Institute for Information Law of Amsterdam to write a descriptive study for the European Commission on Contract Law and Copyright.¹¹³

Professor Hugenholtz expected the final version of the report to be ready by the end of May 2002. Parties that wished to contribute to the debate were requested to submit their contributions. The

108. Info-Soc Directive, *supra* note 9, art. 9.

109. Info-Soc Directive, *supra* note 9, recital 30.

110. See generally Info-Soc Directive, *supra* note 9.

111. See generally Communication to the Council on European Contract Law, *supra* note 94.

112. *Reaction to the Communication on European Contract Law*, at 2, at http://europa.eu.int/comm/consumers/policy/developments/contract_law/comment_s/summaries/sum_en.pdf (last visited Jan. 17, 2003) (on file with the Rutgers Computer & Technology Law Journal).

113. Bulletin of The European Federation of Journalists, EURONEWS, (February/March 2001), at <http://www.ifj.org/publications/euronews/english/euronewsmarch.html> (last visited Jan. 17, 2003) (on file with the Rutgers Computer & Technology Law Journal).

reactions to the Communication on European Contract Law¹¹⁴ include reactions from media associations mentioning problems regarding the definitions of terms such as "equitable remuneration," and include strong support by the media sector for pure self-regulation. These parties' business depends on copyrighted material created by others.

The Commission has been asked by the Council to communicate the results of the consultation, if necessary, in the form of a Green or White Paper, to the Community institutions and the public by the end of the year 2002. This document will discuss whether contract and copyright law should be harmonised.

VI. RECENT DEVELOPMENTS REGARDING COLLECTING SOCIETIES

Recently, collecting societies have been a focal point of legal discussion in the European Union. Until the early 1990s, the issue of rights management had not been a preponderant concern. The consultation process initiated by the Green Paper On Copyright and Related Rights in the Information Society¹¹⁵ indicated a need to standardize some aspects of collective rights management at the European Community level.¹¹⁶

As a further step, in November 2000, a hearing was held by the Directorate-General for the Internal Market to discuss collective management and the administration of collective rights.¹¹⁷ A study pertaining to the collective exercise of rights in the European Union

114. *Reaction to the Communication on European Contract Law*, *supra* note 112.

115. *Green Paper on Copyright and Related Rights in the Information Society*, COM (95) 382 final 1995, at <http://europa.eu.int/scadplus/leg/en/lvb/l24152.htm> (last visited Jan. 18, 2003) (on file with the Rutgers Computer & Technology Law Journal).

116. Jorg Reinbothe, A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union, Address at 10th Annual Fordham Conference at International Intellectual Property Law and Policy, at http://www.europa.eu.int/comm/internal_market/en/intprop/news/reinbothe04-04-02.htm (last visited Jan. 18, 2003) (on file with the Rutgers Computer & Technology Law Journal) [hereinafter Reinbothe].

117. *Hearing on Collective Management-Conclusions (Brussels, 13-14 November 2000)* (Eur. Commission), at http://europa.eu.int/comm/internal_market/en/intprop/news/hearing.htm (last visited Jan. 18, 2003) (on file with the Rutgers Computer & Technology Law Journal).

commissioned by the Directorate-General for the Internal Market has been published (unfortunately not yet in English), which analyzes the role of collecting societies with regard to the European competition legislation. The authors draw the conclusion that a standardized framework is necessary and that legislation for this purpose should be proposed. To this end, a study must be commissioned to study the copyright licensing systems in the member states.¹¹⁸

To date, only two recitals within EU copyright legislation mention collecting societies. First, recital 17 of the Info-Soc Directive reads as follows: "It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules."¹¹⁹ Dr. Reinbothe explains that this regulation is the result of the European Parliament's opinion against collecting societies by the members concentrating on user's rights.¹²⁰ Second, recital 28 of the Artist's Resale Rights Directive,¹²¹ discusses the principles of efficiency and transparency as applied to collecting societies.

