

Brooklyn Law School, 28 January 2000

The European Approach to E-commerce and Licensing

by François Dessemontet, Professor

Universities of Lausanne and Fribourg, Switzerland

INTRODUCTORY REMARKS

Internet and the World Web are widely seen as an American invention, although some of its components have been designed for example in Geneva. Both its prehistoric use among academics and the surge of electronic commerce since 1995 have been fueled by the American demand for more efficient distance selling schemes and cheaper telecommunications. Europe is lagging behind, as are the other continents. In Europe we reach only one third of the U.S. turn-over in e-commerce.

I submit that legal issues are only a part of the explanation for the late arrival of the European Union to e-commerce. Some features of the tariffs on telephone lines might explain why Internet use is not as cheap in Europe as in the United States. For example, even local calls are not included in the basic phone subscription price, and depending where the surfer lives, he or she cannot even have access at local call rates.

Further, most of Europe is a very densely urbanized territory, in which people are near the next shops. Distance selling is not as necessary there as it may be in Montana or New Mexico, or in New York City at peak hours.

Turning to more sociological viewpoints, there is not one common language among Europeans; businessmen often deal in English, but consumers rather shop in their mother tongue; there are around 15 main languages on the European continent, and 65 altogether.

Finally, the new Euro currency has not yet entered into the daily life – this will be the case in 2002. The effect of currency exchange erratic moves should not be underestimated :

For example, the brilliant book by Lawrence Lessig on *Code and Other Laws of Cyberspace* costs thirty U.S. dollars plus shipping with Amazon.com. This amounts in January 2000 to SwFr. 47.1 (at the rate of 1.57 SwFr. for one US \$), but some times ago, thirty U.S. dollars were SwFr. 33.9 (at the rate of 1.13 SwFr. for one U.S. \$). This problem does not exist for people having wages or account in U.S. dollars. It does however make any order on the Net a bit of a currency gamble for Europeans.

Now, the weight of most of these differences is going to lessen in proportion to the increasing appeal of e-commerce. But just the same as I submit that factual differences might explain why Europeans do not buy much on the Net, I should believe that differences in our legal traditions have to be sketched here before more details are given about the current state of the law and the initiatives of the European Union (hereafter Part one). Please pardon the very summary statements which this short comparison with the European complexities may entail for both sides of the Atlantic.

Then, in a second part, I shall report on the present state of affairs in four areas of law regarding intellectual property transactions : electronic signature, consumer protection, liability of internet access and content providers, and finally conflict of laws. Of necessity, important issues such as taxation, relationship with public authorities, for example concerning public procurement, domain names, electronic payments, etc. will not be touched upon.

PART ONE : EUROPEAN LEGAL TRADITIONS

A. *Preeminence of Statutory Law*

In the transatlantic dialogue, the U.S. is relying on self regulation. Even the safe harbor privacy principles issued as a draft by the Department of Commerce rely on the voluntary decision by private organizations to qualify for the safe harbor.

In the U.S., consumer protection has been enhanced e.g. by the Web Assurance Bureau-Online Dispute Resolution. Consumer redress is also promoted through trade associations and chambers of commerce.

The ill-fated attempt to adopt a new Article 2B U.C.C. (even if not yet totally dead as the Uniform Computer Information Transactions Act which has been introduced

as a bill in 5 States) shows that the U.S. is not yet resolved to regulate by law, on a nationwide scale, the basic questions of contracting on the Net.

The some 36 State statutes on digital signature show that there is less reluctance at the level of the State legislatures, but their rules are fragmentary.

Common law will address the remaining issues. But here is the first difference between the U.S. and the European tradition : no common law of contract, libel, defamation, or invasion of privacy exists in Europe. There is no common tradition say between France and Germany on the requirement of writing. In France, this requirement is for evidentiary purposes, but in the absence of a writing, no case could be heard by a court of law if the contractual price is over FF. 5'000.-. It is therefore not exaggerated to state that all important agreements have to be in writing. On the other hand, Germany requires the written form as a precondition of the validity of the contract, but for much fewer contracts.

