

GLOBAL INFORMATION SOCIETY WATCH 2009

*Focus on access to online information and knowledge
– advancing human rights and democracy*



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (Hivos)

Global Information Society Watch 2009

Global Information Society Watch

2009

Global Information Society Watch 2009

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Swiss Agency for Development and Cooperation (SDC)

Printed by

MONOCROMO

Printed in Uruguay

Edición hecha al amparo del Art. 79 de la Ley 13.349
Dep. Legal 350401

Global Information Society Watch

Published by APC and Hivos

2009

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ISBN 92-95049-73-X

APC-200911-CIPP-R-EN-P-0065

*Dedicated to A.K. Mahan - an activist who valued
intellectual rigour and concrete outcomes.*

APC and Hivos would like to thank the Swedish International Cooperation Agency (Sida) and the Swiss Agency for Development and Cooperation (SDC) for their support for Global Information Society Watch 2009. SDC is contributing to building participation in Latin America and the Caribbean and Sida in Africa.



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Introduction: What “Europe”?

Generally,¹ when it comes to access to information in “Europe” there are two entities that are most relevant: the European Union (EU) and the Council of Europe (CoE).

The EU is a *supranational* organisation with, currently, 27 member states. While EU member states continue to have divergent laws and practices when it comes to access to information, the EU has itself laid down rules that govern access to documents held by its institutions. Access to such documents has become increasingly important with the expansion of co-operation within the EU, especially in the area of police and judicial cooperation in criminal matters. However, the different understandings of transparency that live within its member states manifest themselves during negotiations about what rules should govern access to EU documents.

The CoE, currently consisting of 47 signatory states, is an *international* organisation, which brought about the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR). All of the member states of the EU are also members of the CoE and have signed and ratified the ECHR. The CoE has recently adopted the first international treaty on access to official documents, laying down a number of minimum rules.

Regional trends: Access to online information as a democratic right

The European Union

The EU has been using the internet very actively. Its EUROPA website is an enormous source of information, even though the complexity of the EU makes it difficult to translate it into a user-friendly portal. In 2006, the so-called Transparency Initiative was launched, which centred on increasing the financial accountability of EU funding,² the personal integrity and independence of EU institutions and control on lobbying activities. The latter included the adoption of a code of conduct³ regulating lobbyists’ behaviour and the launch of

a voluntary online lobbyist register by the European Commission in 2008. It also set up an online register of expert groups helping the Commission when preparing legislative proposals and policy initiatives. Some of the debates of the Council⁴ are now filmed and can be followed live on the internet.⁵ In 2008, the European Parliament launched its own internet television channel EuroparITV.⁶

However, while differences among member states remain great, internet accessibility in the EU as a whole remains non-inclusive.⁷ Accordingly, programmes have been launched to stimulate online accessibility and inclusiveness. Framed in a mostly economic rationale, in 2003, the so-called e-Europe initiative was launched in order to accelerate Europe’s “transition towards a knowledge-based economy,”⁸ followed up in 2005 by the i2010 programme aimed at creating a “single European information space.”⁹ The year 2007 was the first in which more than half of the EU population regularly used the internet.¹⁰ Nonetheless, a staggering 40% of the EU population has still *never* used the internet.¹¹ Continuing disparities between the overall population and those aged 65-74, the retired and economically inactive, and those with low and high education levels remain a major concern.¹² Facilitating accessibility for persons with disabilities has only recently come onto the agenda, whereas policies among EU member states on this issue remain fragmented.

Since 1993 the right to access documents held by EU institutions has gradually been legally implemented. The main instrument in this regard is Regulation 1049/2001 of the European Parliament and of the Council of 29 May 2001 regarding public access to European Parliament, Council and

1 In 1998 the United Nations Economic Commission for Europe adopted the so-called Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which includes special rules for access to environmental information. As a result, this reports does not deal with this specific area.

2 See, for example, the new website: ec.europa.eu/beneficiaries/fts/index_en.htm

3 Communication from the Commission, European Transparency Initiative: A framework for relations with interest representatives (Register and Code of Conduct), COM (2008) 323 final, Brussels, 27 May 2008.

4 While the European Council (“the Council”) is an organ of the EU, the Council of Europe is a separate international organisation.