In 2001, Dr. Reinbothe announced that the Commission was still working on its internal analysis of the issue raised at the hearing, and that the Commission hoped to be in a position to finalize its analysis before the end of the year.¹²² At the Fordham Conference in April 2002, which was held in New York, Dr. Reinbothe argued that "the management and licensing of intellectual property rights, both individual and collective, has to be operational for the Internal Market to function properly."¹²³ As he explained, a Commission paper is currently being drafted to present the reflections on the legal framework for rights management in the European Market; the document covers both individual rights, as well as centralized or collective rights management.¹²⁴ But, for the time being, no

118. Bulletin of the European Federation of Journalists, Euronews, Dec. 2000 – Jan. 2001.

119. Info-Soc Directive, *supra* note 9, recital 17.

120. Reinbothe, *supra* note 116.

121. See Artist's Resale Rights Directive, *supra* note 105.

122. Reinbothe, *supra* note 116.

123. *Id.*

124. *Id.*

decision has been made regarding possible legislation or initiatives effecting collective management of rights at the European Community level.

Based on current trends, it is likely that another Directorate-General of the European Commission will soon focus on collecting societies. Indeed, the Competition Directorate-General is now focusing its attention on market-dominating owners of exclusive copyrights. The Commission has announced a preliminary examination of the collecting society's commercial practice in the case of a media group's claim against a collecting society. With its legal action at the European Commission, the media group RTL (CLT-UFA) claims that the German collecting society, called GEMA, is restraining competition with its licensing practice.¹²⁵ While GEMA only offers licenses for distinct regions, RTL pleads for an allocation not restricted to such geographic boundaries.¹²⁶

The Directorate-General for Competition obviously intends to solve conflicts between protection of intellectual property and competition in favor of freedom of competition. Due to the fact that the Commission has not yet dealt with this conflict, Alexander Schaub, head of the Directorate, describes the claim as "necessary" and "justified."¹²⁷ In Schaub's opinion, a legitimate exercise of intellectual property rights should not be questioned; however, review is necessary where the market can only be entered through the use of a single system, thus giving the copyright holder an enormous advantage.

Collecting societies have taken a step toward adapting to Internet activities. During the CISAC-Congress in Santiago de Chile in October 2000, the collecting societies, BMI, BUMA, GEMA, PRS, and SACEM, signed the "Santiago Agreement," which allows each society to licence each other's music on a world-wide basis.¹²⁸

125. *Brussels Wants to Feel GEMA on the Tooth*, at <http://www.heise.de/newsticker/data/em-13.10.01-000/> (last visited Jan. 18, 2003) (on file with the Rutgers Computer & Technology Law Journal).

126. *Id.*

127. *Id.*

128. Dr. Jurgen Becker, Santiago Agreement and "Fast Track," Speech at MIDEM in Cannes (Jan. 23, 2001), at <http://www.gema.de/cgi-bin/printview.pl?p=/engl/communication/news/n163/santiago.shtml> (last visited Jan. 18, 2003) (on file with the Rutgers Computer & Technology Law Journal).

Until this agreement was signed, one collecting society could entrust another society only for the exploitation of rights in its territory; users had to enter into license agreements with each collecting society in the countries where the works might be performed online. Now there is no longer any need for a content provider to obtain authorizations from different societies. Instead, world-wide licenses can be obtained only by the society of the country where the content provider has its actual and economic location.¹²⁹

VII. COMPATIBILITY OF THE EU COPYRIGHT DIRECTIVES

Copyright legislation in the EU was initiated in 1988 by the Green Paper on "Copyright and the Challenge of Technology."¹³⁰ The Green Paper identified six areas where the copyright laws of EU Member States should be standardized to enhance the functioning of the European Union Internal Market.¹³¹

Eventually, the EU adopted six copyright laws aimed at standardization: the legal protection of computer programs;¹³² rental rights, lending rights and the main neighbouring rights;¹³³ satellite broadcasting and cable retransmission;¹³⁴ the term of protection for authors' rights and neighbouring rights;¹³⁵ the legal protection of databases;¹³⁶ and the Artist's Resale Rights Directive. Now, all EU Member States have implemented these Directives into their national laws.