As there is no general Statute of frauds in all European countries, the requirement of writing can only be based on a legislative or regulatory provision. Now, some thorough studies have found that in Denmark for example, 4'000 legislative provisions require the written form; if regulatory provisions are added, it is approximately ten thousand rules that require a deed to be in writing ! In Switzerland, by contrast, the most current listing of provisions requiring the written form would encompass around 25 to 30 provisions plus some specific laws.

Thus, it is not possible to speak of a common tradition of civil law countries either as to the import of legal requirements for the written form or as to the number of provisions on that topic. All other issues relating to contracting on the Net might give rise to the same array of diverging rules.

For Europeans, no trust can therefore be put on common law. U.S. law professors may point to the market, or to the norms of self regulating business associations as substitute for legislative measures. But for Europeans to rely on something else than legislature is to be blind to the absence of common law in civil countries, where the only source of *legal rule* is the legislature and where there are no common rules on the market except those deriving from the Brussels authorities. We also rely on it to adopt the adequate framework for electronic commerce because there are no other Europa - wide sources of rules or norms - and the code, that is the software

regulating the Net is not in European hands. However, as the European market is important, the Code developers will have to respect European provision.

Finally, it should be recalled that the State is the most important single entrepreneur in Western Europe, state economic activities accounting for approximately a third to half the Gross National Product (before the privatization of telecoms and other similar activities). The State's attitude towards Internet for its own business will be of paramount importance, but this favors a regulatory approach.

B. Preeminence of European Law

The second salient feature of recent legal developments is the unique relevance of Brussel's law, meaning the Directives of the European Union as adopted by the Council of Ministers in codecision with the European Parliament (located in Strasbourg). Of course, national legislatures may go ahead and regulate electronic signatures, as e.g. Germany and Italy have done in 1997. Germany just regulated certification authority while Italy went a step further equating electronic signature with handwritten signature. Nevertheless, the priority of European directives over the national laws is an important constraint for national legislatures, which have to adapt whatever prior legislation exists to the newly adopted Directives. This sounds familiar to U.S. citizens and Swiss nationals, since both our constitutions are identical in this regard. Yet it is new to most European parliaments, with the interesting side-effect that many an initiative in the national legislature runs into a dead end because opponents may rightfully argue that it is better to wait and see what will come from Brussels. This is what happened to the French proposal on electronic signature of September 1, 1999 adopted by the Government and discussed in the Senate but held back until the European Directive is definitively adopted. In other words, there is a good (or not so good) reason for legislators to drag their feet, and statutes on electronic commerce may be more easily adopted in Singapore than in Spain. This is not to say that existing laws can never apply to e-commerce, but they are not tailored to its specific needs.

Therefore, it is only logical that the following detailed presentation will focus on the European directives rather than on national laws.

Before turning to those particular issues, however, I would finally stress that no European law professor ever advocated the total autonomy of cyberspace. The ideal of cyber-anarchy is very much American-oriented.

Although Finland might boast to be the country of the Linux inventor, and we have our shares of gentle hackers, we most generally believe in the State authority to rule against pornography and revisionist or other hate sites. One of my first legal opinions in relation with the Net was about a virtual casino, and I could conclude that Swiss law would be infringed by a gambling scheme put on the Net by Swiss residents and accessible to Swiss residents who would not have applied for the necessary authorizations - whatever the location of the server. Criminal law application is premised on so many theories that there is always at least one good justification to apply our criminal law, as in this case the principle of universality. We do not smile about it as some U.S. citizens smile or sneer about Colorado or Tennessee law as applicable in cyberspace.

More generally, there are no basic objection to the State providing a legal framework to e-commerce or to the honest and fair dealing on the Net. Maybe Internet is a sort of Trojan horse, pushing American ideals of freedom of speech and self regulation on to the world platform while invading other countries' legal order and basic convictions. If this turns out to be so, however, our legislatures did not take notice of it yet. Although aware of possible conflicts, we Europeans still believe in the traditional methods of solving conflicts of laws. Somehow, we do not appear to believe that the surfers and, especially, the buyers are on the Net outside the real space world. Suppliers of course are transnational, but then they already were in the last decades of the XXth Century. Therefore, we naturally tend to apply the law of the consumer rather than the law of the provider. This should at first limit the invasion of the U.S. law abroad. [On the long run, the Americanization of the world is a sociological phenomenon. At a time when all of our younger attorneys and law professors hold a US LL.M. degree or come on sabbatical to Boston, Washington and San Francisco, how could our law not become americanized ?]

