then ruled that requiring the candidate to take the ENSP entrance examination must be regarded as going beyond what was necessary in order to achieve the objective of selecting best candidates in the most objective conditions possible and therefore could not be justified in the light of EC Treaty provisions.[56] Whatever regime the French come up with will have to ensure that foreign candidates are placed and ranked appropriately in the list which entitles individuals selected to choose their posting and which the ENSP draws up on the basis of their final examination results. France was thus precluded from requiring EU nationals to pass examinations such as the ENSP entrance examination.[57]

The clear implication of the case is that the death knell has rung for single mode of access examinations for regulated sectors as they fail to take account of potential migrant applicants' qualifications. This will cause some upheaval in continental Europe where access to the public service is often predicated on competitive entry examinations.

All in all most developments for the period under review have come from litigation rather than legislation.

JULIAN LONBAY*

III. INTELLECTUAL PROPERTY

A. Introduction

EC intellectual property law has now reached a significant level of harmonization, and the Community can take pride in its achievements in this respect. The need to report a wealth of new matters leaves little space for introduction. However, two issues may be highlighted here briefly. The first is that in May 2004 ten new Member States will join the EU. Although enlargement offers immense opportunities, it also presents a considerable practical challenge. The second is the Commission's plan for a directive to harmonize procedure and remedies for intellectual property infringement throughout the EU.[1] It seeks to go further than the ground rules on enforcement already laid down by TRIPs, and to lay down specific procedural codes for intellectual property infringement of all types—not merely piracy and counterfeiting. This enthusiasm for intervention in the procedural aspects of national law has raised serious concerns in some quarters.

the ENSP. Admittedly the scheme would not apply to Community nationals without adjustments and it also presupposes that candidates had sat an earlier competition for public service which would not be the case with a Community national. According to the Court, the alternative regime showed that alternative modes of recruitment were possible which were less restrictive than the ENSP exam and which would allow qualified candidates to have their specific qualifications taken into account. Ibid, at §§106–9.

[56] Ibid, para 110.

[57] Ibid, para 111.

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[1] Proposal for a Directive of the European Parliament and of the Council on Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights: COM (2003) 46 final, 30 Jan 2003.

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Although efficient solutions are certainly needed in some areas, it is important that the wider impact on national systems is given due weight.[2]

B. Copyright

1. Accession of the EC to the WIPO 'Internet' Treaties Still Pending

The two World Intellectual Property Organisation (WIPO) Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) entered into force in 2002.[3] The Treaties include new rights of distribution and electronic 'making available', provisions on copy-protection devices and unauthorised removal of rights management information, and provisions obliging parties to provide effective procedures and remedies against infringement of rights. This represents a very significant achievement, both in terms of the improvements to the substantive protection of copyright and related rights, and in terms of the international co-operation required to implement this forward-looking scheme.

Nevertheless, with over 120 delegations, compromises in some areas were inevitable. Furthermore, in some areas no agreement was possible. Audio-visual performances were not included in the WPPT: the chasm between those national regimes that protect neighbouring rights and those that do not could not be bridged, despite considerable effort. Although a resolution was passed, calling for an 'Audio-visual Protocol' to be adopted at a future Diplomatic Conference, the issue remains deadlocked. Another controversial issue is the appropriate level of protection for databases, particularly those that result from significant investment but lack the level of creativity required to trigger copyright protection. A separate Database Treaty was contemplated, but time pressures led to deferral of negotiations. There remains significant political resistance to the protection of 'non-original' databases, and agreement at a multilateral level still seems a considerable way off.[4] Of course the Community remains free to legislate for EU-wide protection on these matters, and it has already done so (separately discussed below).[5]

The Community had declared during the 1996 Diplomatic Conference that it intended to ratify both the WCT and the WPPT, and to deposit its ratification instruments simultaneously with those of its Member States; the first time that the Community would become a party to an international copyright treaty in its own right.[6] Although some of the obligations under these treaties were already met by existing Community legislation, others entailed changes. The 'Information Society' Directive

[2] See WR Cornish, J Drexel, R Hilty, and A Kur 'Procedures and remedies for enforcing IPRs: the European Commission's proposed Directive' [2003] EIPR 447.