These six Directives are considered the "first generation" of Directives to address the need to harmonize EU copyright

129. *Id.*

130. *Id.*

131. Reinbothe, *supra* note 116.

132. Software Directive, *supra* note 62.

133. Council Directive 92/100 of 19 November 1992, on Rental Rights and Lending Rights and on Certain Rights Related to Copyright in the Field of Intellectual Property, 1992 O.J. (L 346) 61.

134. Council Directive 93/83 of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) 15.

135. *Id.*

136. Database Directive, *supra* note 102.

legislation.¹³⁷ They apply only to certain categories of works (e.g., software, databases) or rights (e.g., rental rights). Also, the Directives focus on a particular situation (e.g., satellite broadcasting and cable retransmission) or address a particular feature of protection (e.g., duration).

Two of these Directives must be viewed in relation to the new digital environment: (1) the Software Directive, which provides for a detailed regulation of temporary copies of computer programs;¹³⁸ and (2) the Database Directive, which regulates temporary copies and provides the sui generis copyright holders with a online transmission right.¹³⁹

In contrast to the first-generation Directives, the recently adopted Info-Soc Directive standardizes several essential economic rights of authors and the four groups of neighbouring copyright holders.¹⁴⁰ This Directive further addresses protection of technological measures, the rights of management information, as well as important aspects of injunctive relief.¹⁴¹ Member States were required to incorporate these provisions into their national laws by the end of 2002.¹⁴²

Compatibility problems between the different EU copyright Directives are less likely to arise among the different first generation Directives because they aim to standardize a specific area of copyright law. Therefore, the copyright directives have limited influence on other areas. Nevertheless, problems may arise between computer programs and databases due to the different rights and limitations granted by copyright law.¹⁴³ This is

137. Reinbothe, *supra* note 116.

138. Software Directive, *supra* note 62, arts. 4-5(1).

139. Database Directive, *supra* note 102, arts. 5, 6.

140. The most important provisions, in this respect, clarify the scope of the reproduction rights with regard to temporary copies and the granting of rights relating to the utilisation of protected content on the Internet. See Info-Soc Directive, *supra* note 9, arts. 2, 5, 3.

141. See Info-Soc Directive, *supra* note 9, arts. 6, 7.

142. Info-Soc Directive, *supra* note 9, art. 10.

143. The sui generis right for databases provides an online-transmission right, while the Software Directive does not grant an equivalent right. See Software Directive, *supra* note 62. Further, the exceptions providing for the exclusive rights for software differ substantially from the exclusive rights conferred upon databases.

particularly true since many multi-media products and services in the information society consist of protected software and databases.

The Directives take a "without prejudice" approach in this respect. A multimedia product or service (e.g., a *sui generis* protected electronic database containing separately protected works of authorship and a protected computer program) will enjoy different layers of protection. A multimedia product user can benefit only from the different exceptions and limitations to the exclusive rights, when its conditions are simultaneously fulfilled.

The problem associated with copyright protection's multiple layers also arises in the context of multimedia products and services, when these products and services are comprised of different types of works protected both by the horizontal Info-Soc Directive and other first generation Directives. In stating the scope of the Info-Soc Directive, article 1, number 2 provides that the "Directive shall leave intact and shall in no way affect existing Community [legislation] relat[ed] to . . . copyright and related rights."¹⁴⁴ Therefore, limitations to the exclusive rights regulated by the Info-Soc Directive cannot be applied to copyright protected software or databases, as long as the respective Directives do not recognize an equivalent limitation. Because the Info-Soc Directive provides several optional limitations that are not included in the Database or Software Directive, the beneficiaries of the "Info-Soc exceptions" are unable to take advantage of these benefits for products and services comprised of software or databases that are already protected.¹⁴⁵

Moreover, it is also unclear whether the mandatory exception for certain temporary copies from the reproduction rights as provided for in article 5, number 1, of the Info-Soc Directive also applies to protected software and databases. While the Database Directive and the Software Directive grant reproduction and temporary reproduction rights equivalent to those granted in article 2 of the Info-Soc Directive, the Database Directive, and Software Directive do not explicitly provide an exception clause. Thus far, neither the wording of article 5, number 1, nor the recitals of the Info-Soc Directive provide clear answers. Recital 21 merely states that "the

