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**The Exceptions And Limitations To Copyright**

**'LIMITATIONS FOUND OUTSIDE OF COPYRIGHT LAW'**

**General Report**

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*Introduction*

As several national reports pointed out in answer to question 9 of the 1998 ALAI Study Days' questionnaire on limitations found outside of copyright law, statutory limitations on the exercise of exclusive rights are already the result of a balance of interests, carefully drawn by the legislator to encourage both creation and dissemination of new material. The protection of fundamental freedoms, of public interest matters, and of public domain material forms an integral part of the balance and, as a consequence, these notions should not be invoked a second time when interpreting statutory copyright limitations. While this is certainly true in principle, several factors may now justify having a look at other bodies of law in support of the intellectual property bargain.

For one thing, copyright protection has historically never been so broad, whether in terms of protectable subject matter, of the scope of exclusive rights or of the duration of protection<sup>1</sup>. But at the same time, irritation about the copyright rules has never been so great<sup>2</sup>. The current uneasiness towards the copyright regime<sup>3</sup> is further amplified by the characteristics of the digital networked environment. The use of digital technology is modifying both production patterns and consumer habits. The role of users is changing from a passive to a more active role. Not only can users easily reproduce works in countless perfect copies and communicate them to thousands of other users, but they can also manipulate works to create entirely new products. In this sense, even private copying activities are now deemed commercially relevant to the interests of the rights holders and are considered by many as constituting competing activities. To protect the economic interests of the computer programs and database industries, which were thought particularly vulnerable to massive reproduction, the European Commission extended the reproduction right to an unprecedented scope, covering mere acts of use of protected material and prohibiting the introduction of any private use exemption<sup>4</sup>. Moreover, the appropriateness of applying a private use exemption and several other traditionally recognised limitations to the digital networked environment is currently under review in many jurisdictions, and particularly in Europe in the context of the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society<sup>5</sup>. If the

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<sup>1</sup> Lemley, M., 'Romantic Authorship and the Rhetoric of Property', 75 Texas Law Review 875 (1997); and Zimmerman, D.L. 'Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights', 33 William & Mary Law Review 665, 708 (1992).

<sup>2</sup> Quaedvlieg, A. 'Copyright's Orbit Round Private, Commercial and Economic Law – The Copyright System and the Place of the User', 29/4 IIC 420 (1998).

<sup>3</sup> Unless stated otherwise, the expression 'copyright regime' is used in the following pages to refer to both the common law system and the droit d'auteur system.

<sup>4</sup> 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.

<sup>5</sup> 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, art. 5.

legislator ultimately decides to do away with statutory copyright limitations, how is the public interest then taken into account? Can we still talk of a 'balance of interests'?

Creative activities are also going through changes. Publishers and other producers are no longer mere intermediaries in the chain of manufacture and distribution of works, but become more active in the creative process. Distribution of works is also simpler in the digital networked environment and, instead of going through complex distribution networks, consumers will progressively seek direct online contact with producers<sup>6</sup>. Producers are now in a stronger position to dictate the terms of use of their works. As a consequence to these market changes, concerns arise from the possibility that an unbridled use of technological measures coupled with anti-circumvention legislation and contractual practices will allow rights owners to extend their rights far beyond the bounds of the copyright regime, to the detriment of users and subsequent creators. The copyright bargain would be put in serious jeopardy if, irrespective of the copyright rules, rights owners were able to contractually impose their terms and conditions of use with complete impunity. If this were the case, the copyright regime would shrink away to the hands of mass-market licenses and technological measures<sup>7</sup>.

The proposed Article 2B of the Uniform Commercial Code (Article 2B UCC)<sup>8</sup>, currently under discussion in the United States, is probably the best example of this new conception of the workings of the information market. Once adopted and implemented into State law, these new rules will not only validate shrinkwrap and other mass-market licenses of information, but will also set rules about electronic contracting for information products and services<sup>9</sup>. The interest around proposed Article 2B UCC should not be exclusively American. Considering the global nature of digital networked transactions, it is to be expected that, once the text of Article 2B UCC is adopted, some pressure will be exercised on foreign countries to adopt similar provisions. The provisions of proposed Article 2B are thus examined in this General Report wherever relevant, as an illustration of the possible problems that certain licensing practices may raise in the digital networked environment.

