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PRE-EMPTION ISSUES IN THE DIGITAL ENVIRONMENT: CAN COPYRIGHT LIMITATIONS BE OVERRIDDEN BY CONTRACTUAL AGREEMENTS UNDER EUROPEAN LAW?

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INTRODUCTION

Contracts are essential for the proper implementation of the copyright framework, from the moment of creation of a work to its exploitation at the end user level. But while the vast majority of contracts limiting copyright exploitation are beyond doubt enforceable, the few contracts that attempt to bar the precise activities that copyright law has specifically sanctioned cannot stand.[1] Indeed, the grant of exclusive exploitation rights under copyright law, including the limitations imposed on their exercise, is thought to reflect a balance carefully drawn by the legislator to encourage creation on the one hand and dissemination of new material, on the other.[2] Any contractual expansion of rights beyond what is provided for under copyright law risks disrupting this balance of interests, which may ultimately stifle creation.

In practice, the threat of seeing contracts rule out some or all of the users' rights has dramatically increased, since digital technology now allows copyright owners to impose their terms of use, often through non-negotiated agreements. The tendency to have transactions for information governed by contractual terms raises the issue of the overridability of copyright limitations in more acute terms in the digital environment than in the analogue world, where everyone relied on copyright law to set the limits of permitted action. This aspect of the boundary between copyright law and contract law is currently the object of much attention in the United States, particularly during the drafting process of proposed Article 2B of the Uniform Commercial Code (UCC Article 2B). This new provision would not only validate shrinkwrap and other mass-market licenses of information, but it would also set rules about electronic contracting for information products and services.[3] In the wake of the highly criticised decision of the Court of Appeal for the Seventh Circuit in ProCD v. Zeidenberg[4], negotiations over the draft of UCC Article 2B have been marked by intense discussions on the necessity to include in the article a specific section on pre-emption, which would, in addition to the constitutional Supremacy Clause[5] and paragraph 301 of the U.S. Copyright Act[6], ensure precedence of the copyright limitations over contractual provisions to the contrary.

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[1] See: Nimmer, D., Frischling, G.N. and Brown, E. (1998).

[2] Guibault, Cahiers de Propriété Intellectuelle 1996, p. 210.

[3] Samuelson, Communications of the ACM forthcoming 1998, p. 1.

[4] 86 F.3d 1447 (7th Cir. 1996). In this case, the Court enforced a mass market license restriction permitting only 'home use' of a CD-ROM of telephone directory information, despite the fact that telephone directory information had been declared non-copyrightable subject matter by the United States Supreme Court in Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991). Main critics consider that the ProCD decision goes against federal copyright policy not to protect purely factual information and that the mass market license should have been pre-empted under § 301 U.S. Copyright Act.

[5] According to D. Karjala, University of Dayton Law Review (1997), p. 533, 'pre-emption can also occur under the Supremacy Clause of the Constitution, where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"'.

[6] Paragraph 301(a) of the U.S. Copyright Act of 1976 reads as follows: 'On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State".

In the European Union, however, pre-emption issues have rarely been examined. This may be due to the fact that copyright rules are not subject to constitutional pre-emption in any of the Member States, and no provision similar to paragraph 301 of the U.S. Copyright Act has been enacted as a consequence. In rare cases, the legislator has avoided possible conflicts between contract law and copyright law by expressly providing that copyright rules have precedence over any contractual provision to the contrary. This is the case of the directives on computer programs and databases, which both contain provisions stating that contractual provisions, which prevent users from accomplishing specific acts allowed therein, are null and void.[7] In the absence of specific language from the legislator, the assessment of whether other statutory copyright limitations override contractual provisions to the contrary must follow a careful examination of their grounds for adoption. Some limitations may find their justification in competing bodies of law, such as the European Convention on Human Rights or the competition rules of the Treaty of Rome, while others may be implemented on the basis of national public interest considerations or as a remedy to market failure. Public policy reasons may thus warrant the mandatory application of a number of these limitations, for fear of disrupting the balance struck by copyright law.

The question of copyright overridability is not merely theoretical. As transactions relating to digital information are increasingly being completed through licensing agreements, practical problems are likely to arise as to the validity, under European law, of the conditions of use of copyright material set out in such licenses. Moreover, given the global nature of digital networked transactions, it is to be expected that, once the text of Article UCC 2B is adopted, some pressure will be exercised on foreign countries to adopt similar provisions.

This article is divided in two parts. The first part examines, under a European law perspective, the statutory limitations on the exercise of exclusive rights and their grounds for implementation, as well as a number of possible limitations found outside of copyright law, for example in constitutional law, civil law, consumer protection law and competition law. We have also a brief look at the current draft of Article 5 of the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. Leaving the question of the enforceability of mass-market licenses to the consideration of other authors, the second part of this paper concentrates on the issue of copyright overridability issues. On the basis of the findings in the first part, we shall attempt to draw the boundary between copyright and contract law in Europe, by trying to determine the legal status of the statutory copyright limitations in relation to contracts: are the copyright limitations imperative or default rules? Are the copyright exemptions, like the right to reproduce a work for private research, the right to quote and the library privilege mandatory provisions that pre-empt any contractual clause to the contrary?

1. LIMITATIONS ON THE EXERCISE OF EXCLUSIVE RIGHTS

Like any other type of private property right, copyrights are not absolute rights. Even the countries most committed to the advancement of author's rights recognise the need for restrictions or limitations upon these rights in particular circumstances.[8] There are several reasons to restrict the exercise of copyright, all of which are ultimately aimed at maintaining a balance between the respective rights of copyright holders and users.[9] Some limitations are based on fundamental principles of law, some on public interest considerations, and others on economic factors. The justifications for the creation of such limitations are not static however: limitations based today on public interest considerations may eventually be justified as remedies to market failure, and likewise, limitations which are currently implemented in response to perceived market failure may take a public interest dimension in the future. It is also quite possible that certain limitations have more than one ground of justification.

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[7] Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC), O.J.E.C. no. L 122, 17/05/91, p. 42, art. 5; and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J.E.C. no. L 77, 27/3/96, p. 20, art. 6.

[8] See: Bochurberg (1994), p. 31; and Schricker (1997), p. 139.

[9] See for example: WIPO Copyright Treaty, signed on December 20, 1996, preamble: "The Contracting Parties, recognising the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention have agreed as follows".

1.1 **Limitations found in copyright law**

While most exemptions to copyright find their origin in international instruments like the *Berne Convention*, States have always maintained full sovereignty to decide whether to implement them in their national legal order and if so how. Differing policy orientations, distinct drafting techniques and judicial interpretation result in a variety of copyright limitations found among the countries of the Berne Union, ranging from the minimal exemptions allowed under the French Code de la propriété intellectuelle, to the extensive list of limitations recognised under the British Copyright, Designs and Patents Act 1988.[10] Solutions for the same problem also tend to vary from one country to another: a particular use may be carved out from the scope of protection in one country, and take the form of a statutory license, with or without remuneration, in other countries. In any case, limitations imposed on the exercise of exclusive rights under copyright law have been divided into four categories: 1) limitations based on the defence of fundamental rights; 2) limitations based on the promotion of education and culture; 3) limitations based on other public interest considerations; and 4) limitations based on market failure. In the fifth section, we have a brief look at Article 5 of the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society,[11] approved by the European Commission in December 1997.

1.1.1 *Limitations based on the defence of fundamental rights*

In October 1997, the European Parliament issued a Resolution containing its main guidelines and recommendations for the elaboration of a directive on copyright and the Information Society. The safeguard of the public's fundamental rights constitutes an important preoccupation for the European Parliament. Among other points, the Parliament stresses "that it is essential to make a distinction between the protection of copyright and related rights and the protection of individual freedoms, such as freedom of expression and, in general terms, the interests of the general public, the right to respect for human dignity and privacy or the public's right to be informed (…)".[12] At paragraph 19 of the Resolution, the Parliament adds that, in support of the principles expressed in the Ministerial Declaration of July 1997, "rules on responsibility relating to copyright and neighbouring rights must take into account their impact on freedom of speech, respect public and private interests and not impose disproportionate burdens on actors".

1.1.1.1 Freedom of expression and right to information

The individual's freedom of expression and the public's fundamental right to information are guaranteed under several international instruments. The most significant among these may be the Universal Declaration on Human Rights of 1948[13], in particular its Article 19 on the freedom of opinion and expression and the freedom to seek, receive and impart information. In addition, Article 27 is not only concerned with recognising to everyone 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, but also with recognising to everyone the right to freely participate in the cultural life of the community. These two provisions of the Universal Declaration have been incorporated at Article 19 of the International Covenant on Civil and Political Rights[14] and Article 15 of the International Covenant on Economic, Social and Cultural Rights[15], respectively, whereas Article 10 of the European Convention for the protection of Human Rights and fundamental freedoms (ECHR)[16] repeats Article 19 of the Declaration

[10] Hugenholtz, P.B., Adapting Copyright to the Information Superhighway, in Hugenholtz (1996), p. 93.

[11] Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997, COM(97) 628 final [hereinafter "Proposal for a Directive" or the "Proposal"].

[12] Resolution on the Communication from the Commission: Follow-up to the Green Paper on copyright and related rights in the information society, European Parliament, A4-0297/97, of 23 October 1997, § 12.

[13] Adopted unanimously by the United Nations General Assembly on December 10, 1948.

[14] Signed on December 16, 1966, (1976) 999 United Nations Treaty Series, p. 187.