144. See Info-Soc Directive, *supra* note 9, art. 1, no. 2(d).

145. See generally Info-Soc Directive, *supra* note 9.

scope of . . . acts covered by the reproduction right" should be defined "in conformity with the *acquis communautaire*."¹⁴⁶ However, these statements seem to relate to the adoption of the broad definition of the reproduction right as found in the Software and Database Directives.¹⁴⁷

Therefore, it seems that one needs to rely on the general rule contained within article 1, number 2, of the Info-Soc Directive, which provides that the new Directive does not affect existing community legislation in the field of copyright.¹⁴⁸ Because the reproduction right exceptions provided for in the Software and Database Directives are considered exhaustive, one can conclude that the exception of certain temporary copies does not apply to protected databases and software. Again, this poses difficulties and uncertainties when a multimedia product or service is subject to acts covered in article 5, number 1, of the Info-Soc Directive.¹⁴⁹

Article 3 of the Info-Soc Directive contemplates a new economic right by making protected material available to the public in a network environment.¹⁵⁰ While the Database Directive contained a similar right for the *sui generis* protected subject matter,¹⁵¹ the Software Directive did not. Since the adoption of the Software Directive in 1991, the distribution of software via the Internet has become a major market force, making it difficult to apply article 3 of the Info-Soc Directive to copyright-protected software. How far can article 3 of the Info-Soc Directive apply to software protected by copyright? In this case, article 4 of the Software Directive, which states that "the exclusive rights . . . shall *include* the right to do or to authorize" cannot be considered exhaustive.¹⁵² Furthermore, article 1 of the Software Directive obligates Member States to "protect computer programs, by copyright, as literary works . . ."¹⁵³ The Info-Soc Directive does not impede this result

146. Info-Soc Directive, *supra* note 9, recital 21.

147. Thereby including temporary copies equivalent to the corresponding rights granted by the Software and Database Directives.

148. Info-Soc Directive, *supra* note 9, art. 1, no. 2.

149. See Info-Soc Directive, *supra* note 9, art. 5, no. 1.

150. Info-Soc Directive, *supra* note 9, art. 3.

151. Database Directive, *supra* note 102, art. 7, no. 2(b).

152. Software Directive, *supra* note 62, art. 4 (emphasis added).

153. Software Directive, *supra* note 62, art. 1.

because the application of the "making available" right to protected software "leaves intact" and "in no way affects" the provisions of the Software Directive.¹⁵⁴

A final issue regarding the compatibility of the EU's copyright directives concerns the different forms of protection for technological measures. In article 6 and 7 of the Info-Soc Directive, the EU legislature included a provision to "provide adequate legal protection against the circumvention of any effective technological measures . . ."¹⁵⁵ This had the practical effect of implementing regulations similar to those adopted in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in 1996.¹⁵⁶

The application of the provisions from the new EU Directive is subject to an important limitation. According to article 1 and recital 50 of the Info-Soc Directive, the protection offered by article 6 does not affect the specific provisions of the Software Directive that address the circumvention or removal of technical protection devices on copyrighted software.¹⁵⁷ Thus, article 6 does not affect the legal protection of "technological measures used in connection with computer programs" as this is "exclusively addressed" in the Software Directive.¹⁵⁸ Article 7, section 1, of the Software Directive obligates Member States to provide "appropriate remedies" against a person "putting into circulation, or the possession for commercial purposes 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."¹⁵⁹

Therefore, several issues of compatibility between the EU copyright directives must be solved by either national legislatures or the judiciary. The implementation of the Info-Soc Directive provides a good opportunity for Member States to do so.

154. Info-Soc Directive, *supra* note 9, art. 1, no. 2.

155. Info-Soc Directive, *supra* note 9, arts. 6, 7.

156. See World Intellectual Property Organization Homepage, at <http://www.wipo.org/treaties/ip/wct/index.html> (last visited Jan. 18, 2003) (on file with the Rutgers Computer & Technology Law Journal).

