



## Spectrum and copyright: Paving the new media highway

By Winston Maxwell  
and Dominique Baroux

**In the new media and information technology industries, France will pursue two broad objectives during its presidency of the European Union. First, France will attempt to influence the new package of telecom directives that were proposed by the European Commission in November 2007 in order to ensure that those directives reflect the French position on key issues such as spectrum management. Second, France will try to capitalize on the ground-breaking "Olivennes" report, and seek a European consensus on fighting copyright infringement on the Internet.**

**A**s regards the new telecom directives, France will probably seek to soften the European Commission's proposals on spectrum reform. In November 2007, the Commission proposed substantial changes in how radio frequencies should be managed in Europe. The Commission wants member states to treat radio spectrum like any other kind of transmission medium. According to the Commission, the assignment of radio frequencies should rely on market forces so that radio spectrum is given its most economically efficient usage.

The Commission says that users of spectrum should be free to change the technology used and even the services offered over a given piece of spectrum. To use an example that shows the extent of the reform proposals, the Commission would like member states to auction spectrum with the winner of the auction being free to use this spectrum to offer any kind of service, including television broadcasting or mobile broadband.

### Mobile broadband by 2012

The Commission's vision is referred to as "service neutrality" and reflects the

#### AmCham weighs in on "digital dividend"

On May 5, 2008, AmCham's **New Media & IT Task Force** responded to the French consultation on the digital dividend. In its position paper, the Task Force outlined the U.S. experience in migrating towards an all-digital broadcasting environment, and the major changes that are occurring in the U.S. telecommunications and broadcasting industries as a result of that migration. The Task Force highlighted some of the lessons learned from the recent spectrum auctions in the U.S., which yielded \$19 billion for the U.S. Treasury, and underlined some of the little-known features of the auction process. The full text of AmCham's paper is available at <http://www.amchamfrance.org> (visit the task force's page).

"...Telecom operators [may] little by little eat up the spectrum needed by the television and radio broadcasters..."

phenomenon of digital convergence (any content over any network). France and several other member states believe that the Commission's proposals go too far, and that more of a balance needs to be struck between market-driven spectrum rules and the preservation of a strong and stable broadcasting industry. Some fear that telecom operators will little by little eat up the spectrum needed by the television and radio broadcasters and indirectly weaken the "social glue" represented by the public broadcasting sector.

President Sarkozy announced in March 2008 that France had the objective of making mobile broadband available to all its citizens by 2012. Achieving this objective will require some modernization of spectrum rules. But during its EU presidency, France will want to make sure that spectrum reform strikes a proper balance between free market mechanisms and cultural and public service objectives linked to the broadcasting industry.

### Regulator's power

Another heavily debated issue in the Commission's telecom proposal is the idea of creating a separate European regulatory authority for electronic communications. Some countries in Europe have weak or nonindependent regulators. For those countries, the creation of a European electronic communications market authority might help lead to proper application of EU rules and opening of the market.

"France may well [recommend] that the new European electronic communications market authority have more limited powers."

France, however, is recognized to have a strong and effective regulatory authority for the electronic communications industry, and some parties are concerned that the creation of a European authority could weaken the existing authority's powers. During its EU presidency, France may well seek

to modify the European Commission's proposals, perhaps recommending that the new European electronic communications market authority have more limited powers.

## IPR and the Internet

The second major item on the agenda relates to the protection of intellectual property rights (or IPR) on the Internet. France became a leading actor on the subject in November 2007 with the publication of a series of recommendations by a multi-stakeholder commission known as the Olivennes committee. (Ed.'s note: <http://www.culture.gouv.fr/culture/actualites/index-olivennes231107.htm>)

The Olivennes recommendations recognize that solving the problem of copyright infringement on the Internet is only possible if each of the stakeholders takes a step in the same direction.

The committee asserts that content industries, Internet service providers (ISPs) and government have to share ownership of the problem — and of the solution. The

“France might ask the European Commission to propose modifications to the current e-commerce directive in order to encourage ISPs and hosting providers to implement reasonable measures to discourage copyright infringement.”

French government will propose this spring a law that would create an independent agency that would send warning letters to Internet users who download copyrighted material without permission. After a certain number of warnings, the Internet access for that user would be suspended.