A tentative link can be sketched between the two attitudes. Applying the national law rather than some cyberspace law that would of course be heavily influenced by U.S. law, we try to keep some autonomy. Applying the consumer's law, we apply European law in most cases where a U.S. supplier is involved. For how long can we check the advance of U.S. notions of e-commerce ? The question is moot. Legislative autonomy is important in as much as it allows Europe to bargain for fair terms and conditions when an international convention of some sort will be prepared. Legislative autonomy is not an end in itself, but a means to reach a balanced solution - for contracting generally, for privacy, for intellectual property protection and transaction and for conflicts of law.

PART TWO : EUROPEAN SOLUTIONS

A. *Electronic Signatures and E-commerce*

Electronic signatures are not fulfilling the requirement of writing as provided under most European laws, e.g. § 126 Bürgerliches Gesetzbuch of Germany, Art. 14 Swiss Law of Obligations, Art. 1322 *et seq.*, and 1341 French Civil Code (although an interesting case holds that the PIN as used on banking debit cards is a sufficient signature¹).

An European directive on a community framework for electronic signatures has been adopted on November 30, 1999².

The goal of this Directive is to ensure that e-commerce benefits from the internal European market, which entails that a high level of uniformization must be achieved in that sector. It does not purport to consolidate all European texts bearing on e-commerce³ and it does not regulate the licensing transactions by way of separate provisions. Of course, it is applicable to licensing agreements where the national law requests the transfer or license of an intellectual property right to be in writing (which is not the case for licensing

¹ Cass. civ., November 8, 1989, Dalloz 1990, Jurisprudence, p.369 (*Société Crédicas vs Mme Cassan*).

² To be found on : <http://www.ispo.cec.be/>.

³ Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts ; Directive 97/66/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the telecommunications sector ; Directive 93/13/EEC of the Council on unfair terms in consumer contracts ; Directive 97/55/EC of European Parliament and of the Council amending Directive 84/450/EEC of the Council relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, so as to include comparative advertising ; Directive 98/7/EC European Parliament and of the Council amending Directive 87/102/EEC of the Council for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit ; Directive 90/314/EEC of the Council on package travel, package holidays and package tours ; Directive 98/6/EC of the European Parliament and of the Council on consumer protection in connection with the indication of the prices offered to consumers ; Directive 98/43/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member states relating to the advertising and sponsorship of tobacco products ; Directive 92/28/EEC of the Council on the advertising of medicinal products for human use. To be found on : <http://www.europa.eu.int/>.

agreements in Switzerland⁴, for example whenever a trademark is transferred, a written deed of assignment or other document must be filed with the Institute for Intellectual Property⁵).

The main distinction drawn in the Directive is between "electronic signatures" and "qualified certificates". Therefore it follows a Two-Tier approach. On the one hand, the electronic signature is unique, and identifies the sender of a communication. It should also assure integrity of the text. It does in other words certify that the sender expresses his or her intent. It serves both identification and authentication purposes.

Nevertheless, a software used by the sender may be faulty or unprotected. Thus, the electronic signature is not beyond all doubts. Only a qualified certificate may remove those doubts. On the other hand, therefore, specific requirements for security are to be met as per Annex I of the Directive.

The difference between "simple electronic signatures", even certified by a "cybernotary public", and "qualified certificates" is essential when it comes to defining the liability of the certifying authority (the so-called "cybernotary public"). The first laws in Germany and Italy did not explicitly draw the necessary consequences for the increased liability. Where however the problem was thoroughly discussed, as in Denmark, the enactment of this statutes was stalled. It may explain why Austria does not consider adopting the "Two-Tier" approach to digital signature but relying instead on Art. 7 of the UNCITRAL Model law which generally states that no recognition of signatures must be denied simply because it is in electronic form. Along the same line, Switzerland referred to the general rules on the liability of the Code of Obligations, but provided that the liability covers the link between a public key and a given person at the time when the certificate is issued⁶.