157. See Info-Soc Directive, *supra* note 9, art. 1, recital 50.

158. *Id.*

159. Software Directive, *supra* note 62, art. 7.

VIII. APPLYING EU LEGISLATION ON DESIGN PROTECTION TO GRAPHICAL USER INTERFACES AND ICONS

In October 1998, the European Legislature adopted a Directive harmonizing the national laws on the protection of designs within the community (the "Design Directive").¹⁶⁰ The Design Directive was followed in December 2001 by a Regulation on Community designs providing for a community-wide exclusive design right (the "Community Design Regulation").¹⁶¹ These legislative measures provide new means to protect the "look and feel" of graphical user interfaces of computer programs or websites. Because the graphical user interface is the program's front door to the world, most users perceive it as one of the major characteristics of a computer program. The copyright holders of protected software have a great incentive to ensure that the graphical user interface is not being copied or imitated by competitors.

Although article 1 of the Software Directive ensures copyright protection for any form of expression contained in a computer program, copyright protection cannot prevent others from independently developing the same form of expression.¹⁶² Therefore, copyright laws do not protect against the independent creation of an identical or substantially similar graphical user interface or a particular icon. However, the Design Directive and the Community Design Regulation may provide interesting alternative forms of protection for graphical user interfaces.

IX. A BRIEF OVERVIEW OF THE CRITERIA USED TO PROTECT REGISTERED OR UNREGISTERED DESIGNS AS SET FORTH BY THE RECENT EU LEGISLATIVE MEASURES

The requirements for design protection in the Design Directive and in the Community Design Regulation address registered designs.¹⁶³ Both the Design Directive and the Community Design

160. Council Directive 98/71 of the European Parliament and of the Council of 13 October 1998 On the Legal Protection of Designs, 1998 O.J. (L 289) 28 [hereinafter Design Directive].

161. Council Regulation 6/2002 of 12 December 2001 on Community Designs, 2002 O.J. (L 3) 1 [hereinafter Community Design Regulation].

162. See Software Directive, *supra* note 62.

163. See Community Design Regulation, *supra* note 161. The regulation

Regulation define "design" as the "appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation."¹⁶⁴ The graphical user interface defines the appearance of the underlying computer program and therefore can be classified as protectable subject matter. A design shall be protected by a design right to the extent that it is "new and has individual character."¹⁶⁵

The two essential prerequisites, "novelty" and "individual character," are identically defined in both the Directive and the Regulation.¹⁶⁶ First, a design shall be considered "novel" if no identical design has been made available to the public before the date the application was filed, or, if priority is claimed, the date of priority in the case of a registered Community design.¹⁶⁷ The relevant date for unregistered community designs is the date it was first made available to the public. Designs will be deemed "identical" if their "features differ only in immaterial details."¹⁶⁸

Second, a design shall be considered to have "individual character" if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any publicly available design.¹⁶⁹ When assessing the individual character, it is necessary to take into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it

differs with regard to unregistered designs. First, the time for considering a design's novelty and individual character is the date that the design's protection was first claimed and made available to the public, not the filing date. While the three year term of protection for unregistered community designs is much shorter than the five year term of protection for registered Community designs there is no difference concerning the substantial requirements for design protection.

164. See Community Design Regulation, *supra* note 161, art. 3.

165. See Community Design Regulation, *supra* note 161, art. 4; see also Design Directive, *supra* note 160.

166. See Design Directive, *supra* note 160, arts. 4, 5; see also Community Design Regulation, *supra* note 161, arts. 5, 6.

167. See Design Directive, *supra* note 160, art. 4; see also Community Design Regulation, *supra* note 161, art. 5.

168. See Design Directive, *supra* note 160, art. 4; see also Community Design Regulation, *supra* note 161, art. 5.

169. See Design Directive, *supra* note 160, art. 5; see also Community Design Regulation, *supra* note 161, art. 6.

belongs.¹⁷⁰ The relevant time for this assessment is either the application's filing date or, if a priority is claimed, the date of priority; or, in case of an unregistered Community design, the date on which the design for which protection is claimed has first been made available to the public. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.¹⁷¹ The Directives expressly state that protection does not hinge on the design possessing an aesthetic quality.¹⁷²

