

# European Intellectual Property Review

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#### **“Towards a Modern, More European Copyright Framework”, or, How to Rebrand the Same Old Approach? 65**

Under the auspices of the Communication on a “Modern, More European Copyright Framework”, the European Commission has brought forward a series of proposals seeking to facilitate easier cross-border portability of content, greater flexibilities and exceptions to copyright for activities such as text and data mining, while ensuring the effective enforcement of copyright online. However, the proposal for a Directive has been subject to intense lobbying from all sides, with revisions to the proposal strengthening enforcement and broadening the rights afforded. This comment focuses on the nature of the lobbying undertaken by interested parties, and how it represents a continuation of “business as usual” for copyright reform.

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The Digital Millennium Copyright Act’s “notice and takedown” process is increasingly referred to as a model solution for content removal mechanisms worldwide. While it has emerged as a solution capable of producing relatively consistent results, it also has significant problems. The system is also left open to different kinds of abuse, including the use of automated takedown demands. It is important to recognise these issues in order to ensure that they are not repeated in future legislation. To that end, this article examines the DMCA with reference to its historical context, and the general issues surrounding the enforcement of copyright infringement claims. It then goes on to discuss the notice and takedown process in detail—along with its advantages, disadvantages, criticisms and praise. Specific examples of the kinds of abuse reported by online service providers are outlined, along with explanations of the statutory construction that allows these situations to continue. To finish, the viability of potential alternatives and proposed changes are discussed.

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In its decision in *Icescape Ltd v Ice-World International BV*, the Court of Appeal has considered for the first time the effect of the Supreme Court's decision in *Actavis UK Ltd v Eli Lilly & Co* on how patent claims should be construed in the context of infringement allegations. With this judgment, the Court of Appeal recognises expressly that the previous "Protocol Questions" should be abandoned and that from now on the "Actavis Questions" will be applied in order to establish infringement in a case where a variant from the claim achieves substantially the same effect in substantially the same way.

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