[3] Adopted Geneva 1996. It was agreed, very unusually, that each Treaty would only come into force three months after 30 instruments of ratification had been deposited. The text of both treaties may be found at <http://www.wipo.int/treaties/ip/wct/index.html>. See also J Reinbothe and S von Lewinski 'The WIPO Treaties 1996: Ready to Come into Force' [2002] EIPR 199.

[4] For details see J Reinbothe and S von Lewinski *The WIPO Treaties 1996* (2002); S von Lewinski, 'The WIPO Diplomatic Conference on Audiovisual Performances: A First Résumé' [2001] EIPR 333.

[5] Directive 92/100 on rental right and lending right, OJ 1992 L346/61; Directive 93/83 on satellite broadcasting and cable retransmission, OJ (1993) L248/15; Directive 96/9 on the legal protection of databases, OJ (1996) L77/20.

[6] Council Decision 2000/278, OJ (2000) L89/6.

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was therefore adopted (following intense lobbying) in May 2001.[7] An ambitious project, it sought to render the new obligations into practical form, and to do so in a way that was coherent in terms of existing EC law. The implementation timetable was tight, but debate and controversy added considerably to the pressure on individual legislatures. Of the fifteen Member States, thirteen were unable to meet the December 2002 deadline for the Directive's implementation, causing considerable anxiety in the Commission.[8]

2. The 'Information Society' Directive

Although implementation of the WIPO treaties was a crucial objective of the new Directive, the intention was also to provide a more harmonized framework for copyright and related rights in the information society. The Directive therefore provided for the harmonization of three important rights; the rights of reproduction, communication to the public (making available) and distribution.[9] There is an exhaustive list of twenty permissible exceptions, and a single mandatory exception—for certain temporary copies.[10] The mandatory exception covers transient or incidental copies made as an inevitable result of digital technology, whose sole purpose is to enable transmission in a network by an intermediary or lawful use of a work. One intention was to prevent Internet browsing from constituting copyright infringement. The boundaries of the exemption were hotly contested, and case law may yet be needed to determine their precise position for practical purposes.[11] There is also some concern because this exception does not apply to computer programs or databases, and the Commission is committed to monitoring the situation. Very considerable discretion has been left to the Member States, both as to which exceptions are implemented, and as to the manner in which they are implemented.[12] The objective of harmonization is significantly compromised in this respect, and the resulting matrix of protection might reasonably be perceived by users as somewhat chaotic.

Also highly controversial was the implementation of the requirement to provide adequate legal protection against the circumvention of technological measures used by right-holders to prevent unauthorized acts.[13] The 1998 US Digital Millennium Copyright Act enacted similar anti-circumvention provisions, causing difficulties even for legitimate users of copyright works. The concern is that technical measures could be used to prevent any use of copyright works, whether that use was in itself lawful or

[7] Directive 2001/29 on Copyright and related rights in the Information Society, OJ (2001) L1767/10.

[8] The exceptions were Denmark and Greece. See also the Commission statement on the implementation of the Directive on copyright and related rights in the information society (published 29 Oct 2002). Enforcement proceedings were threatened in summer 2003, but have not materialized.

[9] Arts 2, 3, and 4.

[10] Art 5. See B Hugenholtz [2000] EIPR 482.

[11] The United Kingdom, for example, has implemented the provision essentially *verbatim*—doubtless a prudent decision, but not one that enhances our understanding of the exception.

[12] To take just a single example, several of the permitted exceptions are made subject to a requirement of 'fair compensation'. All Member States except the United Kingdom had existing levy systems, and it will be interesting to see how these provisions dovetail. The Directive offers a guideline rather than a definition (Recital 35).