The two main conditions for receiving design protection—i.e., novelty and individual character—will most likely limit the level of protection for graphic user interfaces and icons.¹⁷³ Any user interface which, by its overall impression, can be considered to belong to the known state of the art, or which does not differ from this standard, cannot be protected.¹⁷⁴ In these instances, the user interface is similar to that which is commonly used on the market. The company producing the underlying software will not have a strong interest in protecting its user interface against the independent development of an identical design.¹⁷⁵ However, a new and distinctive user interface will qualify for design protection. Therefore, the rightholder can prevent imitations of its innovative design because the novelty and individual character conditions required to receive design protection are satisfied.¹⁷⁶ The Regulation also limits the rights of unregistered community designs to prevent the copying of their designs.

Consequently, one may conclude that the European legislative

170. See Design Directive, *supra* note 160, recital 13; see also Community Design Regulation, *supra* note 161, recital 14.

171. See Design Directive, *supra* note 160, art. 5; see also Community Design Regulation, *supra* note 161, art. 6.

172. See Design Directive, *supra* note 160, recital 14; see also Community Design Regulation, *supra* note 161, recital 10.

173. See Design Directive, *supra* note 160, art. 3; see also Community Design Regulation, *supra* note 161, art. 4.

174. See Design Directive, *supra* note 160, art. 3; see also Community Design Regulation, *supra* note 161, art. 4.

175. See Design Directive, *supra* note 160, art. 3; see also Community Design Regulation, *supra* note 161, art. 4.

176. See Design Directive, *supra* note 160, art. 10; see also Community Design Regulation, *supra* note 161, art. 19, no. 1.

measures regarding design protection provide a type of protection for graphical user interfaces that is foreign to copyright law. Since the design is the protected subject matter, the independent development of an identical or substantially similar design can be prohibited. On the other hand, the user interfaces of many software products will not satisfy the novelty and individuality criteria.¹⁷⁷ However, products that incorporate a new and innovative user interface that are typically targets of imitators can avail themselves of this new law to deter others from making copies or imitations.

X. THE NEW "DOT EU" TOP-LEVEL-DOMAIN

The recently published Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain ("Regulation 733/2002") marks the first legal step towards the establishment of the .eu top level domain.¹⁷⁸ The main issues addressed in Regulation 733/2002 are the organization of the Registry and the policy framework for registration.¹⁷⁹ During the early part of 2000, the Commission posed several questions in order to determine whether there was a need for a new Top-Level-Domain ("TLD") and registration policy. The result of this inquiry was the first proposal for a Regulation in late 2000.¹⁸⁰ The recently enacted Regulation will remain effective through the beginning of 2003, at which point enterprises, public institutions, and private persons will be able to register their domain names within the new TLD.

To expedite the process, European registrars have already applied for the delegation of the ".eu" TLD with the Internet Corporation for Assigned Names and Numbers ("ICANN") (despite the newly enacted regulation the future Registry will still have to structure a contract where ICANN manages the Internet's worldwide addressing system, and will include the TLD in the root

177. *Supra* notes 167-173.

178. Council Regulation 733/2002 of the European Parliament and of the Council of 22 April 2002 on the Implementation of the .eu Top Level Domain, 2002 O.J. (L 113) 1, 2 [hereinafter Regulation 733/2002].

179. *See* Community Design Regulation, *supra* note 161, arts. 3, 4, 5.

180. Proposal for Regulation of the European Parliament and of the Council on the Implementation of the Internet Top Level Domain ".eu," COM (2000) 827 final, Dec. 12, 2000.

zone made accessible to all Internet users). Regardless of ICANN's involvement, the ".eu" TLD will remain with the Commission because ICANN already agreed to set aside ".eu" for possible future delegation and supports the commission's initiative that the ".eu" TLD be used by European officials.¹⁸¹

During the development of the Regulation, European registrars demanded a registration procedure that was simple and adopted the principles of non-interference, self-management, and self-regulation.¹⁸² The current system is a general balance of powers between the Registry and the Commission. While it entitles the Commission to adopt general policy rules concerning the implementation and functions of the ".eu" TLD, as well as the general policy on registration; other implementation measures are reserved for the Registry.