[15] Signed on December 16, 1966, (1976) 999 United Nations Treaty Series p. 13.

[16] European Convention for the protection of Human Rights and fundamental freedoms, signed in Rome on 4

on the freedom of opinion and expression.

Protection is thus guaranteed to all members of society, whether authors, performers, or simple users of protected material. But the rights holders' freedom of expression, which materialises ultimately in copyright protection on their works, is not absolute: it is counterbalanced by the public's same fundamental rights and freedoms. Hence, rights holders must, in making use of their own rights, take account of those of others.[17] The balance between the rights of the creators and those of the public contributes in maintaining the free flow of information within society.

The fact that, as a principle, copyright law only protects the form of expression and not the underlying ideas certainly tends to limit the possible impact of copyright on freedoms of speech and the right to information. Following this principle, anyone may publish or reproduce the ideas of another contained in copyright material provided that the form of expression is not also reproduced.[18] While the freedom to use another's ideas contributes substantially to the freedom of public debate and news reporting, there may be circumstances where it is important to be able to use not merely a person's ideas, but also his form of expression in order to have effective reporting or criticism of his/her thoughts. For example, it may be important to capture the mood, the tone or the nuances in an address, which may not be possible without reproducing a substantial part of the speaker's form of expression.[19]

Whether from the *droit d'auteur* or copyright tradition, most countries have enacted some measures designed to safeguard the individual's freedom of speech and the public's right to information, and to promote the free flow of information. These limitations are established within the boundaries set by the Berne Convention and the Rome Convention. In this respect, the Berne Convention makes the right to quote mandatory, but leaves the decision to Member States whether to adopt exemptions in favour of the press and whether to exclude official texts, political speeches and speeches delivered in the course of legal proceedings from copyright protection. The adoption of limitations on the exercise of copyright is also permitted under Article 10(2) of the ECHR and Article 19(3) of the International Covenant, whereby States may impose statutory restrictions that are necessary in a democratic society for the protection of the rights of others.

To make a list of all possible limitations adopted for this purpose pursuant to the Berne Convention proves very difficult, particularly in view of the many nuances brought by national legislators and by linguistic subtleties. Some limitations relate to the informational character of the protected material, such as political speeches and other similar public addresses, while others regulate the manner in which protected material may be used without the rights holder's consent. Most limitations are subject to strict conditions of application. However, uses allowed under these provisions often, but not always, do not entail monetary compensation for the rights holders. It is deemed in the general public interest that such material or such uses be allowed without the authorisation of the rights holder and without payment of a fee.[20] Among the numerous limitations that may be introduced into national legislation for the promotion of the free flow of information are the following:

1. Right to quote works of critic, polemic, informational or scientific character for purposes of criticism, news reporting;[21]
2. Right to reproduce press reviews, news reports, miscellaneous reports or articles concerning current economic, political or religious topics that have appeared in a daily or weekly newspaper or weekly or other periodical or works of the same nature that have been broadcast in a radio or television programme;[22]

November 1950, art. 10.

[17] Spoor/Verkade, D.W.F. (1993), p. 187.

[18] Johnston, EIPR 1996/1, p. 6.

[19] Kéréver, RIDA 1996/170, p. 323.

[20] Schricker (1997), p.161.

[21] Code de la propriété intellectuelle, art. L. 122-5, 3º (a); Urheberrechtsgesetz, BGBl. I S. 1273, vom 9. September 1965, § 51 [hereinafter "Urheberrechtsgesetz"]; Dutch Copyright Act of 1912, art. 15a; Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins, Moniteur belge, 27 juillet 1994, p. 19297, art. 21 [hereinafter Belgian Copyright Act].

[22] Dutch Copyright Act of 1912, art. 15; Urheberrechtsgesetz, § 49; Code de la propriété intellectuelle, art. L. 122-5, 3º (b).

3. Right to reproduce, make available or broadcast political speeches and other public addresses;[23]
4. Right to reproduce individual articles, reports or other texts which have appeared in a daily or weekly newspaper or weekly or other periodical, or short passages from books, pamphlets or other writings, in so far as they are scientific works;[24] or
5. Right to record, show or announce a literary, scientific or artistic work in public in a photographic, film, radio or television report, provided this is necessary in order to give a proper account of the current affairs that are the subject of the report;[25]
6. Right to reproduce works for purposes of parody;[26]

These limitations have all been implemented into national legislation in some form or another for the purpose of promoting political, social, economic and cultural debate, as an integral part of a free and democratic society.

1.1.1.2 Right to privacy

Traditionally, copyright owners have never held absolute control over the use of their works. They were never able to prevent personal use of their works, that is to prevent someone from reading, listening to or viewing a work made publicly available for his or her own learning, enjoyment, or sharing with a colleague or friend - without any motive for profit.[27] It is generally thought that copyright and neighbouring rights do not protect against acts of consumption or reception of information.[28] Nowhere in the Berne Convention is it stated however that an author may not object to the performance or broadcast of his work in the family circle[29] or to its reproduction for private use.[30]

Nevertheless such limitations have long been introduced in the legislation of many countries partly on the basis that copyrights and neighbouring rights do not extend to the private sphere of individuals, and partly on the basis that reproduction for private use does not affect the interests of the rights holder. It has been argued that the structure of some of the exclusive rights granted to authors, performers and phonogram producers implies that rights holders are not meant to control the use made of their work in one's own home. In many countries, rights holders are indeed granted the exclusive right to execute in 'public', to communicate to the 'public', and to present a work at a 'public' exhibition.[31] Consequently rights owners may not prohibit the accomplishment of these acts, as long as they are restricted to the private circle. Admittedly, these provisions raise some controversy in case law, as to the proper definition of 'public' and 'private' and as to what can be considered a close family tie or an intimate friendship of the participants to a performance.[32] Furthermore, to be generally considered lawful, no admission fee must be charged on the audience of such a representation.

The basis of the right to make reproductions for private purposes follows the same grounds of analysis as those set out above, despite of the fact that the reproduction right covers all reproductions of a work in any manner of form, notwithstanding any possible distinction between the private and the public sphere. It was initially thought that the hand copying or the typewriting of a manuscript could not affect the normal exploitation of the work, and that such practice could therefore be considered lawful.[33] On

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[23] Urherrechtsgesetz, § 48.
[24] Dutch Copyright Act of 1912, art. 17.
[25] Dutch Copyright Act of 1912, art. 16a); Urheberrechtsgesetz, § 50; Code de la propriété intellectuelle, art. L. 122-5, 3° (c); Belgian Copyright Act, art. 22 § 1, 1º.
[26] Code de la propriété intellectuelle, art. L. 122-5, 4º; Belgian Copyright Act, art. 22 § 1, 6º;
[27] Patterson/Lindberg, (1991), p. 193.
[28] Legal Advisory Board (1995).
[29] See: Code de la propriété intellectuelle, art. L. 122-5, 1º; Belgian Copyright Act, art. 22 § 1, 3º.
[30] See: Code de la propriété intellectuelle, art. L. 122-5, 2º; Belgian Copyright Act, art. 22 § 1, 4º and 5º; Dutch Copyright Act of 1912, art. 16(b); Urheberrechtsgesetz, § 53.
[31] See for example: Code de la propriété intellectuelle, art. L. 122-2: "La représentation consiste dans la communication de l'oeuvre au public par un procédé quelconque, et notamment: 1º Par récitation publique, exécution lyrique, représentation dramatique, présentation publique, projection publique et transmission dans un lieu public de l'oeuvre télédiffusée; 2º Par télédiffusion. La télédiffusion s'entend de la diffusion par tout procédé de télécommunication de sons, d'images, de documents, de données et de messages de toute nature. Est assimilée à une représentation l'émission d'une oeuvre vers un satellite". (Our emphasis)
[32] Bertrand (1991), p. 193; and Del Bianco (1951), p. 127 and ff.
[33] Wistrand (1968), p. 320.

this basis, many statutes still provide that a reproduction is lawful if it is realised for personal or private purposes and if it is made without any motive for profit.[34] Other statutes will require in addition that the user not resort to the services of a remunerated third party to make the copies.[35] It is understood that these reproductions must not be put into circulation so as to reach the public in any way, or they would otherwise come in conflict with the normal exploitation of the work. Generally, reproductions made for personal use are limited in length that is, only small extracts of the work may be copied, and limited to the making of only a very small number of copies.[36]

The considerations at the root of the right to make single copies of a work were soon put to the test with the development of more sophisticated techniques of reproduction. At the time of the Stockholm Conference for the revision of the Berne Convention in 1967, home taping of sound recordings was becoming wide spread among the population. And although no consensus could emerge on the introduction of a specific limitation on private use, delegations agreed to the adoption of the 'three-step-test' of Article 9(2) and to specify, in Article 9(3), that 'any sound or visual recording shall be considered as a reproduction for the purposes of this Convention'. As Ricketson explains, the Main Committee I of the Stockholm Conference has interpreted these provisions, both as a justification for the existence of the private use exemption and as the basis for adoption of home taping regimes:

> 'This clearly envisages that exceptions under Article 9 (2) may take the form of either absolute exceptions or compulsory licences, depending essentially on the number of copies made. (...) As a matter of language, it also makes sense. The power under Article 9 (2) is to permit the reproduction of works in certain special cases, and there is nothing in the wording of the provision which forbids the imposition of conditions on the grant of such permission, such as an obligation to pay for it (or to acknowledge the source of the work reproduced, for that matter).'[37]

A few years before the negotiations of the Stockholm Conference took place, it had already become obvious that the practice of home taping of sound recordings was severely affecting the normal exploitation of works as well as the economic interests of rights holders. Home taping conflicts with the normal exploitation of the work as the loss of a sale deprives the author of his royalties. In 1955, in view of the large profits lost in the hands of home taping, the German collecting society GEMA brought action against producers of tape recorders, asking the court to prohibit the producers of tape recorders from selling the recorders, unless they made customers aware of their obligations under copyright law, and asking to grant damages for past infringement.[38] The German Supreme Court granted GEMA's motion on all points except the claim for damages.[39]

Following the decision of the German Supreme Court, preoccupations concerning the safeguard of the individual's fundamental right to privacy arose, when rights owners expressed their intention to start monitoring the use of their works in the private sphere.[40] Indeed, in order to know whether people were infringing copyrighted works through private copying, owners would have had to physically enter, search and possibly seize material in individual's homes, which was both highly intrusive and practically unenforceable. Again in 1964, the Supreme Court of Germany decided on the same grounds, that the collecting society GEMA could not oblige sellers of home taping equipment to request from their customers that they reveal their identity so as to enable the society to verify the legality of their activities.[41]

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[34] For a complete account of the law in force on this subject in eighteen European countries, see: Hugenholtz and Visser (1995).