[13] WCT Art 11, implemented by Art 6 of the Directive.

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unlawful. Thus right-holders might (for example) use technical measures to prevent copying which would otherwise fall within one of the permitted exceptions to copyright, or even to prevent a work from falling into the public domain at the expiry of the copyright term.[14] The US debate soon encompassed wider issues such as freedom of speech, and fears were expressed as to the chilling effect on innovation and competition. The parallel provision of the Directive provoked similar strong responses throughout the EU. Even though it requires that Member States will take 'appropriate measures' if such problems arise, the vague wording has done little to allay the fears of the user community.[15]

Admittedly the Directive addresses issues on which there are strong and divergent sets of views and interests, and no solution could satisfy all. Nevertheless, the responsibility for setting a fair and appropriate balance rests with the legislature. Although the Directive achieves much that is commendable, many nettles remain to be grasped.

3. Other Copyright Matters

The Directive on Artists' Resale Right has finally been adopted, and is due for implementation by 1 January 2006.[16] The right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art, by enabling them to receive consideration for successive transfers of their work. It extends to all acts of resale by an art market professional following the first transfer by the artist.[17] The right is to a royalty based on the sale price obtained, although the maximum payable is €12,500.[18] The royalty is payable by the seller, to the author of the work or those entitled under him or her. The right is coterminous with the ordinary copyright term—the author's life plus 70 years. There was considerable opposition to the Directive from a number of Member States (including the United Kingdom) who feared that art sales would be diverted from European auction houses to countries (such as the United States and Switzerland) where no such rights exist. As a result the period allowed for implementation is unusually generous, and those Member States which do not presently apply a resale right may restrict application of the right to living artists (thus, not their heirs) for an additional four years. Given this long catalogue of limits and qualifications, the Directive offers only a half-hearted endorsement of that dignified continental concept, *droit de suite*.

[14] For one view see Electronic Frontier Foundation 'Unintended Consequences: Five Years under the DMCA': <http://www.eff.org/IP/DMCA/ unintended_consequences.php>.

[15] Art 6.4.1: 'Member States shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law . . . the means of benefiting from that exception or limitation . . .'.

[16] Directive 2001/84 on the resale right for the benefit of the author of an original work of art, OJ (2001) L272/32. It was first published in 1996.

[17] The category 'art market professional' includes art dealers, auctioneers, and galleries, whether acting as seller, buyer, or intermediary: Art 1(2). However, the resale right does not apply to direct transactions between individuals acting in their private capacity without the participation of an art market professional, or to acts of resale by persons acting in their private capacity to museums which are not for profit and are open to the public (Recital 18).

[18] The minimum sale price above which the right must apply is €3,000. Art 4 set the royalty according to bands: 4 per cent for the portion of the sale price up to €50,000; 3 per cent from €50,000.01 to €200,000; 1 per cent from €200,000.01 to €350,000; 0.5 per cent from €350,000.01 to €500,000; 0.25 per cent above €500,000.

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Greater consensus on the desirability of harmonized rental and lending rights allowed the EC to adopt a far less compromising approach in that field. The Rental Rights Directive granted authors and performers an unwaivable right to equitable remuneration for rental, and a right to equitable remuneration for use of a commercial phonogram (to be shared between performers and producers).[19] The Directive offered no definition of 'equitable remuneration'. Understandably, given the likely tangle of interests, the precise details were left for determination at national level. This approach was confirmed recently in *SENA*. The ECJ stressed that the concept of equitable remuneration must be interpreted uniformly in all Member States, though it is for each Member State to determine the most appropriate criteria for assuring adherence to that Community concept.[20]

Finally in the broad context of rental rights, the publication of the Commission's report on the public lending right (PLR) should be noted.[21] The Rental Rights Directive provided for a very elementary degree of harmonization, and required the Commission to report by July 1997. The report did not appear until September 2002, following considerable delays in implementation by Member States. The report expresses concern that PLR is not applied properly or uniformly in Member States, and states that even the minimal harmonization of PLR required by the Directive does not appear to have been achieved.