Further an European Directive about E-commerce is not yet adopted because of diverging opinions between the Council of Ministers and the Parliament.

⁴ See the latest case in this regard : Trib. Commerce Berne, May 29, 1999 in : *Revue du droit de la propriété intellectuelle, de l'information et de la concurrence* (hereafter : SIC !) 1999, 657-659.

⁵ Art. 17 para. 2 Federal Law on the Protection of Trademarks and Art. 28 para. 1 [a] Federal Ord. on the Protection of Trademarks.

⁶ Art. 20 OICP, to be found on : <http://www.admin.ch/>.

A new draft of this directive has been adopted by the Council of Ministers on December 7, 1999, 7 days after the Directive on Electronic signature was adopted. But the issues are here more those of consumer protection, to which I now turn.

B. Consumer Protection

Broadly speaking, consumer protection is needed for licensing transactions as for all other commercial operations.

The "click-on" licensing and ensuing downloading are effectuated for intellectual property rights as for any other goods or wares. However, the peculiar nature of the software so imported in the computer of the buyer or licensee entails three important differences with the normal sales of goods on the Net.

1. Distance selling

This is a revolution as far as intangibles are concerned. No longer are intermediaries required. Cheaper prices will mean a booming market for software and cultural goods.

From a legal view point, although it is open to some doubts, most commentators appear to believe that the Directive on Distance Selling N° 97/7 applies to licensing agreements. It is unfortunate in two respects :

aa) The idea that a separate written confirmation of the order should be sent via teletype or ordinary mail is wholly inapplicable for most electronic licensing. There is no practical way to keep records of the transaction save on hard disk. Therefore the draft Directive on e-commerce provides that the provider is to give an easy, direct and permanent access to some basic information on himself (Art. 5), and also that detailed information on the method for keeping records if any must be given to the licensee or buyer [Art. 10 (1) (a)] – but no obligation to keep them is provided, save for general terms and conditions (Art. 11 (2) *in fine*).

bb) The right to rescind a distance sale within seven days will mostly be unapplicable to the on-line licensing under the Directive on Distance-Selling N° 97/7, because a general exception to the right of rescission is provided whenever the service is

already used by the buyer⁷. Thus, the licensee who will usually use the software or other intangible goods as soon as it is downloaded will not be in a position to revoke the licensing agreement. I do not see that a solution of that question is close at hand.

2. Conclusion of the Contract

The exact time of conclusion of the contract is when the buyer or licensee has received through the Net the notice of receipt of his or her acceptance by the provider.

When the licensee or buyer is not a professional having entered an agreement contrary to that rule, the supplier or licensor has to open appropriate, accessible and efficient means for the consumer to become aware of his possible mistakes during the preliminary steps leading to the click-on licensing, in order for him to remedy them.

There is some drafting uncertainty under Article 11 (2) of the draft Directive for e-commerce, providing that “[...] the service provider shall make available to the recipient of the service appropriate means that are effective and accessible allowing him to identify and correct handling errors and accidental transactions before the conclusion of the contract. [...]” It should mean that an immediate cancellation of the order must be possible if the order has been made unintentionally. More important, the French Conseil d’Etat has suggested that hyperlink be created so as to embody as part of the contract the professional codes of conduct as General Terms and Conditions. It is the first time to my knowledge that Terms and Conditions are seen as protecting the interests of the consumers. Such a renewed confidence in General Terms and Conditions could allow for the European law and the U.S. self-regulatory approach to converge to a larger extent. But are there general terms and conditions protective of the licensee, in fact ? Not to my knowledge.

C. *Liability of Access and Site Providers*

The draft directive allows for a "mere conduit" exemption of liability for access and site providers. This was controvert during the first reading of the directive before the

⁷ Art. 6 al. 3 Directive 97/7 on Distance-Selling : « Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal [...] for the provisions of services if performance has begun, with the consumer’s agreement, before the end of the seven working day period [...] ».