5 See the Council website on legislative transparency: www.consilium.europa.eu/cms3_fo/showPage.asp?id=1281&lang=EN&mode=g

6 www.europariv.europa.eu

7 For example, in 2005, 57% of individuals living in the EU did not regularly use the internet; in 2006 only 10% of persons over 65 used the internet, against 68% of those aged 16-24; only 24% of persons with low education used the internet, against 73% of those with high education levels; only 32% of unemployed persons used the internet against 54% of employed persons. See: ec.europa.eu/information_society/activities/einclusion/docs/i2010_initiative/rigadashboard.doc

8 See: ec.europa.eu/information_society/europe/2002/index_en.htm

9 See: ec.europa.eu/information_society/europe/i2010/strategy/index_en.htm Unlike the earlier e-Europe initiative, i2010 also comes with a budget. For more details see: ec.europa.eu/information_society/europe/i2010/financing/index_en.htm

10 Commission of the European Communities (2008) Report from the Commission on the application in 2007 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM(2008) 630 final, Brussels, 10 October, p. 33.

11 *Ibid.*, p. 34.

12 *Ibid.*

Commission documents. The regulation lays down procedural rules for individuals to apply for documents, and stipulates the exceptions to granting access to the documents, such as the protection of public security, privacy, international relations, documents from third parties, documents under discussion, and a number of others that can be overridden by public interest (which to date has only been successfully relied upon by an applicant before the Community courts in one case). Ultimately, the European Court of Justice (ECJ) can review the lawfulness of a refusal to grant access.

The EU regime is not a freedom of information regime in the sense that no general requests for information can be made. Rather, it is based on a public register of documents, in which applicants must locate relevant documents themselves and, if they are not directly accessible (meaning hyper-linked to the full text), apply for them specifically. Accordingly, Article 11 of the regulation provides for an obligation of each institution to make available a register of documents. All three institutions – European Parliament, the Council of the European Union and the European Commission – now have online registers.

In 2006, 90% of the European Parliament and 96% of the Council's public documents were directly accessible on the internet¹³ – no precise numbers exist for the Commission.¹⁴ However, major problems remain, and the regulation is now under review. For instance, it is not specified exactly which documents have to be included or “directly accessible” (Art. 12[1]). There is also no obligation to list *all* documents of an institution.

In line with the regulation, documents that are considered sensitive (Art. 9) are excluded from the public register unless the originator consents to the listing. As a consequence, there are documents listed in the registers which are not accessible. Conversely, many documents which *could* be requested are not listed – more than a third of the Council's documents are not accessible on the register.¹⁵

Making the registers more user-friendly by inserting cross-references to documents in other registers and other stages of a decision-making process has also been a common request.¹⁶

The above may explain why the majority of those that do take advantage of the possibility to gain access are already specialists in EU affairs.¹⁷ Of the EU institutions, the Commission is the most criticised for the maintenance of its register.¹⁸

When it comes to the protection of personal data, the last few years have seen a drastic decrease in protection. Shortly after the terrorist attacks in Spain and the United Kingdom, the so-called ePrivacy Directive¹⁹ was amended via the Data Retention Directive,²⁰ which requires member states to ensure that communications providers retain, for a minimum of six months and a maximum of two years, data necessary to trace and identify *inter alia* the source, date, time and duration of communication.

Recent proposals concerning the retention and processing of data traffic “for security purposes” in a revised ePrivacy Directive have again sparked major concern that this could result in the collection of yet more traffic data without setting a time limit on its retention.²¹ Another topic that has continued to spark controversy is the transfer of personal data beyond the borders of the EU, such as passenger name records, which have been sent to United States (US) authorities.

13 European Parliament (2008a) Transparency and Public Access to Documents: Some Aspects concerning e-Transparency in the EU institutions and the Member States, Briefing Paper (PE 393.285), Brussels, March 2008, p.5.

14 Commission of the European Communities (2008) op. cit.

15 European Parliament (2008b) Working Document No. 2 on 2006 annual report on access to EU documents (art 17 of Regulation (EC) No 1049/2001 and art. 97 p. 7 of the EP rules) Part B, Committee on Civil Liberties, Justice and Home Affairs (PE400.323v01-00), 16 January 2008.