[35] Bertrand (1991), p. 194. See: Code de la propriété intellectuelle, art. L. 122-5, 2º: "Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire: les copies ou reproductions strictement réservées à l'usage privé du copiste et non destinées à une utilisation collective (…)", where the term "copiste" has been interpreted as the physical person making the copies for himself.

[36] Stewart/ Sandison (1989), p. 250.

[37] Ricketson (1987), p. 484.

[38] "Schallplatten", Urteil des Bundesgerichtshofs vom 18. Mai 1955 – Aktz.: I ZR 8/54 (Kammergericht) reproduced in GRUR 10/1955, p. 492.

[39] Wistrand (1968), p. 368.

[40] Reinbothe, IIC 01/1981, p. 39.

[41] "Personalausweise", Urteil des Bundesgerichtshofs vom 29. Mai 1964 - Aktz. : Ib ZR 4/63 (Kammergericht), reproduced in GRUR 02/1965, p. 104. For a commentary on this decision, see: Institute for Information Law (K.J.

Such actions would have conflicted with the fundamental right to privacy of each individual, which is not only guaranteed under the German Basic Law, but also under Article 8 of the ECHR and Article 17 of the International Covenant on Civil and Political Rights. The German Supreme Court decisions and their effects strongly influenced the preparatory work for a reform of the German copyright law. The new German Copyright Act was adopted in 1965. It introduced the first known statutory right to equitable remuneration in favour of authors, performers and phonogram producers for home taping, through the imposition of a levy on the sale of sound recording equipment.[42]

The German experience has influenced to a great extent the future legislative actions undertaken in other countries with respect to the establishment of home taping regimes,[43] originally with respect to sound recordings, and eventually to audio-visual works. Such regimes have been put in place in a number of countries for two reasons: first, to protect the citizens' fundamental right to privacy,[44] as guaranteed under Article 8 of the ECHR, and second, to provide rights holders with monetary compensation for the private use of their works. But in the absence of international provisions on the subject, the regulation of home taping is left to national legislation. Not surprisingly then, the structure of these regimes varies significantly from one country to another, if and where such regime is in place at all. In view of the circumstances surrounding their creation, non-voluntary licenses for home taping may also be seen as a cure to market failure.

1.1.2 *Limitations based on the promotion of education and culture*

Although not founded on the defence of fundamental rights and freedoms, some limitations are nevertheless adopted on the basis of major public interest considerations, such as the promotion of education and culture. Statutory provisions passed to this end encompass a wide range of measures designed to allow institutions like schools, libraries, museums and archives,[45] to make specific unauthorised use of protected material. Some of these restrictions have been implemented pursuant to Article 10(2) of the Berne Convention, which gives full discretion to the countries of the Union to regulate the 'utilisation of works by way of illustration' for teaching purposes. Acts of reproduction accomplished by libraries, schools, archives and museums under a reprography regime fall also under the category of limitations based on the promotion of education and culture, but they are based on and must conform to Article 9(2) of the Convention.

Whereas an individual's private use of a work is allowed under the conditions described in the section above, multiple reproductions done by schools, libraries, and other such institutions do not fall under the private use exemption.[46] Such a practice leads in fact to copies that are intended for collective use, the collective body in question being that formed by the pupils, students or library patrons, which violates the owner's exclusive right of reproduction. Nevertheless with the development of reprographic techniques in the early 1970s, the number of photocopies made within educational institutions, libraries and other public and private organisations grew drastically. Although such reproductions may have followed public interest objectives, they became very damaging for the normal exploitation of works and the legitimate interests of rights holders.

In some countries, this problem was left for the parties to solve, generally through the negotiation of licences between rights owners and users. A number of countries chose however to regulate the reprographic use of protected material by educational institutions, libraries and other institutions through the implementation of a non-voluntary licence regime. According to such a regime, a fixed levy is

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Koelman), (1997), p. 16.

[42] Wistrand (1968), p. 364.

[43] Visser, Copyright Exemptions Old and New: Learning from Old Media Experiences, in Hugenholtz (1996), pp. 49-56, at p. 50.

[44] Spoor/Verkade (1993), p. 189, where the authors specifically acknowledge the fact that the creation of home taping regimes is based originally on the protection of the user's private sphere.

[45] See: Copyright, Designs and Patents Act 1988, U.K. Statutes, c. 24, ss. 37-42;Urheberrechtsgesetz, § 46, 47, 53(5).

[46] See for example: "CB-infobank I", Bundesgerichtshof, Urteil vom 16.1.1997, Aktz: I ZR 9/95 (OLG Köln) reproduced in *GRUR* 06/1997, p. 459 where the Court decided that reproductions made by a research service for purposes of archiving are not admissible under the personal use exemption when the reproductions are intended to be used by third parties.

imposed on domestic manufacturers, importers or acquirers of reprographic equipment. The law may also provide for (additional) payment per page reproduced, from physical and legal persons making the copies or, as the case may be, from entities who make such equipment available to others. The sums paid under reprography regimes are administered by a collective society, often on a mandatory basis.[47] Often reprography regimes extend beyond schools and libraries, to all reproductions made by governmental organisations, enterprises, administration offices and copy shops where reprographic equipment is available.[48]

A number of countries decided not to adopt specific provisions applicable to educational institutions, libraries, archives or museums, beyond the mandatory right to quote for scientific purposes, the recognition of a private use exemption and the setting up of a reprography regime.[49] In countries where special measures have been introduced with respect to schools and other educational institutions, the most important limitations to be found are the following:

1. The right to make compilations of only short works or of short passages of works by one and the same author and, in the case of artistic works, photographs or drawings, only a small number of those works, for purposes of teaching;[50]
2. The right to take over parts of works in publications or sound or visual recordings made for use as illustrations for teaching;[51]
3. The right to communicate to the public parts of works by broadcasting a radio or television programme made to serve as an illustration for teaching purposes;[52]
4. The right to perform and display a work in the course of teaching activities.[53]

Such reproductions and other uses are usually allowed provided that the work, which is reproduced or used, has been lawfully communicated to the public and that the reproduction or use is in conformity with that which may be reasonably accepted in accordance with social custom. As in the case of citations, the source must be clearly indicated, together with the indication of the author if it appears in the source. Furthermore, the law often provides for the payment of an equitable remuneration to the author or his successors in title.

The right of public libraries to lend protected works to the public was harmonised at the European level through the adoption of the Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.[54] The Directive grants an exclusive right as a basic principle but at the same time offers Member States the opportunity to choose a right to remuneration instead of the exclusive right. The possibility of derogation provided by Article 4 is intended to allow for the Member States' cultural policies, in particular the need to guarantee access for consumers to public libraries. In addition, at the time of its adoption it was intended to facilitate a compromise between the Member States, which have strongly differing provisions, if any, on lending rights.[55]

Unlike other European copyright acts, Article 38 of the British Copyright, Designs and Patents Act of 1988 provides for very extensive and complex library privileges. Under this Act, public librarians may, subject to the applicable regulations, supply to any of their patrons one copy of one article from an issue of a periodical publication or one copy of a reasonable proportion of a work other than an article. In order to receive such copy, the user must provide the librarian with sufficient evidence that this copy will serve for purposes of research or private study only. This right also extends to inter-library loans, which are also subject to strict conditions of application. However, the applicability of these limitations to the digital networked environment raises important concerns, both on the part of the rights holders and

[47] Belgian Copyright Act, art. 61; Urheberrechtsgesetz, § 54 (6).
[48] Spoor/Verkade (1993), p. 242.
[49] France and Belgium for example have no such specific exemptions. See: Hugenholtz and Visser (1995), p. 11 and 19.
[50] Urheberrechtsgesetz, § 46; Dutch Copyright Act, art. 16 (3). See: Spoor/Verkade (1993), p. 212 ff.
[51] Dutch Copyright Act of 1912, art. 16 (1)(a).
[52] Urheberrechtsgesetz, § 47; Dutch Copyright Act of 1912, art. 16 (1)(b).
[53] Urheberrechtsgesetz, § 52.
[54] O.J.E.C. no. L 346, 27/11/92, p. 61.
[55] Reinbothe and v. Lewinski (1993), p. 34.

of the users.