This aspect of the French proposal was recently criticized by the European Parliament. Nevertheless, the overall philosophy of the Olivennes recommendations — that all stakeholders should cooperate in order to develop new business models, making inexpensive content more easily available to Internet users and at the same time discouraging infringement — has been applauded by many as a step in the right direction,



## The CNIL Committee

The AmCham **New Media/IT Task Force** and the **Legal Affairs Task Force** have formed an ad hoc body to be known as the AmCham **CNIL Committee**. (“CNIL” stands for *Commission nationale de l’informatique et des libertés*, or the National Committee on Information Technology and Freedom — visit [www.cnil.fr](http://www.cnil.fr)) The committee’s role is to work with the French data protection authority, the CNIL, on data protection issues associated with U.S. legal proceedings such as pre-trial discovery and administrative agency investigations.

In January of this year, the CNIL issued a press release citing problems that may be created when the requirements of U.S. legal proceedings, on the one hand, and French and European data protection principles, on the other, are incompatible. Practically speaking, the collision of U.S. and French law can compromise a company’s simultaneous compliance with a U.S. court-order in the context of discovery, and with French data protection laws.

In addition it is believed that more and more French and U.S. companies alike are faced with situations where compliance is rendered difficult. Because discovery and investigations are often pan-jurisdictional in scope, issues may arise in other EU member states as well.

The AmCham CNIL Committee believes, as apparently does the CNIL, that the most efficient solution will be one that can be adopted across the EU. To this end, the AmCham CNIL Committee on its creation formed plans to meet with the CNIL in June to discuss possible solutions that could be presented to the so-called Article 29 Data Protection Working Party. This is an umbrella group for data-protection authorities from all EU member states; it is intended to serve as an independent advisor to the European Commission on data protection and privacy issues. The chairman of the Article 29 Data Protection Working Party is Alex Türk, who also serves as president of the CNIL. The CNIL was set up 30 years ago.

All persons interested in getting involved with the CNIL Committee should contact New Media/IT Task Force Chair Winston Maxwell ([wjmaxwell@hhlaw.com](mailto:wjmaxwell@hhlaw.com)) or Legal Affairs Task Force Co-Chair Carol Umhoefer ([carol.umhoefer@dlapiper.com](mailto:carol.umhoefer@dlapiper.com)).

## Alex Türk, Président de la CNIL

Né le 25 janvier 1950 à Roubaix (Nord), docteur d’Etat en droit public (1984), maître de conférences de droit public (1985-1992) à la faculté de droit de Lille II, chargé de cours à l’Institut d’études de sciences politiques de Lille (1991-1994) ainsi qu’aux universités catholiques de Lille, conseiller général depuis 2001 du canton de Lille-centre, Alex Türk, sénateur du Nord élu le 24 septembre 1992 (non-inscrit) et réélu en septembre 2001 (non-inscrit), est membre de la Commission des lois depuis 1992.




Membre de la Commission nationale de l’informatique et des libertés depuis 1992, Président de l’autorité de contrôle Schengen de 1995 à 1997, de l’autorité de contrôle commune d’Europol (2000-2002), de l’autorité de contrôle d’Eurodac (2003) et vice-président de la CNIL de 2002 à 2004, Alex Türk est Président de la Commission nationale de l’informatique et des libertés depuis le 3 février 2004.

Il a été élu Président du groupe des « CNIL » européennes (en anglais, Article 29 Working Party, dit G29) le 19 février 2008.

and a possible model for other European countries.

### Internet industry fears

If the French government is successful in pushing its proposals through its own parliament this spring, it may want to put this subject on the European agenda during its presidency of the EU. France might ask the Commission to propose modifications to the current e-commerce directive in order to encourage ISPs and hosting providers to implement reasonable measures to discourage copyright infringement. [Ed.'s note: [http://ec.europa.eu/internal\\_market/e-commerce/directive\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/directive_en.htm)] Other measures may be necessary to encourage copyright holders to make their content available through legal channels and to cooperate with ISPs and hosting providers in connection with anti-piracy efforts.

These reforms are the subject of extensive controversy. The Internet industry fears that any modification of the e-commerce directive will result in a rollback of existing protection for ISPs, which would hurt investment and innovation in the digital economy. Meanwhile, privacy groups are also concerned that confidentiality of users' communications should not be compromised in any reforms. 

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