Parliament and the push to exempt the access providers is contrary to what has been decided in a few cases. For example, the site provider has been held liable in the Hallyday case in France⁸. In Switzerland, the general manager of a telephone company has been sentenced by the Federal Tribunal for not stopping the exploitation of phone sex accessible to minors of age⁹.

On the other hand, the German law on Electronic signatures of 1997 also exclude the liability of the access provider when it does not know the content of the information. I do not favor such a broad exception. In my view, it all comes down to a correct application of the fault requirement. If an access or a site provider has knowledge or *reasons to know* that a site is practicing swindle or fraud, contributory liability for fault may be recognized. There appears to be no solid ground why Member States should not continue applying their own standards of fault or due diligence. The development of the e-commerce does not require any immunity of the very impressive groups like AOL (merging with Time Warner) or Deutsche Telekom (merging with Lagardère), that do not appear to be menaced in their existence by the usual rules on liability. Finally, in any civilized society, those who engage into business have to bear the risks of the peculiarities of their line of business, as they do reap the benefits deriving from those peculiarities.

Of particular interests are in this regard the U.S. notions of contributory infringement of copyright and of ancillary liability, as have been discussed e.g. in the Scientology case.

The French practice appears to accept the notion of contributory liability, but the introduction of an ancillary liability as in the area of the printed press is barely mentioned¹⁰.

The likely effect of the draft directive on e-commerce, if adopted, would be to stifle the development of adequate remedies against accomplices. Now this might appear

⁸ See *Estelle Hallyday vs Valentin Lacambre*, Appeal Court of Paris, February 10, 1999, to be found on : <http://www.legalis.net>. See now, however, *Lynda Lacoste vs Multimania Production, Esterel and SSPI*, Nanterre District Court, December 8, 1999.

⁹ ATF (Decision of the Swiss Federal Tribunal) 121, IV, 109.

¹⁰ French Report by the Council of State : Conducting of a study into the legal issues raised by the development of Internet, part IV, Paris, September 22, 1997, to be found on : <http://www.mbc.com/ecommerce/legis/france.html>.

to go beyond the contractual topics which we discuss this morning, but it is clear for every European practitioner that, as soon as a licensee is exceeding the terms and conditions of the license agreement, he is technically infringing the intellectual property right. If the violation of the license agreement is for example by way of dissemination of the licensed materials on the Net, then the site providers or even the access provider should when at fault be held liable if they undertake nothing against this infringement. As wrote Prof. Lessig "intermediaries are pliant targets of regulation"¹¹; therefore it is better to aim at them than at the individual users of copyrighted materials.

D. *Country of Origin and Conflicts of Laws*

The draft directive on electronic commerce is premised on the mutual recognition of information society services when duly organized under their country of origin. "Country of origin" is nowhere defined for cyber-business, i.e. those virtual facilities that outsource all handling of physical goods to third firms. The country in which the hardware is located is of no particular significance, as has been accepted for jurisdiction purposes in U.S. and Swiss decisions¹².

The principle of country of origin is a fundamental one for the European Union, since the case "Cassis de Dijon"¹³ and the adoption of the directives on the corporations. Nevertheless, many think that consumer confidence towards e-commerce can be enhanced only if the consumer's own courts are competent and his own law is applicable¹⁴.

As for the jurisdiction, Article 5 (1) of the Brussels/Lugano conventions (under revision) open the court of the place of performance of the contract. However, Article 13 (3) provides for the jurisdiction of the courts of the consumer when a specific proposal or

¹¹ Lessig Lawrence, *Code and the other law of cyberspace*, New York, December 1999, p.50.

¹² See "Lyrics" decision by the Federal Tribunal, Sic ! 1999 pp. 635-636.

¹³ Court of Justice of the European Communities, case 120/78, R. 1979, 649 (Rewe-Zentral-AG/Bundesmonopolverwaltung für Branntwein vs Cassis de Dijon).