1.1.3 *Limitations based on other public interest considerations*

A number of other limitations, which are commonly recognised as serving the general public interest, can be found in national legislation. Among these, are limitations to the reproduction right adopted in favour of the physically handicapped and those adopted for administrative and judicial purposes, both of which were already envisaged as one possible application of the limitation set out in Article 9(2) of the Berne Convention, during the negotiations of the Stockholm Conference in 1967.[56] Public interest is also invoked as a basis for the adoption of other forms of copyright limitations, which are in fact primarily the result of strong lobby exercised by stakeholders, as well as for the adoption of specific restrictions, which are especially drafted to mirror established industry practices. The latter restrictions are often implemented on the basis of competition law considerations, to prevent any abuse of dominant position within an industry. This is namely the case of the limitations adopted in relation with computer programs.[57]

Under the EC Directive on the legal protection of computer programs, lawful owners of a copy of a computer program have the right to make, in the absence of specific contractual provisions, a permanent or temporary reproduction of the program as well as to make a translation, adaptation, arrangement or any other alteration. These acts are allowed under the sole condition that they are necessary for the use of the computer program in accordance with its intended purpose, including for error correction. Lawful users may also make one back-up copy of the computer program. The right to a back-up copy may not be prevented by contract insofar as it is necessary for that use. The Directive further provides that the rightful owner of a copy of a computer program may, without the authorisation of the right holder, observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.[58] Authorised users of databases protected under the new European Directive on the legal protection of databases are also entitled to accomplish similar acts with respect to the databases, without the rights holder's authorisation.[59]

1.1.4 *Limitations based on market failure considerations*

Other forms of copyright limitations have been implemented in view of alleviating the perceived market failure in the production and exploitation of protected material. Market failure can best be described in cases where market conditions make bargaining between individual copyright owners and potential users of copyright material impossible or prohibitively costly, or where copyright owners are unable in practice to enforce their rights effectively against unauthorised users.[60] In such circumstances, economic efficiency demands that alternate ways be found to make up for the absence of negotiations between rights holders and users and to compensate the unenforceability of the exclusive rights for the unauthorised uses made of works. Most limitations based on market failure take the form of non-voluntary licences, such as the home-taping levy on blank cassettes and recording equipment for

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[56] Ricketson (1987), p. 485 and ff.

[57] See: Kroker, E.I.P.R 1997/5.

[58] Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC), O.J.E.C. no. L 122, 17/05/91, p. 42, art. 5.

[59] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J.E.C. no. L 77, 27/3/96, p. 20, art. 6: "1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part. 2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases: in the case of reproduction for private purposes of a non-electronic database; where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; where there is use for the purposes of public security of for the purposes of an administrative or judicial procedure; where other exemptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c)".

[60] Adelstein and Peretz, International Review of Law and Economics 1985/5, p. 211.

sound and audio-visual works,[61] or that of a remuneration right for the broadcast of sound recordings.[62] However it is also possible that this type of limitations consists simply in a restriction on the scope of protection in favour of users, without any kind of monetary compensation to the rights holder.

Because of the arrival on the market of audio and video-recorders permitting users to make inexpensive and good quality copies of sound recordings and films for private purposes, rights owners have lost an important part of their revenues on sales and royalties. As indicated earlier in this document, both the enforcement of exclusive rights and the direct negotiation of licences with users are practically impossible in the case of home copying. In consequence, several national legislatures have set up non-voluntary licence regimes to the benefit of authors, performing artists and phonogram producers. These provisions are intended to give copyright holders a compensation for the exploitation of their protected works by means of private home taping.[63] The solution has been applied in other instances as well, whenever the collective enforcement of rights makes more sense or is the only possible method in comparison to individual enforcement. Incidentally, it has not been convincingly demonstrated that reprography regimes respond to market failure symptoms. Considering that most photocopies are done by institutions, offices and copy shops, rights owners have the means of identifying potential users in order to directly license for the conditions of use of copyright material, without encroaching on the fundamental right to privacy of this category of users.[64] Indeed, as G. Davies explains:

> 'The main difference is that private copying is the copying of copyright material for personal use by a private individual in the home, whereas the bulk of photocopying is done by institutions and offices and much of what is copied is non-copyright material. Moreover, while vast numbers of private individuals have audio and video reproduction equipment at home, they do not yet possess photocopying machines for personal use. Thus, while private copying is a problem caused in the main by private individuals, reprography is a problem caused by institutions, and especially educational institutions'.[65]

With the advent of the digital networked environment, the distinction between home copying and reprography is no longer as unequivocal as it was. One may argue that computers have become massive photocopying machines, not only in the hands of institutions but also in the hands of private individuals. Considering that electronic copyright management systems and other digital techniques permit rights holders to license directly for the use of their works and to receive payment for the authorised uses, thereby eliminating the main cause of market failure, it has been suggested that this type of copyright exemption should be lifted as regards the digital environment.[66] This should be done of course only if one considers that the only basis for adoption of these exemptions is market failure, as in the case of the reprography regimes. However, in our opinion, home-copying regimes may still be justified as a means to protect the public's fundamental right to privacy, even in the digital environment.

1.1.5 *Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society*

Since the early 1990s, the European Community has engaged intense efforts towards the harmonisation of the copyright and neighbouring rights rules. Five Directives were adopted on copyright and related matters, bringing with them the obligation for Member States to implement these rules into their national legislation[67]. However, the same period saw the rapid growth of the information highway, to which the

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[61] See: Urheberrechtsgesetz, § 54 et seq.; Code de la propriété intellectuelle, art. L. 122-5, 2º and art. L. 211-3, 2º; Copyright Act of Canada, R.S.C. (1985), c. C-42 as last amended by S.C. 1997, c. 24, sections 79 and ff.

[62] Belgian Copyright Act, art. 55; Code de la propriété intellectuelle, art. L. 241-1.

[63] Schricker (1997), p. 163.

[64] See: Quaedvlieg, Informatierecht/AMI 1997, p. 92.

[65] Davies (1993), p. 167.

[66] Legal Advisory Board (1995), available at: 'http://www2.echo.lu/legal/en/ ipr/reply/reply.html'

[67] Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC), O.J.E.C. no. L 122, 17/05/91 p. 42; Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, O.J.E.C. no. L 346, 27/11/92, p.

European Commission had to devote equal attention. Of particular interest were the on-going works at the WIPO in view of the adoption of the new Treaties. All this activity led to the publication, in July 1995, of the Green Paper on Copyright and Related Rights in the Information Society[68]. A vast consultation process with the industry, rights holders, users and other interested parties, followed the publication of the Green Paper. Over one year later, the Commission published a second document, based on the results of the consultation. The *Follow-up to the Green Paper* was written to set out the Commission's Internal Market policy in the area of copyright and related rights in the Information Society and explain the reasoning behind the approach taken notably with respect to the priorities and means of action chosen[69].

As a result of this consultation process, the Commission presented, in December 1997, a Proposal for an EC Directive on Copyright and Related Rights in the Information Society[70]. According to the Background Document, the Proposal would adjust and complement the existing legal framework, and would particularly harmonise the rules pertaining to the right of reproduction, the right to communicate to the public, and the distribution right. The Proposal is also meant to implement the main obligations of the new WIPO Copyright Treaty and Performers and Phonograms Treaty, in view of their ratification by the Community.

The structure of rights and limitations of the Proposal for a Directive differs somewhat from that of the WIPO Treaties. Contrary to the WIPO Treaties which contain no specific limitation besides the reference to the «three-step test», the Proposal would introduce an *exhaustive* list of limitations in addition to the test. Member States would not be allowed to provide for any exemptions other than those enumerated in Article 5. The Commission believes that, without adequate harmonisation of the exemptions to the reproduction right and to the right to communicate in public, as well as of the conditions of their application, Member States might continue to apply a large number of rather different limitations and exemptions to the rights and, consequently, apply the rights in different forms to the detriment of the Internal Market. The prohibition to impose limitations other than those included in the list would therefore extend to limitations that are implemented in relation to the digital network environment, as well as to those that apply in the analogue world. Thus, the impact of the Proposal would not only be on future limitations adopted for the promotion of the Information Society but also on current exemptions. Furthermore, one question remains unanswered in the Explanatory Memorandum and that is whether the distribution right is also covered by Article 5 of the Proposal or whether this provision only concerns the right of reproduction and the right of communication to the public. This issue may have certain significance in countries, such as The Netherlands, where no distinction is made between the right to communicate to the public and the right of distribution, but most of all in cases where the making of reproductions under certain statutory limitations logically entails their distribution, such as reproductions made for the purpose of teaching which are handed out to students.

Although Article 1(2) of the Proposal states that, 'unless otherwise provided, the Proposal shall apply without prejudice to existing Community provisions relating to' copyright and related rights, the relationship between this Proposal and current limitations put in place by Member States is not clear. For instance, it is safe to assume that the specific exemptions of the Computer Programs Directive and of the

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61; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, O.J.E.C. no. L 248, 06/10/93 p. 15; Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, O.J.E.C. no. L 290, 24/11/93 p. 9; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J.E.C. of 27/3/96 no L 77 p. 20.

[68] Commission of the European Communities, Green Paper on Copyright and Related Rights in the Information Society, Brussels, 19 July 1995, COM(95) 382 final.

[69] Commission of the European Communities, Communication from the Commission – Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, Brussels, November 20 1996, COM(96) 586 final, p. 5.

[70] Proposal for a European Parliament and Council directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997, COM(97) 628 final [hereinafter "Proposal for a Directive" or the "Proposal"].