16 European Citizen Action Service (2006) Should there be a Freedom of Information Act for the EU? Report on the application of regulation 1049/2001 on access to documents, Brussels, September 2006. www.ecascitizens.eu/content/view/50/180

17 In 2007, for example, initial applications to Council documents came mainly from students and researchers (40%). Lawyers (8.8%), industry and commerce and pressure groups (14.2%) were also high on the list of social and professional categories represented. Most confirmatory applications also originated from students and researchers (56.2%). Council of Europe (2008) Protecting the right to privacy in the fight against terrorism, Commissioner for Human Rights, CommDH/IssuePaper (2008) 3, Strasbourg, 4 December, p. 13.

18 Bunyan, T. (2002) *Secrecy and Openness in the European Union: The Ongoing Struggle for Freedom of Information*, Statewatch. www.freedominfo.org/features/20020930.htm; Hayes, B. (2005) *The right to know or the right to try and find out? The need for an EU freedom of information law*. www.statewatch.org/news/2005/nov/eu-FOI.pdf; European Parliament (2008a) op. cit.

19 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

20 Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

21 Working Group on Data Retention (2009) *Position on the processing of traffic data for “security purposes”*. www.statewatch.org/news/2009/mar/eu-dat-ret-wg-e-security-position-paper.pdf

This represents the latest phase in a steady corrosion of European privacy safeguards since the attacks of 11 September. Until then, EU legislation had prohibited communications providers from retaining data for any longer than necessary to resolve billing disputes (Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector). A narrow exception allowed member states to depart from this standard for the sake of national security and to prosecute criminal offences.

The Council of Europe

In a 2003 declaration on freedom of communication on the internet, the CoE confirmed that Article 10 of the ECHR was clearly applicable to the internet. In 2006, of the then 46 member states of the CoE, 39 had laws in place regulating the right to access information held by public authorities, whereas 32 went beyond merely guaranteeing a right to official documents to include a broader right to information.²² In the same year, the Court that interprets the ECHR (the ECtHR) issued a milestone judgment where, for the first time, it ruled Article 10 of the European Convention to be applicable to a case that concerned a refusal of access to administrative documents relating to a nuclear power station in the Czech Republic.²³

In 2008, the CoE pioneered the first binding international treaty on access to information: the Convention on Access to Official Documents, which is meant to lay down certain minimum requirements of national legal systems regarding access to information.²⁴ By 18 July, 12 countries had signed the Convention.

In a 2009 resolution, the CoE further pointed out that it considers the standards of the ECHR to “apply to online information and communication services as much as they do to the offline world” and that access to the internet ought to be conceived of as part of public service provision.²⁵ At the same time, the increasing threat that is posed by counter-terrorism measures to privacy, the freedom of speech and information was underscored yet again.²⁶

Regional trends in online intellectual property rights

European Union

Intellectual property rights (IPR) are among the most hotly debated policy issues at the EU level. Since 1988, the EU has harmonised substantial parts of its law concerning copyright and intellectual property for the sake of reducing barriers to transborder trade.²⁷ An important general instrument was adopted in 2001 with the EU Copyright Directive,²⁸ which *inter alia* banned so-called circumvention technologies. Since most limitations on copyright are not made mandatory in the Directive, national differences in implementation remain. Another disadvantageous effect has been the relatively weak position of consumers, such as educational institutions, towards powerful rights holders in online transactions.²⁹

In 2004, the IPR Enforcement Directive was adopted, which has been criticised for providing broad subpoena powers for rights holders to obtain personal data on consumers.³⁰ While it merely concerns civil proceedings, a 2005 proposal for a new IPR Enforcement Directive includes criminal sanctions, which may also become the basis for prosecution of search engines or internet service providers (ISPs).³¹

One of the most controversial issues still remains internet “piracy”. Large recording companies have been very actively lobbying for stricter European norms and

22 Access Info Europe (2006) Access Information: A Fundamental Right, a Universal Standard, briefing paper, 17 January 2006. www.access-info.org/?id=20

23 *Sdružení Jihočeské Matky v Czech Republic* (App no 19101/03) 10 July 2006. It notably marks the first recognition of the Court that any restriction on this right would have to meet the requirements of Article 10(2), which means such a restriction must be prescribed by law, have a legitimate aim and must be necessary in a democratic society. Most recently, the Court has reiterated this in *Társaság A Szabadságjogokért v Hungary* (App no 37374/05) 14 April 2009.