¹⁴ See e.g. Ph. Lemoine's speech during the October 1999 OECD Forum on Electronic Commerce (Mr Lemoine is Co-Chairman of the Galeries Lafayette), to be found on : <http://www.oecd.org/>; see also J. Murray, *The proposed E-commerce Directive and the Consumer*, in : Commercial communications, The Journal of Advertising and Marketing Policy and Practice in the European Community, Issue 15, December 1998.

advertisement has been made in the consumer's country of domicile and that he has done in his country the acts necessary to the conclusion of the contract.

Now, when someone pulls from the Net an offer which he then accepts, it is difficult to accept the notion that a "specific proposal or advertisement" has been made in his country. Therefore, the draft directive is coherent with the Brussels/Lugano Conventions as they stand today. However, a draft Article 13 has been proposed for the new Regulation which should take the place of the Brussels Convention. The opening of the national courts of the consumers for the litigations arising out of e-commerce would result from the revised wording of Article 13 (1) (c) requesting only that the seller (or licensor) "directs [commercial or professional] activities to the [Buyer's or Licensee's] State". Actually the draft Regulation should find a good deal of support. It is not fair to think of the consumer who logs on to the Net as if he or she were going for a week-end shopping spree to London or New York¹⁵. Virtual shopping is not real travelling, and therefore it should not entail submission to a foreign sovereign's courts of law. Conversely, the licensor or supplier is reaping benefits from his transnational activities. Therefore, he should be subject to the jurisdiction of the consumer's country, as he did not restrict his offer to a given territory or set of territories. If by his own volition he sells or licenses abroad, there is no reason for the foreign courts not to entertain claims against him. The only exception could be when his offer is restricted to given territory; then if he does not sell outside of those, he should not be attracted to the courts of other territories. Article 5 (1) of the present Brussels Convention embodies the same idea when opening courts at the place of performance of the contract – which of course is not a practical test for software or other copyright licensing. Tentatively, one could assert that "performance" means in this context the downloading of the item in the licensee's computer.

As to the applicable law, the general rules of the Rome Convention of 1980 (which is undergoing revision) would entail that the law of the licensor's country is applicable (as this is stated in Article 122 of the Swiss Law of International Private Law)¹⁶.

There is again a specific provision for consumers contracts¹⁷.

¹⁵ Interestingly, this was an argument put forward in the *Playboy Entertainment vs Chuckle-Berry Publishing Inc.*, 939 FSu 1032 (S.D.N.Y 1996).

¹⁶ « Agreements pertaining to intellectual property are governed by the law of the state in which the transferor or grantor of the intellectual property right has its habitual residence. A choice of law is allowed. [...] ».

Besides more theoretical rationalizations, the usual justification for the licensor's law to be declared applicable is to increase the licensor's confidence in the solution of any possible litigation, hence his willingness to part with his absolute monopoly over a given intellectual right¹⁸. Now, where mass transactions concerning software or infotainment are at stake, there is no specific need for the licensor to have confidence in his licensees. Rather in order for e-commerce in Europe to expand, the licensee's diffidence vis-à-vis the licensor should be dissipated. To allow for the application of the licensee's law could contribute to this. For example, the most interesting questions about the liability of the licensor, are not to be left to the licensor's law. If for instance a self-destroying software explodes and damages important data of the licensee, when the licensor happens to live in a country where consequential damages are strictly limited to the amount which was foreseeable, the consumers will have too little redress for the harm inflicted upon him. Article 74 of the Vienna Convention on the Sales of Goods is not applicable to consumers dealings (and probably not to licensing either, but there is a strong trend in Europe to re-qualify some licensing on basic software as "sale" – thus depriving the licensor of his claims on many a restriction enumerated in the transfer agreement).

In my view, for licensing agreements as for other harmful behaviours on the Net (infringement on the right of privacy, on the right of publicity, defamation, libel, swindle, etc.), the applicable law should be established by cascading criterions :

- a) the law chosen by the parties
- b) the law of the licensee
- c) the law of the place of performance if different from (b) or if (b) is not to be found (e.g. because the licensee is anonymous or is a cyber-space firm with no fixed location)
- d) the law of the licensor.

In the future, closed-system dealings on the Net will be as important as open business transactions. Therefore, party autonomy should prevail between licensor and licensee.

¹⁷ Art. 5 Rome Convention on the Law applicable to contractual obligations.