Database Directive would continue to apply.[71] However, there is no indication as to the intended fate of 'minor reservations', which are implemented in some countries on the basis of local public interest considerations. Would these small limitations have to be abolished, even if they have no economic significance for the Internal Market?[72]

The Proposal would also submit all limitations to the requirements of the 'three-step test', according to Article 5(4) which reads as follows:

> 'The exceptions and limitations provided for in paragraphs 1, 2 and 3 shall only be applied to certain specific cases and shall not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with normal exploitation of their works or other subject matter'.

Opinions vary as to the interpretation and weight to be given to the Agreed Statement concerning Article 10 of the WCT,[73] as well as to the extent to which States must ensure the compliance of existing limitations to the 'three-step test'. The Commission seems to take the view however, that all such limitations must be made compatible with the requirements of the 'three-step test', as shown by this comment from the Explanatory Memorandum accompanying the Proposal:

> 'It goes without saying that the obligations under the new Treaties have to be met in any case. Both Treaties provide for important clarifications and further guidance, which will have to be respected by those adhering to the Treaties. In particular the «three step test» will serve as an important guideline for the definition and application of limitations. This implies that, also with respect to the reproduction right, *certain limitations set out at Community level as well as at national level will have to be amended to be brought in line with the new WIPO Treaties also in the Community and its Member States'*.[74] (Our emphasis)

As it currently stands, Article 5 of the Proposal is divided into four paragraphs, the fourth one stating the principles of the 'three-step test'. The first and second paragraphs would provide for limitations relating to the reproduction right, whereas the exemptions of the third paragraph would be applicable to both the reproduction right and the right to communicate to the public. Thus, Article 5(1) would introduce the only mandatory limitation, according to which 'temporary acts of reproduction referred to in Article 2 which are integral to a technological process made for the sole purpose of enabling a use of a work or other subject matter and have no independent economic significance, shall be exempted from the right set out in Article 2'. This provision would cover purely technical and ancillary reproductions, made for the sole purpose of accomplishing other acts of exploitation of works, and which have no separate significance of their own. The Explanatory Memorandum gives the example of an on-demand video transmission between a computer in Germany and another in Portugal, where such a transmission implies the making of close to one hundred, often ephemeral, acts of storage of the video along the transmission to Portugal.

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[71] Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Recital 31: "Whereas such a harmonised legal protection should not inhibit decompilation permitted by Directive 91/250/EC".

[72] See for example: Dutch Copyright Act of 1912, Article 17(c), which reads as follows: "Congregational singing and the instrumental accompaniment thereof during a religious service shall not be deemed an infringement of the copyright in a literary or artistic work".

[73] Agreed Statement to the World Copyright Treaty, Geneva, December 1996, which reads as follows: 'It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws, which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) of the WCT neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention'. See: Doutrelepont and Debrulle, Auteurs & Média 1997/3, p. 236.

[74] European Commission, Explanatory Memorandum on the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10 December 1997, p. 18.

It is essentially a matter of policy orientation and legislative drafting whether to grant broad exclusive rights accompanied by a series of limitations or to define narrower rights without limitations. In this case, the European Commission has opted for the definition of a broad right of reproduction, coupled with a limitation applicable in cases of purely technical and functional reproductions. If this provision were adopted, courts would come to examine first, whether a particular act of reproduction is 'temporary', second if it falls within the category of those accomplished as an 'integral [part of] a technological process made for the sole purpose of enabling a use of a work" and third, whether such act has an "independent economic significance'. Notably all three criteria of evaluation set out in the Proposal for a Directive are foreign to current European copyright law. It could be argued that, instead of imposing a limitation strictly directed to technical processes which may prove insufficient in the long run, countries that wish to do so could adopt a 'fair use' type limitation which would have the advantage of being more flexible to similar situations calling for an exoneration from liability in the future. Furthermore, the introduction of a 'fair use' type limitation could incorporate the more familiar and more elaborate criteria of evaluation developed in the United Kingdom and elsewhere.

The second paragraph of Article 5 of the Proposal lists three optional limitations to the reproduction right: 1) the reproduction on paper or similar support by using any kind of photographic technique or other processes with similar effects ('reprography'); 2) the reproduction on audio, visual or audio-visual recording media made by private individuals for private use and non-commercial ends ('home taping'); and 3) specific acts of reproduction made by public libraries, museums and other establishments accessible to the public, which are not for direct or indirect economic or commercial advantage ('library privilege'). In its Explanatory Memorandum, the Commission writes that the first sub-paragraph concerning reprography does not focus on the technique used but rather on the result obtained, which has to be in paper form. This, clearly, would not apply to the digital environment. The background document to the Proposal further explains that:

> 'The effect of these optional exceptions would be that Member States could, for example, maintain their current systems for compensating right holders for **private copying** or photocopying (e.g. levies on sales of blank tapes and audio and video recorders, levies on photocopiers and photocopies). The Directive would not, therefore, introduce any obligation on Member States to introduce such private copying or photocopying levies or harmonise their level'.

Hence, the essential purpose of Article 5(2) would be to ensure the legality of such limitations, whether current or future, and to submit them to the requirements of the 'three-step test'. Interestingly, the Commission stresses, in the Explanatory Memorandum, that the exemption allowing the implementation of reprography regimes is left as an option in the Proposal, despite existing differences between Member States that provide for such exemptions, as their effects are in practice rather similar. The Commission then goes on to say that 'the Internal Market is far less affected by these minor differences than by the existence of schemes in some Member States and their inexistence in others' and that 'those Member States that already provide for a remuneration should remain free to maintain it, but this proposal does not oblige other Member States to follow this approach'.[75] Clearly, to be consistent with its wish to harmonise all exemptions to the reproduction right so as to effectively eliminate barriers inside the Internal Market, the Commission would have to make the adoption of this limitation mandatory.

The fate of the private use exemption in the digital environment is probably one of the most debated issues before the European Commission and other foreign governments. The European Commission has taken the view in the past that private use exemptions should not be made applicable to the digital environment, as shown in the Computer Programs Directive and the Database Directive. In the context of the Proposal, stakeholders have been urging drafters to restrict this exemption so as not to apply to digital copies. Another solution, put forward by some users, could be to extend the home copying regimes to the digital world and impose a levy on manufacturers, importers and distributors of computer hardware and modems.[76] A third solution could be to differentiate, along the lines of the German provisions and if technically possible, between private use of a work by individuals, which could remain available to users

[75] *Id.*, p. 36.
[76] See: Frölich (1997), p. 6; and Schricker (1997), p. 103.

with or without payment of a remuneration, and personal or internal use of works within enterprises, public organisations and the like, being either subject to the authorisation of the rights holder or subject to the payment of an equitable remuneration.[77]

When considering whether the private use and home copying exemptions are still relevant and necessary with respect to the digital environment, the European Commission must take several factors into account. First, the economic impact of the digital networked environment on the exploitation of works is not yet fully known. Second, it is felt that eliminating the private use exemption could disrupt the traditional balance between rights holders and users, where the latter have always been able to read, listen to or view publicly available works for their own learning, enjoyment. In relation to this is the key question of what constitutes a 'normal exploitation of a work' in the digital networked environment. Do all types of private uses of lawfully obtained copies of works constitute a 'normal exploitation' of a work, just because technology allows the control of each and every single use? While copyright owners should be able to extract revenue from the commercial exploitation of their works in the digital networked environment, users should retain the possibility, as part of their autonomy as consumers, to make reproductions in well-defined circumstances for private purposes without the owner's consent. And, as Michael Hart explains:

> 'The call from some quarters that there should be no private copying exception in relation to digital technology is clearly absurd. People will still want to be able to record a television programme of interest when they go out, if they cannot get home in time, to watch when they return, irrespective of whether the television or video recorder is digital or analogue. An improved and clarified definition of private copying which takes proper account of the digital environment, supported by some specific instances of what type of private copying should be lawful (e.g. timeshifting), is needed which makes it clear that it is restricted to purely private and non-commercial copying of which is a part of a person's reasonable use and enjoyment of a work rather than a substitute for a sale'.[78]

Third, although the signs of market failure may come to disappear with the development of technology, privacy issues are likely to take another dimension in the digital environment. The electronic monitoring of the use of protected material would not entail the conduct of a search and seizure into anyone's home, as it did in the analogue world, but would risk putting several aspects of the protection of electronic personal data in jeopardy. Hence, the protection of the individual's fundamental right to privacy still remains a major preoccupation in the digital world[79].

While the solution not to apply a private use exemption in the digital environment would seem to coincide with the approach previously taken by the European Commission, it is apparently not the one followed within the framework of the Proposal for a Directive. Recital 26 of the Proposal states that 'digital private copying is not yet widespread and its economic impact is still not fully know', that 'it appears to be justified to refrain from further harmonisation of such exceptions at this stage' and that it 'will closely follow market developments with respect to digital private copying and consult interested parties, with a view to take appropriate action'. In consequence, Article 5(2)(b) of the Proposal would allow for limitations on the reproduction right, applicable to both analogue and digital technology, as long as individuals make such reproductions for private use and for non-commercial ends. Basically, the Commission would leave the decision up to the Member States to maintain or to introduce new limitations for digital private copying, until further harmonisation is conducted.[80] Considering the gap between the respective positions of the rights holders and the users in this matter, the decision of the European Commission to put off the harmonisation of the private use exemption may be a wise one after all. In the meantime, markets will undoubtedly evolve so as to give a better picture of the impact on the interests of rights holders of digital reproductions made by individuals strictly for non-commercial private purposes.