24 There has been widespread criticism from non-governmental organisations concerning the Convention (see: www.access-info.org/data/File/Access%20Convention%20-%207%20Main%20Problems%20-%203%20March%202008%20-%20FINAL.pdf). In July 2008, the Parliamentary Assembly of the Council of Europe appointed a rapporteur to draft an opinion on the Convention. Paradoxically, the subsequent adoption process of the Convention has been shrouded in secrecy (see: www.article19.org/pdfs/press/council-of-europe-ignoring-public-opinion-council-of-europe-set-to-adopt-con.pdf).

25 The adopted texts of the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services of 28 and 29 May 2009 in Reykjavik can be found at: [www.coe.int/t/dghl/standardsetting/media/MCM\(2009\)011_en_final_web.pdf](http://www.coe.int/t/dghl/standardsetting/media/MCM(2009)011_en_final_web.pdf)
See also: Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to internet filters, 26 March 2008, available at: tinyurl.com/cna63u

26 See also a 2008 critical report issued by the CoE Commissioner for Human Rights (op. cit.).

27 The policy started with a Green Paper on Copyright and the Challenge of Technology (COM (88) 172 final). A number of Directives have been adopted, which are implemented by member states in their national law, and which regulate specific areas including computer programmes (Council Directive 91/250/EEC), lending rights and the main neighbouring rights (Council Directive 92/100/EEC), satellite broadcasting and cable retransmission (Council Directive 93/83/EEC), the duration of the protection of the authors' rights and neighbouring rights (Council Directive 93/98/EEC) and the legal protection of databases (Directive 96/9/EC). The EU is also bound by international instruments such as the Berne Convention, the World Intellectual Property Organization (WIPO) Copyright Treaty and the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which have necessitated the EU to adapt its rules. Recently, the proposed Anti-Counterfeiting Trade Agreement (ACTA), which also relates to online copyright protection, has led to concerns about the opaqueness of its negotiations. A leaked proposal indicates that the agreement may result in criminal sanctions against significant willful intellectual property rights infringements even without financial motivation, and enables right holders “to expeditiously obtain information identifying the alleged infringer.” See: wikileaks.org/leak/acta-proposal-2007.pdf

28 Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

29 Institute for Information Law (2008) *Response to the Green Paper on Copyright in the Knowledge Economy*. www.ivir.nl/publications/guibault/IVIR_Response_to_Green_Paper_on_Copyright_in_Knowledge_Economy.pdf

30 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

31 Patents have been excluded from the scope of the proposal. However, recently advances have been made in the direction of establishing a Community patent and an EU Patent Court. See: register.consilium.europa.eu/pdf/en/08/st16/st16006.en08.pdf

enforcement, and are pushing for a more active role for ISPs when it comes to monitoring content.³² Some European governments seem to be sympathetic to this idea. So, for example, France has been seeking to introduce a “graduated response” scheme which would entail monitoring by ISPs, notification of alleged infringers of copyright, and, eventually, the temporary termination of internet service.

In 2008, the Commission published a Green Paper on Copyright in the Knowledge Economy, which was the basis for public consultations. A Communication of the same year hinted at the introduction of more restrictive measures resembling the French model to combat illegal downloading.³³ During the current review of the so-called Telecoms Package,³⁴ negotiations on renewed rules on online copyright have stalled, and proposals for new legislation have been postponed.³⁵

Another controversial issue relates to the temporal protection of copyrighted materials. In 2008 the Commission published a proposal to amend the Copyright Term Extension Directive to extend the term of protection for recorded performances and records from 50 to 95 years.³⁶

Council of Europe

Until now, the ECtHR has generated little case law on issues of copyright since its rights are not usually considered to have horizontal effect (meaning between individuals/

citizens), but rather between public authorities and citizens. Since Article 10 of the ECHR is applicable to online content too, clearly any state decision to block certain content would have to fulfil the conditions of the Convention for legitimate interference with the rights it protects. As a result, regimes such as that proposed by France, where an administrative body would be mandated to decide to cut internet connectivity in the case of alleged copyright infringements, would certainly raise issues of proportionality.