¹⁸ François Dessemontet, *Transfer of Technology under UNCTAD and EEC Draft Codifications : A European View on Choice of Law in Licensing*, in : *Journal of International Laws and Economics* (1977), p. 6-7.

If as is usual no choice of law has been made for consumer transactions, there are good grounds to protect the consumer and apply its law. It is more a matter of psychological enhancement of the consumers' confidence. The real effect should not be to cripple the entrepreneurs on the Net. To the extent business-minded entrepreneurs would stop to consider issues of conflicts of law, they would also be advised that the licensing laws of most countries are similar - since almost everywhere there is no restatement or compilation of the private law of licensing which is judge-made law.

Going back to the basics, the choice of the law of the performance of the specific obligation under Article 4 Rome Convention can be explained by the fact that the provider of services or supplier of goods is organized in a given environment. In former times, he was organizing his activities taking into account the legal rules and liability in this environment. And in case of a litigation he would be exposed to bankruptcy proceedings or seizure in that country. Now the virtual corporation has few assets, since it outsources most of its commercial activities, and the first consideration - which is far more important - does no longer hold true : in the cyberspace the supplier is not mainly organized according to a real space territory. Thus, there is no need to submit the contract to the supplier's law. This is the great difference with most licensing agreements outside electronic commerce.

CONCLUSION

In this regard, it should be said that Professor Nimmer's gallant effort to restate the law of licensing in the ill-fated Article 2 B UCC should be a source of inspiration for lawyers all across the world who have to deal with licensing issues. Never could one read such minute provisions on the various issues raised by licensing, for example lien or pledges on licensing rights (sections 507-508).

Further, let me say that many if not most European intellectual property scholars do not share the concern of those who, in the United States, believe that the Constitution would forbid private parties to come to an agreement protective of some rights outside the statutory protection. Private autonomy stands over the goals that are assigned by the promoters of the law and economics approach to the copyright law and other intellectual property statutes.

1. First, the very existence of a well-developed body of unfair competition law supplementing the unavoidable loopholes of the statutory intellectual property rights prevents the Europeans to see in the legislative protection of IP rights an implicit exclusion of all other protection by means of contractual rights.
2. Second, at a time of deregulation, when the State is back to assume its most important functions, leaving the promotion of the economy to the market (not abandoning the police of the market place, thus consumer and privacy protection, of course), it is only fair that private citizens can organize the apportionment of rights between themselves by agreement.
3. Finally, there is a whole dimension missing from the U.S. law and economics approach to IP rights : it is not only the U.S. constitution that sets the framework of protection of IP rights, but also Art. 15 al. 1 of the 1966 International Covenant on Economic, Social and Cultural Rights¹⁹ (“The State Parties to the present Covenant recognize the right of everyone (...) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”) and Art. 27 al.2 of the Universal Declaration of Human Rights²⁰, to quote: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

When considered in that light, the right of IP rights holders to organize their commercial activities as they see fit, so long they find partners to transact business with, cannot be curtailed by the purpose of the IP statutes²¹. Even if it were found to exist, a public policy based on those statutes could not override basic human rights that are enshrined in a text ratified by the U.S.

¹⁹ Adopted on December 10, 1966 by the United Nations and ratified by the US on October 10, 1997.

²⁰ Adopted on December 10, 1948 by the General Assembly of the United Nations.

²¹ For a different opinion see e.g. Mark A. Lemley, *Beyond Preemption : The Law and Policy of Intellectual Property Licensing*, 87 Calif. L. Rev. 111 (1999).

The only recourse could be to notions such as the patent misuse of Section 271 of your Patent Act (35 U.S.C.), or to the fair use provision of your copyright Act, or more generally to the provisions of the antitrust laws. As has been pointed out, you cannot so easily accept that the licensee "clicks away" fair use²² - but most of the European laws' limitations of copyright are not mandatory in my view : licensors and licensees can establish their own regulations for themselves, disregarding the limitation to the copyright that benefit all people not bound by contract.

* * *

²² See Lessig Lawrence, *Code and the oher law of cyberspace*, New York, December 1999 pp. 197 *et seq.*