In view of the constant expansion of copyright protection and of the increasing tendency of copyright holders to impose their terms of use of copyright material through (often non-negotiated) contracts, it appeared important to examine whether general principles of law are and can be invoked in support of the copyright balance. This forms the context in which question nine of the questionnaire was written. Initially intended to discuss the protection of fundamental freedoms and the access to public domain material, this question was expanded to cover also general public interest matters, competition issues, abuse of right, and consumer protection.

This General Report exists by virtue of sixteen comprehensive National Reports, which I received as a response to question nine of the questionnaire from the following national groups of ALAI: Australia (Ms Libby Baulch, Mr Warwick Rothnie and Ms Mary Wyburn); Belgium (Marie-Christine Janssens); Canada (Mr Ghislain Roussel); Denmark; France (Mr Christophe Caron and Ms Valérie-Laure Bénabou); Germany (Prof. A. Dietz); Greece (Mr Georges Koumantos); Italy

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<sup>6</sup> Quaedvlieg, A., IIC 1998, p. 433.

<sup>7</sup> On this topic, see: Institute for Information Law (L. Guibault), 'Contracts and Copyright Exemptions', Institute for Information Law, Amsterdam, December 1997; Nimmer D., Frischling, G.N. and Brown, E., 'The Metamorphosis of Contract into Expand', Paper presented at the Boalt Conference on Intellectual Property Law and Proposed Article 2B of the UCC, held at University of California at Berkeley, Boalt School of Law, on 24-25 April 1998; and Karjala, D., Federal Preemption of Shrinkwrap and On-Line Licenses, University of Dayton Law Review 1997/22, pp. 511-545.

<sup>8</sup> National Conference of Commissioners on Uniform State Laws, 'Uniform Commercial Code Article 2B Licenses', National Conference of Commissioners on Uniform State Laws & American Law Institute, Chicago, Draft of August 1, 1998 and available at: '<http://www.law.upenn.edu/library/ulc/ucc2b/2b898.htm>' [hereinafter 'Article 2B UCC'].

<sup>9</sup> Samuelson, P., 'Legally Speaking: Does Information Really Want to Be Licensed', Communications of the ACM, forthcoming 1998, p. 1.

(Mr Alberto Pojaghi); Japan (Prof. Hiroshi Saito); Mexico; The Netherlands (Prof. Herman Cohen Jehoram); Spain (Mr Ramon Casas, Mr Antonio Delgado, Ms Nazareth Pèrez de Castro, and Ms Raquel Xalabarder); Switzerland (Mr Paul Brügger); Sweden (Prof. Gunnar Karnell); UK (Mr Theodore Goddard); and USA (Mr Neil A. Smith and Ms Constance Ramos). I would like to thank all reporters for their valuable assistance in providing me with very interesting answers and points of view.

### *1 Fundamental rights and freedoms*

The individual's freedom of expression and the public's fundamental right to information are guaranteed in many national and international instruments, such as the First Amendment to the American Bill of Rights, in Article 10 of the European Convention for the protection of Human Rights and fundamental freedoms (ECHR)<sup>10</sup> and Article 19 of the International Covenant on Civil and Political Rights<sup>11</sup>, to name but a few. Protection is guaranteed to all members of society, whether they are authors, performers, or simple users of copyright material. But the rights holder's freedom of expression, which materialises ultimately in copyright protection on his 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<sup>12</sup>. The balance between encouraging creations and dissemination of copyright material contributes to the free flow of information within a free and democratic society.