The CoE has produced a number of other relevant legal instruments such as, importantly, the Convention on Cybercrime, which entered into force in 2004 and entails provisions on criminal liability for intellectual property violations.³⁷

Criticism against the Convention has largely focused on a lack of effective safeguards to protect fundamental rights such as privacy, a lack of a “double criminality” provision, as well as its broad scope.³⁸

Conclusion

Over the past fifteen years of incremental EU rule making, there is now a considerable amount of case law and practical experience on institutions’ policies to implement what is increasingly seen as a fundamental right of EU citizens to access information.

Since the Regulation on access to documents does not specify which kind of documents have to be entered into the online registers, however, the EU institutions adhere to very different standards. As a result, a large number of documents are excluded from public view. In addition, one must know quite a lot about the workings of the EU, and be able to navigate through the different registers in search of a trail of documents, to reconstruct the decision-making process on a certain issue.

When it comes to national laws in the larger region of the CoE, under certain circumstances, a right to access to information has clearly been recognised by the ECtHR. This marks an important shift in the Court’s interpretation of the Convention, as mirrored in the adoption of the Convention on Access to Official Documents.

32 The issue of whether ISPs can be required to actively monitor potential copyright infringements has been hotly debated. So, while the eCommerce Directive did not entail an active obligation of ISPs to monitor content, injunctions by rights holders against ISPs may be compatible with the Copyright Directive, leaving the issue in legal limbo. Self-regulatory initiatives by ISPs that *inter alia* involve internet filtering to avoid liabilities have been the reaction. Also, some governments want to legislate to require ISPs to filter the internet (e.g., Germany, in order to prevent child pornographic content).

33 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, Com(2007) 836 final, Brussels, 03 January 2008.

34 This denotes proposals for amendments of a number of directives by the Commission in order to reform the regulatory framework for electronic communications networks and services. It includes a proposal for a directive (COD/2007/0247) that would amend the Access Directive (2002/19/EC), the Authorisation Directive (2002/20/EC) and the Framework Directive (2002/21/EC) as well as a proposal for a directive (COD/2007/0248) that would amend the Universal Service Directive (2002/22/EC) and the Personal Data and Protection of Privacy Directive (2002/58/EC). It also includes a proposal for a Regulation creating a new European Electronic Communications Market Authority (COD/2007/0249).

35 At the same time, the review of the eCommerce Directive in order to clarify the issue of liability is being postponed until the new Commission is sworn in at the end of the year.

36 Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, COM(2008) 464 final, Brussels, 16 July 2008. In March 2009, the proposal was rejected by the body that negotiates agreement before the Council of Ministers takes a vote, which will at least delay a term extension.

37 European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, Strasbourg, 11 May 1994. It has also issued recommendations on issues relating to intellectual property rights in 2001, when the Council adopted a convention on the legal protection of services based on, or consisting of, conditional access.

38 Double criminality connotes the requirement that a conduct be considered a criminal offence under the law of both the transferring and the receiving country. If you are in country A and hack into a computer located in country B, and if country B subsequently asked country A to extradite you, then the double criminality principle requires that hacking is considered a crime in both countries.

An important caveat in times of ongoing privatisation and liberalisation is the fact that in both regimes, access to information is only recognised in relation to information held by public authorities, not private actors. At the same time, the EU approach to enforcing intellectual property rights has been far-reaching, while national interpretations still vary. Bringing about a more coherent legal environment will require additional EU rules in the future. The music industry is likely to continue putting on the pressure to have ISPs burdened with more responsibility when it comes to copyright infringements. As a result, internet piracy is unlikely to disappear from the agenda in the near future, while copyright extension and a European policy concerning patents and trade agreements on intellectual property rights will remain important issues to be discussed at the regional level. ■

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GISWatch has three interrelated goals:

- **Surveying** the state of the field of information and communications technology (ICT) policy at the local and global levels
- **Encouraging** critical debate
- **Strengthening** networking and advocacy for a just, inclusive information society.

Each year the report focuses on a particular theme. **GISWatch 2009** focuses on *access to online information and knowledge – advancing human rights and democracy*. It includes several thematic reports dealing with key issues in the field, as well as an institutional overview and a reflection on indicators that track access to information and knowledge. There is also an innovative section on visual mapping of global rights and political crises.

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GISWatch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

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