C. Patents and Know-How

The Community continues to make significant progress towards the implementation of the Community Patent. In March 2003 the Council reached agreement on the text of a 'common political approach', which lays out the main principles of the Community patent.[22] Applicants will be able to obtain a single unitary patent valid throughout the EU, at a cost likely to be around half the present cost of obtaining equivalent protection. The language regime is that of the European Patent Convention (EPC) until grant, but after grant of the patent the applicant will have to file a translation of the claims into all official Community languages. The European Patent Office (EPO) will have a central role in the administration of the Community Patent, and will alone be responsible for examination of applications and grant. The national patent offices will advise applicants and forward applications to the EPO, and may have a role in supporting the EPO with searches in relevant languages. A Community Patent Court is to be established in Luxembourg by 2010 (as a panel attached to the Court of First Instance), and will have centralized jurisdiction over disputes. It had proved extremely difficult to reach unanimous agreement on both jurisdictional and linguistic arrangements, so the political breakthrough is welcome.

[19] Directive 92/100 (above n 5), Arts 4 and 8(2).

[20] C-245/00 *Stichting Ter Exploitatie van Naburige Rechten (SENA) v Nederalndse Omroep Stchting (NOS)* [2003] ECDR 12. Netherlands law allowed representatives of performing artists and phonogram producers to determine the amount of equitable remuneration by mutual agreement, and failing that to allow the national court to determine it—an approach described by the Court as 'very protective of the parties and at the same time consistent with Community law' (Para 45).

[21] Report from the Commission . . . on the public lending right in the European Union: COM (2002) 502 final.

[22] Agreement on Presidency proposal for Common Political Approach (3 Mar 2003), 7159/03 <http://register.consilium.eu.int/pdf/en/03st07st07159en03.pdf>.

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The text of the proposed Regulation on the Community Patent has been revised to incorporate the common political approach.[23] Revision to the EPC will be necessary to allow the EPO to issue Community Patents, and the Council has issued proposals for this.[24] A Diplomatic Conference of all the EPC contracting States will be required to approve such changes, and the revised convention ratified. It therefore seems unlikely that applications for the Community Patent will be possible before perhaps 2007 or 2008.

The proposals for a directive concerning a harmonized approach to utility models have been mentioned in several previous notes—an indication of the extreme difficulty of moving forward in this area. In 2001, however, the Commission undertook a consultation exercise on the impact of a unitary Community utility model.[25] There were comparatively few responses, and over three-quarters of these were opposed to the idea. Most of those opposed thought that the initiative should be abandoned, although some were in favour of resuming work towards harmonizing the regimes in Member States. Perhaps the subject will be revisited once the Community Patent is established.

The proposed directive on software patents is making better progress.[26] Currently computer-implemented inventions can be patented by applying either to the EPO or to national patent offices. Although national patent laws should be consistent with the EPC, there is no unifying structure to bind the national courts, so in practice the detailed conditions for patentability vary. The lack of legal certainty is widely regarded as very damaging, so the proposal is intended to clarify the existing law. No attempt is to be made to amend the EPC's position on the unpatentability of business methods, although many such patents have been granted in the United States.

D. Other

A new system has been created for protecting designs in Europe. A regulation adopted in December 2001 created two forms of Community design rights.[27] It provides for registered and unregistered Community Designs, which will be enforceable in all the Member States. Both registered and unregistered designs must meet the same criteria, of novelty and individual character. Unregistered design protection came into force on 6 March 2002. From that date all qualifying designs automatically receive EU wide protection, lasting 3 years from the first public disclosure of the design. The new

[23] Text published by the Council 11 June 2003, <http://register.consilium.eu.int/pdf/en/03/st10/st10404en03.pdf>.