Under Article 5(3) of the Proposal, Member States would also have the option of applying

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[77] Schricker (1997), p. 166.

[78] HART, E.I.P.R. 1998/5, p. 170. See also: Dreier (1997), p. 23.

[79] Cohen, Connecticut Law Review 1996/28, p. 981; and Institute for Information Law (L. Bygrave & K. Koelman) (1998), p. 49.

[80] European Commission, Explanatory Memorandum on the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10 December 1997, p. 37.

further exemptions to both the reproduction right and the right to communicate to the public. Such limitations would be permitted, provided that they conform to the 'three-step test', in the following five circumstances:

1. Use for the sole purpose of illustration for teaching or scientific research as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
2. For uses to the benefit of visually-impaired or hearing-impaired persons, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;
3. Use of excerpts in connection with the reporting of current events, as long as the source is indicated, and to the extent justified by the informatory purpose;
4. Quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, the source is indicated, their making is in accordance with fair practice and to the extent required by the specific purpose;
5. Use for the purposes of public security or for the purposes of the proper performance of an administrative or judicial procedure.

These limitations would apply to any category of work. They are modelled either on the provisions of the Berne Convention or on provisions found in the legislation of many Member States. In the Commission's view, these limitations have more limited economic importance. Article 5(3) therefore only sets out minimum conditions for their application, and it is for the Member States to define the detailed conditions of their use, albeit within the limits set out by the provision.

As indicated in the Explanatory Memorandum, the limitation for teaching and scientific purposes would not only cover traditional forms of use of protected material, such as print or broadcast media, but could also serve to exempt certain uses in the context of on-demand delivery of works and other protected matter. This appears to be in sharp contrast with the treatment awarded to public libraries and other similar institutions. Indeed, the same document declares with respect to Article 5(2)(c) that the limitation provided therein does not apply to the communication to the public right and that in view of the economic impact at stake, a statutory exemption for such users would not be justified. The Explanatory Memorandum states further that this, 'of course, does not mean that libraries and equivalent institutions should not engage in on-line deliveries', but that such activities 'should be managed on a contractual basis, whether individually or on the basis of collective agreements'. What is the legal or economic basis for such a difference in treatment? Are the activities of libraries so different from those of educational and research institutions that they have a bigger impact on the economic interests of rights holders? Could the activities of educational and research institutions not be managed on a contractual basis as well?

The structure of Article 5 of the Proposal for a Directive raises three major comments. First, concerning the *exhaustive* character of the list of limitations, we believe, along with the Legal Advisory Board, that harmonisation does not necessarily mean uniformity.[81] Rules should be converging, but should also allow distinctive features found in national legislation to subsist, as long as they do not hinder the Internal Market. The Berne Convention constitutes a good element of comparison, where the option of adopting a more complete list of exemptions, which would have been exhaustive, had been examined at the Stockholm Conference. However, this proposal was rejected for two main reasons. First, because in order to encompass all the principal exemptions existing in national laws, such a list would have had to be very lengthy, and it would still not have been comprehensive. The second motive for rejecting this option was based on the fact that not every country recognised all the possible exemptions, or that some of them were granted only subject to the payment of remuneration under a compulsory license. It was feared that by including an exclusive list of limitations, States would be tempted to adopt all the limitations allowed and abolish the right to remuneration, which would have been more prejudicial to the rights owners.[82] These remarks hold true today in respect of the Proposal for a Directive.

Second, if proposed Article 5 only covers the right of reproduction and the right of communication to the public, what limitations, if any, may be implemented with respect to the distribution right? And third considering the *exhaustive* character of the list of limitations included in the Proposal,

[81] Legal Advisory Board (1997), § 9A.
[82] Ricketson (1987), p. 480.

the manner in which these limitations are intended to interact with pre-existing limitations is not obvious from the text of the Proposal: are the limitations listed in the Proposal to abrogate and replace all prior rules? As mentioned above, Article 1(2) of the Proposal sheds no light on the fate of the 'minor reservations' implemented by some Member States. What room would be left under the Proposal for Member States to legislate on purely local public policy matters?

Moreover, as the market structures of the analogue and the digital worlds are so drastically different, why should the scope of application of Article 5 of the Proposal extend to the analogue world rather than simply covering the digital environment? In any case, like others have pointed out, we have serious doubts as to the ability of the current Proposal to meet the twin objectives of harmonisation and adaptation of copyright limitations to the 'digital agenda' challenges.[83] A 'fair use' type limitation may prove more efficient and flexible in the short and middle term or at least, until the impact of the digital networked environment on the rights of copyright owners and users is better known. At that time, lawmakers would be able to determine with more precision the extent of the possible limitations to adopt in favour of users.

1.2 Limits found outside of copyright law

A number of legal rules may serve as an additional means to ensure fair dissemination of information. These restrictions originate from diverse sectors of the law namely, constitutional law, civil law, consumer protection law and competition law. All share a common objective: the safeguard of the public interest. These norms have not been implemented primarily to apply to copyright matters. Nevertheless, they constitute a precious safety net for users of protected material, against rights holders who misuse their copyrights to the detriment of the public interest. They are also invoked periodically to justify the adoption of particular copyright limitations.

This is particularly the case in Germany, where the validity of several copyright limitations has been challenged before the Federal Supreme Court as being contrary to article 14(1) of the *Grundgesetz*, which secures private property. Interestingly, this provision of the Basic Law also guarantees that the public interest is taken into account in the use of private property. Paragraph 14(2) provides that 'property imposes duties. Its use should also serve the public interest', whereas paragraph 14(3) states that expropriation of private property is allowed only in the public interest and subject to compensation.[84] Hence, in the leading case, known as the 'School-book case',[85] the Federal Constitutional Court found that while the Basic Law in principle guarantees the attribution of the economic value of a copyrighted work to the author, it does not provide a constitutional safeguard for any and all kinds of exploitation. The Court recognised the legislature's power to decide the appropriate standards, which guarantee an exploitation of the exclusive rights that is proportionate to the nature and social importance of copyright. In this instance, the Court believed that the interest of the general public in easy access to cultural objects justified the incorporation, without the author's consent, of copyright material into compilations intended for religious, school or instructional use. This did not mean however that authors had to give access to their works free of charge.[86]

In our opinion, constitutional law could serve in certain circumstances as an additional limit to the exercise of exclusive rights, in cases where restrictions imposed by copyright owners on the use of protected material affect users' fundamental rights and freedoms.[87] To our knowledge, the European

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[83] Hart, E.I.P.R. 1998/5, at p. 169.

[84] Grundgesetz, BGBl. S. 1, vom 23. Mai 1949. Art. 14 reads as follows: '(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws. (2) Property imposes duties. Its use should also serve the public interest. (3) Expropriation shall be permitted only in the public interest. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts'.

[85] 'Kirchen- und Schulgebrauch', Beschluß des Bundesverfassungsgerichts (1. Senat) vom 7. Juli 1971 – Aktz. : 1 BvR 765/66.

[86] See: Davies (1993), p. 124.

[87] See: Hugenholtz (1989), p. 150 and ff.; and Fraser, Cardozo Arts & Entertainment Law Review 1998, p. 51 where the author writes: 'The argument for bringing a First Amendment privilege outside of the confines of the fair

Commission on Human Rights rendered only one decision on the conflict between copyright and freedom of information.[88] The matter concerned the control exercised by the copyright owner over lists of television programs and the defendant's right to use the lists as part of his freedom to impart information, guaranteed under article 10 of the ECHR. Unfortunately, the Commission did not directly consider the weight to give each legal norm, but came to a rather obscure and much criticised conclusion on the issue[89]. In the Netherlands, article 10 of the ECHR was also raised as a defence against allegations of copyright infringement.[90]

In this case, the District Court of Amsterdam ruled that the newspaper *Volkskrant* and two of its journalists had infringed the plaintiff's copyrights on a work of plastic art, when they published, as illustration to the text of an interview, the photograph of a Dutch personality showing the plaintiff's work in the background. The Court considered that, in the protection of the 'rights of others', guaranteed under the second paragraph of article 10 of the ECHR, lies the recognition that authors' rights are an acceptable limit to an unimpeded freedom of expression. Whether in the case at hand such a limitation was necessary in a democratic society, depended according to the Court first, on the balance of the relevant interests under the copyright act and second, on the seriousness of the violation of the freedom of expression.

The District Court of Amsterdam reminded that, subject to the limitations set out in the law, the copyright act grants the author of a literary, scientific or artistic work an exclusive right to publish or reproduce it, and that the statutory limitations of the copyright act could be partly understood as concessions in favour of the freedom of expression. Although the literature has assumed for a long time that the legislator has taken account of the proper balance of interests within the framework of article 10 of the ECHR, an unmistakable current of opinion has emerged since the 1980s according to which the author's rights guaranteed under the copyright act can, in certain circumstances, come into conflict with article 10 of the ECHR, especially because the narrow formulation of the system of statutory limitations does not provide sufficient guarantees for the freedom of expression. On the basis of these considerations, the Court came to the conclusion however that, in the circumstances, the exercise of the rights holder's exclusive rights on his work of plastic art did not violate the newspaper's or the journalists' freedom of expression.