Almost unanimously, the reports indicate that the copyright regime already addresses the public's claim for freedom of expression and for a right to information, through the idea/expression dichotomy and the multiple statutory limitations.<sup>13</sup> The fact that, as a principle, copyright law only protects the form of expression and not the underlying ideas is seen as limiting 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 copyrighted material provided that the form of expression is not also reproduced.<sup>14</sup> Furthermore, a number of limitations based on the provisions of the Berne Convention are specifically meant to allow, under specific conditions, the use of protected material to the benefit of each individual's fundamental freedom of speech and of the public's right to information. Such limitations as the right to quote for purposes of criticism, press reviews, or news reports and the right to reproduce works for purposes of research or study ensure a limited right to use copyright material in furtherance of the free flow of information. In the opinion of most reporters, the copyright system offers sufficient protection for the fundamental freedom of expression and right to information of the public, so that there is no need to look at this question from outside of copyright law.

Of course, the argument of a separate freedom of expression defence has been raised in some jurisdictions in the context of copyright infringement proceedings.<sup>15</sup> As an American author puts it:

‘The argument for bringing a First Amendment privilege outside of the confines of the fair 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

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<sup>10</sup> European Convention for the protection of Human Rights and fundamental freedoms, signed in Rome on 4 November 1950, art. 10.

<sup>11</sup> Signed on December 16, 1966, (1976) 999 United Nations Treaty Series, p. 187.

<sup>12</sup> Spoor, J.H. and Verkade, D.W.F. *Auteursrecht*, 2d ed., Deventer, Kluwer, 1993, p. 187.

<sup>13</sup> See: Reports from Canada, Denmark, Germany, Greece, Italy, Japan, Mexico, Spain, Sweden, Switzerland, United Kingdom.

<sup>14</sup> Johnston, G., “Copyright and Freedom of the Media: A Modest Proposal”, [1996] 1 *EIPR* 6-17, at p. 6.

<sup>15</sup> See: Reports from Belgium, and the United States.

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'.<sup>16</sup>

At times, the argument has been successful, although it always remains a marginal trend.<sup>17</sup> In many instances, courts seemed favourable to the argument, but ultimately decided that the facts of the case did not lend themselves to such a finding<sup>18</sup>. But a separate defence to copyright infringement based on a defendant's fundamental freedom of speech is most often rejected on the following grounds:

'The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes'.<sup>19</sup>

One possible exception to this general principle would be reproductions made for the purpose of parody. Indeed, intrinsic freedom of speech and public interest values are generally attached to parodies, because they are thought to promote new ideas and criticism within a democratic society. Aside from a few notable exceptions,<sup>20</sup> parody is usually not listed among the statutory limitations. Consequently, in order not to be held liable for copyright infringement, the maker of a non-authorized reproduction of a work for purposes of parody would have to invoke a separate defence, which could be based on freedom of speech. Two reports suggest that, in fact, courts would probably go beyond literal interpretation of the law and be more receptive to a freedom of speech defence in the context of parody than they would be in other situations.<sup>21</sup> The Canadian report raises also the case of an on-going litigation opposing a private editor to a publicly owned corporation, who has the monopoly on the publication of court decisions. This litigation is a good illustration of the more fundamental issue of the enforcement of Crown copyrights as a possible obstacle to the exercise of the public's right to information. With respect to the public's right to information, some reports make further reference to the legislation on access to information enacted in their country.

As to possible limitations on the exploitation of a work based on the safeguard of the fundamental right to privacy, a few reports mention third parties' right of publicity (*droit à l'image*, or *droit de la personnalité*) and protection of nominative data. In some countries, these considerations have been integrated into statutory limitations, where for example the author, the rights holder or the possessor of a portrait may not reproduce it or communicate it to the public without the consent of the person represented or of his assignees during a certain period of time after this person's death.<sup>22</sup> In

<sup>16</sup> Fraser, S., 'The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet', 1998 vol. 16:1 *Cardozo Arts & Entertainment Law Journal* 1-52, at p. 51.

<sup>17</sup> In the United States, in relation to the freedom of speech see: *New Era Publications International APS v. Henry Holt & Company, Inc.*, (SDNY 1988), affirmed 873 F.2d 576 (2nd Cir. 1989). In Australia, in relation to the freedom of communication see: *Australian Capital Television Pty Ltd v. The Commonwealth of Australia*, (1992) 177 CLR 106.