[24] Presidency proposal—Revision of the European Patent Convention to accommodate the Community Patent, 10958/03 <http://register.consilium.eu.int/pdf/en/03/st10/st10958en03.pdf>..

[25] Commission Consultation on the impact of the Community utility model in order to update the Green Paper on the protection of utility models in the single market, SEC (2001) 1307. Summary report of replies to the questionnaire on the impact of the Community utility model with a view to updating the Green Paper on protection by the utility model in the internal market: <http://europa.eu.int/comm/internal_market/en/indprop/model/utilreport_en.pdf>.

[26] Proposal for a directive on the patentability of computer-implemented inventions COM (2002) 92. The Council Presidency compromise proposal is at <http://register.consilium.eu.int/pdf/en/02/st13/13168en2.pdf>. The proposal is subject to the co-decision procedure. The Legal Affairs Committee of the European Parliament approved a revised draft in June 2003, and in September the Parliament adopted text for the proposed directive.

[27] Regulation 6/2002 OJ (2002) L3/1. See also the Implementing and Fees Regulation (Regulation 2245/2002 (OJ (2002) L341/28) and Regulation 2246/2002 (OJ (2002) L341/54) respectively).

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unitary Community Design right, administered by OHIM, has been effective since 1 April 2003. The application procedure is straightforward. The examination process itself is intended to be nominal, only covering formalities, and will not involve checks on substantive issues. There is no provision for opposition before registration; the means of challenge will involve an application to OHIM for a declaration of invalidity after registration and publication. Holders of registered designs will have exclusive rights to use the design concerned, and will be protected against both deliberate copying and the independent development of a similar design. In contrast, with an unregistered right there is only infringement where the original design has been copied. Registration will last for a maximum of 25 years from filing, with renewal fees due every five years. National design protection, as harmonized by the old Design Directive,[28] will continue to exist in parallel with Community design protection. The array of possibilities for design protection is not merely increased by the Community regime, it is positively enhanced. It is already proving popular.[29]

The Database Directive has been in force since 1 January 1998,[30] and cases on the subject are beginning to be reported. It creates a *sui generis* right, granted to the maker of a database that shows 'substantial investment' of various forms. The right is to prevent 'extraction and/or reutilisation' of 'the whole or of a substantial part' of the database.[31] It has proved difficult for national courts to apply these terms, and several references to the ECJ are pending.[32] The policy issues are contentious. If the ambit of protection is drawn too widely there is a risk that important sources of information may be monopolized. Yet on the other hand, there is little incentive to invest in the production of a database which may be freely utilized by others. The correct balance is, once again, difficult to find.[33]

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IV. CITIZENSHIP AND HUMAN RIGHTS

Citizenship and human rights continue to play an important role in the evolution of Community law. Both sets of principles have appeared in the case law of the European Courts and in the creation of a Constitutional document for Europe. Part II of the draft Constitution incorporates the Charter of Fundamental Rights of the Union. Additionally, the first report from the independent network of experts in fundamental human rights details the various international human rights obligations which the Member States are subject to, analysing Member State policy in a number of areas in

28 Directive 98/71 on the Legal Protection of Designs, OJ (1998) L289/28.

29 For further details and comment see C-H Massa and A Strowel [2003] EIPR 68; KA Levin and MB Richman [2003] EIPR 111 and M Schlötelburg [2003] EIPR 383.

30 Directive 96/9 on the Legal Protection of Databases, OJ (1996) L77/20.

31 Art 7(1).

32 *British Horseracing Board Ltd v William Hill Organisation Ltd* [2002] ECDR 4 and Case C-338/02 *Fixtures Marketing Ltd v AB Svenska Spel* [2003] ECDR CN2.

33 For more see J Lipton [2003] EIPR 139.

* Newnham College, November 2003. Part II of this contribution on developments in the area of Trade Marks will appear in the next Current Developments section on EU law.

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