Civil law offers a further mode of control over the manner in which copyright owners make use of their exclusive rights. The concept of abuse of right is available in certain circumstances in the context of civil liability cases. Abuse of right was initially understood as the intentional misuse of a right by its owner, which results in a prejudice to others, thereby giving rise to damages. Today, the notion has evolved so as to encompass any fault, whether intentional or not, in the exercise of a right. Abuse of right may therefore be invoked to limit a copyright owner's abuse of his rights to the detriment of users.[91] According to a French author, any abuse of the exclusive rights which the law grants him constitutes a violation of the conditions of their safeguard.[92] Moreover, article L. 122-9 of the French Code de la propriété intellectuelle provides that a tribunal may order any appropriate measure to be taken in the case of 'notorious' or 'manifest' abuse in the use or non-use of the exploitation rights of a deceased author by his representatives.[93]

In certain jurisdictions, general principles of civil law may also serve as the basis for the

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use doctrine is that the purposes of the Copyright Act, although alleged to act as the engine of the First Amendment, do not always coincide with the basis underlying the First Amendment. Furthermore, maintaining the First Amendment privilege within the fair use doctrine leaves the impression that the interests found in the *Bill of Rights* can be balanced away every time the price to copyright holders is too high'.

[88] De Geïllustreerde Pers v. De Staat der Nederlanden, European Commission for Human Rights, 6 July 1976, NJ 1978, p. 237.

[89] Hugenholtz (1989), p. 164.

[90] De Volkskrant v. M.A. van Dijk en de Stichting Beeldrecht, Arrondissementsrechtbank te Amsterdam, 19 January 1994, reproduced in Informatierecht/AMI, March 1994, No. 3, p. 51.

[91] See: Strowel (1993), p. 166 where the author refers to the decision of the European Court of Justice in Grundig-Consten, of July 13, 1966, [1966] ECR 299, involving the misuse of trademarks. See also: Krikke, Informatierecht/AMI 1995/6, pp. 103-110; and Stein, Informatierecht/AMI 1993/7, pp. 123-126.

[92] Carreau, Mélanges en l'honneur de André Françon 1996, p. 31.

[93] See: Affaire Foujita, Civ. 1re, 28 February 1989, reproduced in RIDA 1991/148, p. 107.

recognition of limitations outside of the copyright system. In Dior v. Evora[94], the Dutch Supreme Court relied on an interpretation of article 6:1 of the Civil Code to admit the legality of an unauthorised reproduction of photographs of consumer products for advertising purposes. Indeed, this provision of the Civil Code, which states that 'obligations exist only insofar as they result from the law', had previously been interpreted by the same Court as meaning that, in cases which are not specifically regulated under the law, the solution which fits in the legal regime and which does connect to cases provided for in the law must be acceptable. With respect to limitations on copyrights, the Court admitted a restriction on the basis that the rights holder had abused his right of authorisation in the sense of article 3:13 of the Civil Code.[95]

Consumer protection rules may also play an increased role in the transactions relating to the dissemination of information. Considering the conditions under which copyright material is now available on- or off-line, one can easily assimilate copyright owners to merchants and users to consumers. In our opinion, consumer protection rules could be made applicable to the digital networked environment, in all cases where copyright owners' licensing practices unreasonably encroach upon the users legitimate rights and interests as a consumer. This was the objective pursued by the European Parliament and the Council when they adopted the recent Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, as suggest the two following recitals:

> '(4) Whereas the introduction of new technologies is increasing the number of ways for consumers to obtain information about offers anywhere in the Community and to place orders; whereas some Member States have already taken different or diverging measures to protect consumers in respect of distance selling, which has had a detrimental effect on competition between businesses in the internal market; whereas it is therefore necessary to introduce at Community level a minimum set of common rules in this area;
> '(13) Whereas information disseminated by certain electronic technologies is often ephemeral in nature insofar as it is not received on a permanent medium; whereas the consumer must therefore receive written notice in good time of the information necessary for proper performance of the contract'[96].

Many of the situations which give rise to the application of the notion of abuse of right or of the rules of consumer protection law are likely to involve an element of anti-trust or unfair competition. Some copyright licensing practices have indeed been challenged before national courts as well as before the European Court of Justice, as contrary to the European competition rules. One of the most important cases of the recent years, in which the licensing practices of a copyright owner were examined under articles 85 and 86 of the Treaty of Rome, is the Magill Case.[97] On appeal, the European Court of Justice agreed with the decision of the Court of First Instance of the European Communities that by refusing to license a third party to publish the advance weekly listings of their television and radio programs, the applicants were abusing a dominant position contrary to Article 86 of the EEC Treaty. A compulsory license was imposed as a remedy for the abuse. On the impact of this decision on future licensing practices, Vinje commented:

> 'While no wholesale attacks on traditional and accepted licensing practices are to be expected, the ECJ's judgment in Magill preserves the necessary flexibility to apply competition law to situations, such as those that may arise with respect to the 'information superhighway', where the industrial context and new technological constraints make third parties dependent on licensing from dominant undertakings in order to participate in legitimate competitive activities'[98].

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[94] HR 20 oktober 1995 (Christian Dior/Evora), reproduced in IER 1995/6, 223.

[95] Grosheide, Informatierecht/AMI maart 1996 nr 3, p. 46.

[96] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, O.J.E.C. June 4, 1997, Nr. L 144/19.

[97] Radio Telefis Eireann v. E.C. Commission (Magill TV Guide Limited intervening), Decision of the Court of First Instance of the European Communities, July 10, 1991, Case No. T 69/89 reproduced in IIC 1993/24, p. 83, confirmed by RTE and ITP v. Commission, Judgement of the Court, 6 April 1995, joint cases C-241/91 and C-242/91.

[98] Vinje, E.I.P.R. 1995/6, p. 297.

Competition law considerations are also at the heart of the adoption of the restrictions to the rights granted under the EC Directive on the legal protection of computer programs,[99] concerning computer system interoperability. Interoperability of computer interfaces is considered by the industry as essential for the development of new products and for the compatibility of existing software. Consequently, besides the restrictions provided at articles 5 and 6 of the Directive, Recital 27 specifically states that its provisions are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty, if a dominant supplier refuses to make information available which is necessary for interoperability as defined in the Directive.[100] The drafters of the EC Directive on the legal protection of computer programs have conceived an imaginative solution in their search for a fair balance of interests in regards to computer interoperability: the necessary information that is not provided on a voluntary basis by the original developer may be obtained through decompilation, under the conditions specified in the Directive. Failure to comply on the part of the original developer may bring the institution of procedures for practices running afoul of articles 85 and 86 of the Treaty of Rome.

2. COPYRIGHT VERSUS CONTRACT ISSUES

As shown in the previous section, statutory copyright limitations find their justification in a number of sources, namely in the defence of fundamental rights and freedoms, guaranteed under the European Convention on Human Rights, in the preservation of free competition, as well as in other general public interest considerations. Beyond the rules of the copyright system, other rules of law exist as additional safeguards of the public interest and as limits to the exercise of exclusive rights, namely when two bodies of law come into conflict or when the statutory copyright limitations are thought to be too narrowly defined to offer an equitable solution in a particular case. Not all limitations on the exercise of copyrights have the same importance for the public interest, however, and a number of them should receive greater attention from regulating authorities, especially with respect to contractual agreements.

The regulation of contractual practices in the field of copyright is not unusual. In several countries, publisher's agreements and contracts signed for the production of sound and audiovisual works are submitted to specific rules of form and content.[101] Where specific legislation has not been enacted, courts are often called in to temper the unbalance resulting from the strict application of the principle of freedom of contract.[102] However, all provisions implemented in view of regulating contractual relations in copyright matters have been aimed at protecting the traditionally weaker party to the negotiations: the author. It is somewhat of a reversal of fortune that we should now look at protecting the interests of users of copyright material, for fear that copyright owners try to unduly extend their rights through mass market licenses.

Under any one of the legal systems in force in the Member States, freedom of contract is the rule, and contractual restraints the exception. Whether under the copyright regime or the *droit d'auteur* regime, parties to a contract are generally free to negotiate the content, nature and scope of any copyright license agreement, as long as they remain within the bounds of public order. A contract whose object is prohibited by law or contrary to public order is null. However, norms of public order take many faces and vary from one country to another. The question is then whether the copyright limitations that are identified as imperative rules constitute public order norms around which parties may not contract.[103] Or, as one author puts it: 'Under what circumstances would limiting freedom of contract be justified when contractual arrangements expand copyrights?'[104]

The rights of users have been expressly protected on two occasions by the European

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[99] Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC), O.J.E.C. no. L 122, 17/05/91, p. 42, art. 5 and 6.

[100] Kroker, E.I.P.R 1997/5, at p. 249.

[101] See: Code de la propriété intellectuelle, art. L. 132-1 and ff.; Gesetz über das Verlagsrecht, of 19 June 1901 (RGBl. S. 217, as subsequently modified); Belgian Copyright Act, art. 20 and ff.

[102] Strowel (1993), p. 32.

[103] See for example: Directive 97/7/EC Of The European Parliament And Of The Council Of 20 May 1997 On The Protection Of Consumers In Respect Of Distance Contracts, art. 12(1) which reads: 'The consumer may not waive the rights conferred on him by the transposition of this Directive into national law'.

[104] Elkin-Koren, Berkeley Technology Law Journal 1997/12, p. 105.