<sup>18</sup> In the Netherlands: *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. In Canada: *Canadian Tire Corp, Ltd. v. Retail Clerks Union et al.*, (1985) 7 C.P.R. (3d) 415 (F.C.T.D.); *R. v. James Lorimer and Company Limited*, [1984] 1 F.C. 1065;

<sup>19</sup> *Compagnie Générale des Établissements Michelin- Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada et al.*, [1997] 2 F.C. No. T-825-94 available at: '<http://www.fja-cmf.gc.ca/en/cf/1997/vol2/html/1997fca19917.p.en.html>'.

<sup>20</sup> French Code de la propriété intellectuelle, art. L. 122-5, 4°; Belgian Copyright Act, art. 22 § 1, 6°.

<sup>21</sup> See: Reports from Italy, and The Netherlands.

<sup>22</sup> See: Belgian Copyright Act, § 10; Dutch Copyright Act, Art. 10.

other countries, a person whose right of publicity has been violated through the exploitation of a copyright work may seek injunctive relief and/or compensation under the general notion of abuse of right.<sup>23</sup>

## 2 *Public interest considerations*

Of course, public interest considerations are an integral part of the copyright system. In principle laws are enacted only if they are, or thought to be, in the public interest. Following this principle, the structure of the copyright system owes a lot to the legislator's acknowledgement of and response to public interest concerns, in its effort to encourage both creation and dissemination of original works. The copyright system as whole is thus believed to establish a balance between the interests of the creators and those of the public, in furtherance of the common good. However, the focus of question 9B is on the collective interests of society, invoked in parallel to the statutory limitations, as a counterbalance to the individual interests of the copyright holder. There may be, outside the copyright regime itself, particular instances where the needs of the majority justify overriding those of the individual, and where the citizen should relinquish any thoughts of self-interest in favour of the common good of society as a whole.<sup>24</sup>

As in the case of the freedom of expression and the right to information, a majority of reporters conclude that public interest considerations are already part of their copyright regime and that there is consequently no need to examine the issue further. Some reports merely note the absence of relevant jurisprudence on this matter.<sup>25</sup> Nevertheless, while it is true that most aspects of public interest concerns may have been addressed inside the statutory copyright limitations, a few reports observe that courts enjoy, under the law of their country, additional leeway in the judicial interpretation of particular sets of facts in order to take account of public interest considerations. In the Netherlands, article 6:168(1) of the Civil Code states that 'the judge may reject an action to obtain an order prohibiting unlawful conduct on the ground that such conduct should be tolerated for reasons of important social interests. The victim retains his right to reparation of damage, according to this title'. This provision has served at least on one occasion to limit the rights of a copyright owner. In that case, the court rejected an architect's petition for an injunction on the grounds that the halt of building activities would constitute a disproportionate means of redress, considering all interests at hand.

The notion of public interest would appear to play a more important role in the judicial system of countries from the common law tradition. Indeed the most extensive report on this question comes from the United Kingdom. Whereas English law provides for a specific number of statutory limitations, there is said to be room for expansion and adaptation of the given limitations, through the courts' use of the common law rule of judicial interpretation in the general public interest, provided for under Section 171(3) of the 1988 Copyright Act. This provision reads as follows: 'Nothing in this part affects any rule of law preventing or restricting the enforcement of copyright, on the grounds of public interest or otherwise'. As Mr Goddard explains however, there are a number of cases where public interest is discussed in the English jurisprudence, but it is impossible to point to any rule of law which might come within the purview of Section 171(3) of the 1988 Act. Most cases which refer to the notion of public interest involve a different claim, for example when equitable relief is sought and public interest is invoked as a secondary issue.

Despite the enactment of Section 171(3), there are no court decisions to report in which a separate public interest limitation was created or where public interest considerations played a further

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<sup>23</sup> See: French Report from Dr Caron and discussion below on the notion of abuse of right.

<sup>24</sup> Davies, G., *Public Interest and the Copyright System*, Munich, VCH Verlagsgesellschaft, IIC Studies No. 14, 1994, p. 2.