The first draft of the Regulation stated that the Commission should be consulted for any aspect of the registration policy; however, the Council suggested reducing the Commission's possible influence and created regulations that provide a detailed framework for the Registry.¹⁸³ Some principles added by the Council include: an extra-judicial settlement of conflicts,¹⁸⁴ the implementation of a sunrise period, and the creation of a list with geographical and geopolitical terms that either cannot be registered as domain names or can be registered only under a second level domain according to the public policy rules.¹⁸⁵ This list will be established by the Member States who will have the right to veto some terms.

The Council further demanded more detailed definitions of the characteristics and obligations of the Registry and a clearer differentiation between the Registry and the future registrars of the ".eu" TLD.¹⁸⁶ One such regulation is that the entrusted

181. *See* Community Design Regulation, *supra* note 161, recital 14.

182. *See* Community Design Regulation, *supra* note 161, title IV.

183. Common Position 9/2002 adopted by the Council on 6 November 2001, 2002 O.J. (C 45E) 53, 55.

184. *Id.* The regulation that Registry decisions should be subject to the Member State jurisdiction of Registry establishment was deleted.

185. Common Position 9/2002, *supra* note 183, art. 5; Regulation 733/2002, *supra* note 178, art. 5.

186. Common Position 9/2002, *supra* note 183, art. 5.

organization itself cannot act as a registrar; non-profit organizations will be entrusted with the task.¹⁸⁷

The Council and the Parliament further clarified that there will be no sub-domains.¹⁸⁸ To keep the national governments' influence on the Registry in check, an advisory board would be established consisting of representatives of consumer organizations, industrial and trade unions, and public institutions.¹⁸⁹ In particular, the European Parliament demanded implementation and strengthening of the "first come, first served" principle.¹⁹⁰ However, the Commission opted for reducing this principle according to the principle of subsidiary,¹⁹¹ while the Council completely opposed implementing it directly into the Regulation.¹⁹² As a result, the principle was included only in the Recitals and it was partly integrated in article 5, stating that a sunrise period exists for holders of prior rights to register their domain names before the public registration process begins.¹⁹³

Future actions will include publication of a call for expressions of interest and designation of the Registry to set up a detailed registration policy. Then, two contracts will need to be drafted: the first limited in time and renewable between the Commission and the Registry in order to specify the conditions for the organization, administration, and the management of the ".eu" TLD; and the other between the Registry and ICANN to obtain clearance for the former from the latter to operate the new addressing space. Following a sunrise period for holders of prior rights, the public registration of domain names under the TLD .eu can begin in 2003.

187. Opinion of the Economic and Social Committee on the "Proposal for a Regulation of the European Parliament and of the Council on the Implementation of the Internet Top Level Domain '.EU,'" 2001 O.J. (C 155) 10.

188. See Report on the Proposal for a European Parliament and Council Regulation on the Implementation of the Internet Top Level Domain ".EU", 2001 A5-0226, amend. 7, at 8 [hereinafter Report on Proposal].

189. Report on Proposal, *supra* note 188, amend. 18.

190. Report on Proposal, *supra* note 188, amends. 23, 32.

191. Amended Proposal for a Regulation of the European Parliament and of the Council on the Implementation of the Internet Top Level Domain ".EU," COM (2001) 535 final at 5-6.

192. Common Position 9/2002, *supra* note 183, art. 5.

193. Regulation 733/2002, *supra* note 178, recital 20, art. 5.

XI. CONCLUSION

The purpose of this Article is to provide a survey of emerging issues in the field of intellectual property law. As stated above, it is a much larger task to discuss all intellectual property related issues existing within the European Community. My research reveals that there are numerous issues that warrant additional attention from the European Commission. For instance, the European Commission should develop a defined choice of law rule for copyright infringements occurring via the Internet. The Commission should also address the patentability standard for computer-implemented inventions. Similarly, the European Community would be better served by a standardization of law affecting licensing contracts. I look forward to following the European Community's efforts to legislate in the field of intellectual property law, and create legal principles of uniform applicability amongst the European Union's Member States.