Commission, with the adoption of the EC Directive on the legal protection of computer programs and the Directive on the legal protection of databases. The European Commission has made it clear that the right for any lawful user of a computer program to make a back-up copy of the program, "insofar as it is necessary for that use", may not be set aside by contract, nor can the right to observe, study or test the functioning of the program, if such decompilation meets the requirements of the Directive.[105] The prohibition to contract against the right to make a back-up copy is provided at article 5(2) of the Directive, while the interdiction to prevent a lawful user from decompiling the program for private purposes is stated at article 9(1), which provides that 'any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void'.[106] The Directive on the legal protection of databases contains a similar provision, stating that any contractual agreement contrary to the right for the lawful user to extract and re-utilise insubstantial parts of the database for any purposes whatsoever, shall be null and void.[107]

Besides the rights given to users under the Computer Programs Directive and the Database Directive, the question of overridability of user freedoms has been the object of little attention from legislators and authors in Europe.[108] Moreover, whereas both of these directives specify which exemptions may not be set aside by contractual agreement, the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society keeps silent on this issue. In its Explanatory Memorandum, the Commission puts much importance on contractual relationships, as a means for information producers, intermediaries and end users to determine directly the conditions of use of protected material. As the LAB pointed out in its Reply to the Green Paper, 'there is good reason to expect that in the future much of the protection currently awarded to information producers or providers by way of intellectual property, will be derived from contract law'. However, there is also reason to fear that, without appropriate contractual boundaries, users may be forced to forego some of the privileges recognised by law, in order to gain access to protected material.

In this context, one must then decide if a number of these limitations should have precedence over contractual provisions to the contrary. Whether specific copyright rules constitute imperative or default contract rules must be determined essentially in light of public interest considerations.[109] Except for the widely accepted notions on the protection of fundamental rights and on the safeguard of the freedom of competition, public interest matters are mostly a question of national policy: what is in the public interest in one country, is not necessarily in the public interest in another. Thus limitations based on the notion of public interest differ from one country to the next and can hardly be aggregated to reflect what is in the 'global' public interest. Admittedly, not only the nature and content of public interest considerations vary from one country to another, but the solutions put in place at the national level to deal with public interest considerations vary as well.

For example, in the United Kingdom, while the common law defence of public interest is considered outside and independent of any statute and not limited to copyright cases, it has nevertheless been codified in the 1988 Act in these words: 'Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise'.[110] An often-quoted comment taken from an earlier British case would summarise the matter as follows: 'Public interest, as a

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[105] Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC), O.J.E.C. no. L 122, 17/05/91, p. 42, art. 5(2).

[106] See also Recital 26 of the Directive: 'Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exemptions provided for in Article 5 (2) and (3) should be null and void'.

[107] See: Mauro, Computer & Telecoms Law Review 1995/1, pp. 27-39, and Computer & Telecoms Law Review 1995/2, pp. 29-44.

[108] One exception, see: Legal Advisory Board (1995), available at: 'http://www2.echo.lu/legal/en/ipr/reply/reply.html'.

[109] See : Lemley, Southern California Law Review 1995/68, p. 1274 where the author writes: 'The case of enforcing the terms of federal intellectual property law in the face of a contradictory contract depends heavily upon the nature of the federal interest at stake. There must be some affirmative governmental policy benefit in order to justify overriding the public and private interests in enforcing contracts. In the context of intellectual property law, therefore, it matters greatly whether the federal statutes were intended as default rules or whether there is a public interest in enforcing the rights of vendors and users as the laws are written'.

[110] Copyright, Designs and Patents Act 1988, U.K. Statutes, c. 48, art. 171(3).

defence in law, operates to override the rights of the individual (including copyright) which would otherwise prevail and which the law is also concerned to protect'.[111] In Germany, the acknowledgement of public interest considerations is guaranteed under article 14(2) of the Grundgesetz, in relation to the use of private property. In relation to copyright, the Federal Constitutional Court noted in the 'School-book case', that:

> 'The legislature is not only obliged to secure the interests of the individual; rather, it is also charged with drawing bounds on the individual rights and powers that are necessary in the interest of the general public; it must bring about a just balance between the sphere of the individual and the interests of the public. Thus, the constitutionality of the contested provision… hinges upon its justification by the public interest'.

That the public interest must prevail in certain circumstances, where the rights of copyright owners and users conflict, now seems to make little doubt in anyone's mind, in any of the European countries. How this translates into practice is not entirely clear however, mainly because of the lack of clear indication from the legislator and of relevant case law. One may argue that, although the law makes no express mention of the mandatory nature of the copyright limitations, the copyright system has been carefully designed so as to incorporate public interest considerations and that, consequently, any agreement enjoining the user from performing certain acts that are otherwise allowed under copyright law would go against public interest. In any case, if parties were to agree to such a provision, the violation of the user's obligations would at most amount to a breach of contract. Furthermore, before deciding whether to enforce such a contract against a particular user, it is quite conceivable that a court would first examine whether this contractual agreement runs contrary to established copyright policy and whether its enforcement would be in the public interest. In practice, the court may be further influenced by the fact that the obligations derive from a fully negotiated agreement or from a standard form contract. A court may also confer different weight to the several copyright limitations, as a result of an analysis of their grounds for adoption and a review of the public policy at stake.

In our opinion, a number of copyright restrictions are not merely default rules. Limitations based on the universally recognised notions of protection of constitutional rights and freedoms and on the promotion of the free flow of information, such as the right to make reproductions for purposes of study, research, criticism, news reporting and parody, undeniably constitute imperative rules of copyright law whose application should not be waived by the parties to a contract. Contractual agreements preventing users to make reproductions for such fundamental purposes would, in our opinion, violate article 10 of the European Convention on Human Rights. This assertion holds also true as regards the digital networked environment. It is indeed well recognised that quotations made for purposes of criticism and news reporting are an integral part of a free and democratic society. Moreover, the information highway is becoming a privileged medium for political, social, economic and cultural debate, where most major newspapers and broadcasting enterprises around the world are already engaged in on-line activities, such as real-time communication of news reports and electronic publishing. It is thus important that users be allowed to make quotations of works in the digital networked environment, and that they have the possibility to report current events without fear of copyright infringement proceedings. In the same manner as in the analogue world though, quotations and reproductions for news reporting in the digital environment should be compatible with fair practice, and their extent should not exceed that justified by the purpose for which they are made. Of course, these limitations should not be overridden by contractual agreements.

Given that, in the analogue world, the recognition of a private use exemption is partly justified by the need to protect the user's right to privacy and his consumer autonomy, we believe that, as long as the use is strictly limited to one copy made for the personal use of a private individual, this exemption should not be set aside by contract. The same holds true in our opinion as regards the digital environment, if such an exemption is indeed allowed with respect to digital reproductions at the outcome of the drafting process of the Proposal for a Directive and its subsequent implementation into national legislation.

In contrast, we submit that restrictions implemented in favour of schools, libraries, archives and museums should not be immune to contractual overrides. Of course, education, research, and learning contribute to the general welfare. But, in our opinion, limitations of this type do not pursue objectives so fundamental to the defence of individual freedoms and the free flow of information that they should be

[111] Beloff v. Pressdram, [1973] 1 All E.R. 241.

considered imperative rules from which parties may not deviate by contract, under any circumstances. Moreover, one could well argue that individual or collective licensing schemes specifically crafted to suit the needs - and budgets - of these categories of users would suffice to fulfil the intended policy goals.

This opinion would seem even more justified as regards the digital environment. The involvement of public libraries in the sphere of electronic document delivery is increasingly considered as coming in direct competition with the services of publishers or other commercial information providers, thereby affecting the normal exploitation of works and the legitimate interests of rights holders. Because there is only little information currently available on the true economic impact of the activities of public libraries on the electronic exploitation of protected works, it is difficult to determine the proper form and scope of any possible limitation intended to benefit public libraries with respect to the digital environment. Ultimately, such a limitation, if needed at all, would have to take into account the interests of the rights owners, as well as the information and cultural policies at the root of the public library system. In the meantime however, many believe that the existing limitations should not apply in the case of electronic document delivery, which would therefore be subject to the rights owner's authorisation.[112] This is in fact the position adopted by the European Commission in relation to the current draft of the Proposal for a Directive.

CONCLUDING COMMENTS

In the digital networked environment, rights holders have the means to exercise tight control over the use made of their works, through a combination of technological measures, contractual practices and copyright law principles. In fact contracts constitute a key element in the way information is exchanged in the new environment, serving as the tool through which authors determine the extent of authorised uses. Contracts are also seen as a means to discourage infringement. An effective control over the use of protected works is certainly desirable: creators should be able to exercise and enforce their rights to the full extent necessary to recoup the cost of investment made in the production of works and to generate reasonable profit from their commercial exploitation. Without an adequate level of protection, creators may not have the necessary incentive to produce new works. But as much as creators need protection, users must be able, in the interest of the free flow of information, to make use of lawfully obtained copies of works including, in certain well-defined circumstances, the capacity to make limited uses of those works without the consent of the rights holder.

Concerns arise from the possibility that an unbridled use of technological measures coupled with anti-circumvention legislation and contractual practices would permit rights owners to extend their rights far beyond the bounds of the copyright regime, to the detriment of users and the free flow of information. The copyright bargain reached between granting authors protection for their works and encouraging the free flow of information would be put in serious jeopardy if, irrespective of the copyright rules, rights owners were able to impose their terms and conditions of use through standard form contracts with complete impunity. If this were the case, the copyright regime would shrink away to the hands of mass-market licenses and technological measures. Unless the legislator clarifies the issue, these concerns may become all too real with the gradual implementation of electronic copyright management systems, whose workings are based on technology and contractual relations, with the generalisation of mass-market licenses as the main vehicle for transactions in information over the information highway and with the eventual adoption of Article 2B UCC, which would validate mass-market licenses in the United States. The Proposal for a Directive would certainly be a good opportunity for the European Commission to make its position clear on the overridability of copyright limitations.

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