<sup>25</sup> See: Reports from Belgium, Canada, Denmark, Germany, Greece, Italy, Japan, Spain, and Sweden.

part in the interpretation of the circumstances giving rise to a fair dealing defence under Section 30 of the 1988 Act. However, on the basis of this same provision, courts are reported to have refused to enforce the rights of copyright owners in a number of cases, namely when the work that was allegedly infringed was itself pirated from another author or published in breach of confidence. By interpreting Section 171(3) together with Section 171(1)e), which provides that nothing in the 1988 is to affect any rule of equity relating to breach of confidence or trust, courts have held copyright to be partially or totally unenforceable for the sake of free access to information, on either one of the four following grounds: 1) where it is in the public interest that a confidential, and possibly unpublished, copyright work should be made available to the public; 2) where a copyright work is so offensive to the public interest that the law refuses to give the owner of the copyright any rights or remedies against infringers; 3) where the copyright owner has impliedly licensed various forms of conduct which would otherwise constitute acts of infringement; 4) where enforcement of the copyright in a work would derogate from the grant given by the copyright owner.

In Australia, a non-statutory public interest defence had been admitted by a court in 1980 in relation to copyright infringement, but was held not to be applicable on the facts. Later on, other court rulings and legal authors raised doubts on the admissibility of such a defence and more recent decisions are said to prefer an analysis based on the court's discretion in refusing relief to a copyright owner in circumstances where the public interest intervenes, as opposed to a public interest defence per se.

According to the American report, public interest considerations are addressed, in relation to copyright matters, mainly within the fair use defence. If not applied as a direct limitation on the exercise of copyrights, the notion of public interest constitutes nonetheless a rule of judicial interpretation in the United States, which is primarily invoked in contractual matters. It is a general principle recognised in common law that, in certain circumstances, terms that would be enforceable under contract law may be unenforceable because they are invalid under a fundamental public policy which clearly overrides the fundamental policies supporting freedom of contract<sup>26</sup>. Considering the importance of free expression and competition policy issues regarding information, an amendment was proposed and introduced in the latest draft of Article 2B UCC. This amendment would provide the following: 'a contract term that violates a fundamental public policy is unenforceable to the extent that the term is invalid under that policy'<sup>27</sup>. As the Reporter's notes explain, this provision may have definite significance in the interpretation of standard contractual terms of use of copyright material:

'even in mass market transactions, limitations in a license for software or other information that prohibit the licensee from making multiple copies, or that prohibit the licensee or others from using the information for commercial purposes, or that limit the number of users authorized to access the information, or that prohibit the modification of software or informational content without the licensor's permission would in most circumstances be enforceable. On the other hand, terms in a mass-market license that prohibit persons from observing the visible operations or visible characteristics of software and using the observations to develop non-infringing commercial products, that prohibit quotation of limited material for education or criticism purposes, or that preclude a public library licensee from making an archival copy would ordinarily be invalid in the absence of a showing of significant commercial need. (...) The fundamental policy lies in encouraging and sustaining discussion and appropriate use of information placed in public contexts and is reflected in property law concepts of fair use and fundamental ideas of free expression'.

Finally the notion of public interest has intervened punctually in a few other countries in

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<sup>26</sup> Restatement (Second) of Contracts, § 178.

<sup>27</sup> Article 2B UCC, sect. 2B-105(b).

relation to copyright matters, for example when fixing the tariffs for the license of copyright material for educational purposes in Switzerland, when applying the limitations established by international copyright instruments in favour of developing countries to provide access to works deemed necessary for national education in Mexico, and when fixing the sales price of books or imposing mandatory delays for diffusion of works in France.

### 3 *Competition law*

The interface between intellectual property law and competition or antitrust law has been the object of continued attention from courts and legal authors already for many years, and perhaps most of all in the United States. This interest is primarily justified by the apparent conflicting nature of the two regimes of law, and by the difficulty of drawing the boundary between the collective interest of society in maintaining free competition and the private interest of the rights holder in exercising his intellectual property rights. On the one hand, competition laws are enacted to protect the competitive process in the hope of promoting economic efficiency, consumer welfare and technological progress.<sup>28</sup> Competition laws are thus meant to prevent economic actors from obtaining, maintaining or attempting to gain monopoly power in a market by driving out competition.

On the other hand, the grant of exclusive intellectual property rights may be seen as conferring potential monopoly power on their owners. Indeed the value of intellectual property rights rests precisely in the ability of the owner to control who may take advantage of a work, to set the conditions of use and to fix the price of the work.<sup>29</sup> In principle then, competition law and copyright law have the potential of coming into conflict with each other.

The views about the economic impact of intellectual property rights on the competition process have evolved over time, along with the economic approach taken by administrations and courts in support of the competition policy. The neo-classical view, which prevailed during the years 1970's and 1980's, was to presume monopoly power from the grant of patents and copyrights and to regard a number of contractual practices as highly suspicious. Today, the influence of the Chicago School of Economics has somewhat faded away and the pendulum is swinging slightly the other way.

The presumption of market power is no longer applied. Governments generally attempt to reconcile both regimes of law, which are thought to share the common purpose of encouraging innovation and enhancing consumer welfare. Intellectual property rights are therefore considered essentially on the same footing as any other private property right and seen as pro-competitive, provided that they are properly licensed. Consequently, the rules of competition law still intervene on a case-by-case basis, e.g. in situations where licensing practices effectively hinder the competition process. The possible application of the rules of competition law to copyright license contracts constitutes therefore another form of limitation on the exercise of copyrights.

The question of the possible interaction between competition law and intellectual property law was specifically examined during the negotiating process of the GATT/TRIPs Agreement. As a result, the TRIPs Agreement contains two provisions which are directly relevant to this issue.<sup>30</sup> Article 8(2) allows Members to take appropriate measures, provided that they are consistent with the provisions of the Agreement, which may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the

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<sup>28</sup> See for example: Brodley, J.F., 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress', 1987/62 *New York University Law Review* 1020-1053.

<sup>29</sup> Vermut, R.S., 'A Synthesis of the Intellectual Property and Antitrust Laws: A Look at Refusals to License Computer Software', 1997/22 *Columbia-VLA Journal of Law & the Arts* 27-59, at p. 29.

<sup>30</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to The Final Act and Agreement Establishing the World Trade Organization. General Agreement on Tariffs and Trade, signed in Marrakech, on April 15 1994.

international transfer of technology. Given the addition of the phrase ‘consistent with the provisions of this Agreement’, Article 8 is mostly read as a policy statement that explains the rationale for measures taken under other articles, such as Article 40, and would probably not justify the creation of an exception not foreseen under the Agreement.<sup>31</sup> Under Article 40(1) of the Agreement, Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. On the basis of this acknowledgement, Members are given the power under Article 40(2) to adopt measures to control anti-competitive practices in contractual licenses:

2. Nothing in this Agreement shall prevent Members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

According to Gervais, Article 40(2) establishes the right of WTO Members to determine, on a case-by-case basis, which licensing practices are deemed to constitute an abuse of intellectual property rights and have an adverse effect on competition. The criteria of abuse of right and adverse effect are cumulative. Licensing practices which meet these two criteria may be subject, on a case-by-case basis, to measures of prevention or control, consistently with other provisions of the Agreement.<sup>32</sup>

In the United States, the Antitrust Division of the Department of Justice has traditionally been aggressive in its pursuit of intellectual property licensing strategies for antitrust violations, but mostly with regard to patent rights. This was particularly true in the 1970's, when the Department of Justice issued its ‘Nine No-No's’, a list of licensing practices that the Division determined should warrant close scrutiny.<sup>33</sup> It is not a surprise to note however that, one year after the signature of the TRIPS Agreement, the U.S. Department of Justice and the Federal Trade Commission issued new antitrust guidelines for the licensing of intellectual property, thereby getting rid of the previous ‘Nine No-No's’.<sup>34</sup> The general principles embodied in the guidelines are described as follows: (a) for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property; (b) the Agencies do not presume that intellectual property creates market power in the antitrust context; and (c) the Agencies recognise that intellectual property licensing allows firms to combine complementary factors of production and is generally pro-competitive.

As the report from Mr. Neil states, it is generally not a defence to a copyright infringement claim in the United States that the rights owner is violating the U.S. federal antitrust laws. However, despite a certain relaxation of the guidelines, the Antitrust Division of the Department of Justice has enforced the antitrust laws with a certain aggressiveness over the years. A number of antitrust

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<sup>31</sup> Govaere, I., ‘The Use and Abuse of Intellectual Property Rights in E.C. Law’, London, Sweet & Maxwell, 1996, p. 37.

<sup>32</sup> Gervais, D., ‘The TRIPS Agreement: Drafting History and Analysis’, London, Sweet & Maxwell, 1998, pp. 191 and 192.

<sup>33</sup> Brunetti, A., ‘Wading into Patent Pooling’, *Intellectual Property Journal*, November 1997, available at: ‘<http://www.ipmag.com/brunetti.html>’.

<sup>34</sup> Antitrust Guidelines for the Licensing of Intellectual Property, Department of Justice, Antitrust Division, April 6, 1995, available at: ‘<http://www.usdoj.gov/atr/public/guidelines/guidelin.htm>’. See: Gilbert, R. and Shapiro, C., ‘Antitrust issues in the licensing of intellectual property: the nine no-no's meet the nineties’, *Brookings Papers on Economic Activity*, forthcoming 1998.

lawsuits brought by the government on the grounds that a copyright holder has abused his monopoly grant through anti-competitive practices have resulted in the approval by courts of consent decrees. One of the first major antitrust cases involving a copyright matter, which was litigated between 1941 and 1950, opposed the U.S. government to the collective licensing society American Society of Composers, Authors and Publishers (ASCAP). ASCAP was accused of exercising anti-competitive activities in its licensing of musical compositions and distribution of royalties.<sup>35</sup> This consent decree still governs the manner in which ASCAP licenses the use of the works in its repertoire and distributes the royalties to its member composers, lyricists, and publishers.

In the recent years, the Microsoft Corporation has been under attack from the Antitrust Division of the U.S. Department of Justice on charges of abuse of dominant position, contrary to the provisions of the Sherman Act. This led to the approval of a consent decree in 1995, which prohibited the software manufacturer from tying sales of 'other products' to its market-dominant PC operating system Windows 95.<sup>36</sup> Although it scored temporary victory against the Department of Justice last June<sup>37</sup>, the problems of Microsoft are not yet over however, whereas several motions are still pending in relation to the Corporation's licensing of its web browser, operating systems and office productivity software. In view of the vigour with which the Antitrust Division is enforcing the antitrust laws in the software industry, one can hardly tell that the Antitrust Guidelines on the Licensing of Intellectual Property reflect a change in the government's competition policy. It is also interesting to note, at times, the divergence of opinion on the subject of competition policy between the U.S. administration and the courts.

Under European competition law, the enforcement of intellectual property rights is considered to have a possible affect both on competition and on the free movement of goods within the Internal Market. The exercise of intellectual property rights are therefore not only subject to certain Treaty rules, such as the rules on the free movement of goods and services (Article 36), and competition (Articles 85 and 86), but also to the general principle of non-discrimination as laid down in Article 6 of the EC Treaty. A complete description of the workings of competition law in Europe is outside the scope of this General Report. However the distinction between the principle of the free movement of goods and that of competition may be explained as follows:

'The rules on competition are very different from the rules concerning the free movement of goods and services. The first are aimed at curtailing anti-competitive behaviour of economic actors which may affect intra-Community trade whereas the latter are mainly aimed at removing obstacles posed by national law to intra-Community trade. This implies that the rules on free movement of goods should in theory apply where it is intellectual property law that creates distortions to intra-Community trade. Conversely, the competition rules should apply if it is the intellectual property owner who uses his exclusive right to distort competition within the Community. However, this distinction is not enforced in the case law concerning intellectual property rights. National intellectual property law is hardly ever struck down under the rules on the free movement of goods, whereas both sets of rules are currently applied to curtail the alleged anti-competitive behaviour of economic nationally granted rights'.<sup>38</sup>

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<sup>35</sup> United States of America v. American Society of Composers, Authors and Publishers et al., Amended Final Judgement, Civil Case No 13-95, 14 March 1950, United States District Court (SDNY), last modified by an Order of 19 February 1993, 832 F.Supp. 82 (SDNY 1993), aff'd 32 F.3d 727 (SDNY 1994).

<sup>36</sup> United States of America v. Microsoft Corporation, 56 F.3d 1448 (DC Cir. 1995).

<sup>37</sup> United States of America v. Microsoft Corporation, U.S. Court of Appeals for the District of Columbia Circuit, of 23 June 1998, No. 97-5343 (where the majority held that Microsoft's Internet Explorer browser and its Windows 95 operating system appeared to be an 'integrated system' and could be marketed together without violating the anti-tying restrictions agreed to in the 1995 Justice Department consent decree).

<sup>38</sup> Govaere (1996), p. 42.

Certain 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 controversial cases of the recent years, which touches on the question of where to draw the boundaries to the exclusive rights of intellectual property owners in view of the need to safeguard competition in the Internal Market, is the Magill Case.<sup>39</sup> The key issue in this case was whether, and to what extent, an owner of copyright in advance listings of forthcoming television and radio programmes can rely on his exclusive right to exclude potential competitors from the derivative market of TV guides without constituting an abuse of dominant position in the sense of Article 86 EC Treaty.<sup>40</sup> 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 TV and radio listings, the applicants were abusing a dominant position contrary to Article 86 of the EC Treaty. A compulsory license was ordered as a remedy for the abuse.

In France a few years earlier, the anti-competitive activities of a copyright owner in meteorological data were challenged in circumstances similar to those of the Magill Case and, according to Ms Bénabou's report, the Court of Appeal of Paris came to a comparable conclusion. But as the French reporter points out, one may wonder if the TV and radio program listings, meteorological data and the like are copyrightable works in the first place and if all such cases should not be decided instead on the principle of 'originality'. Nevertheless although no relevant case law can be cited concerning a violation of the national competition laws by a copyright owner, a number of reports consider that the Magill precedent may have a certain influence on future similar court cases in their country.<sup>41</sup>

As the report from Ms Bénabou further suggests, the principle of exhaustion of rights may also be seen as a limitation on the exercise of copyrights in Europe. The principle originates from the application of Article 36 EC Treaty concerning the free movement of goods. It first evolved from European Community case law and was later codified in the laws of the Member States. The principle of exhaustion of rights essentially provides that neither the copyright owner or his licensee, nor a copyright management society acting in the owner's or licensee's name, may rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of copyright material which has been lawfully marketed in another Member State by the owner himself or with his consent.<sup>42</sup> This principle has been expressly incorporated into French law, more particularly in a provision of the Code de la propriété intellectuelle relating to computer software, but is also part of the general principles of law developed by the European Court of Justice and followed by French tribunals.

On the issue of possible abuse of dominant position by owners of copyrights, several reports in and outside Europe make a distinction between the individual and the collective exercise of author's rights.<sup>43</sup> Two factors contribute to a great extent in giving collecting societies a dominant position in the market: 1) they have often a legal or de facto monopoly in the licensing of a particular type of work, in the sense that original authors who wish to entrust the administration of their rights to a collecting society often have no choice but to do business with one specific society in their country (for example, SOCAN which is the only collecting society for the performance of musical

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<sup>39</sup> *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.

<sup>40</sup> Govaere (1996), p. 135.

<sup>41</sup> See: Reports from Belgium, Germany, Italy, and The Netherlands.

<sup>42</sup> *Musik- Vertrieb Membran GmbH & K-tel International v. GEMA*, Decision of the Court of Justice of the European Communities, January 20, 1981, reproduced in IIC 04/1981 pp. 526-531.

<sup>43</sup> See: Reports from Australia, Belgium, Canada, France, Germany, Spain and Sweden.

works in Canada); and 2) collecting societies are often the only ones empowered to negotiate licenses for the use of the works included in their repertoire, sometimes even to the exclusion of the original author himself.<sup>44</sup> Users have then no choice but to accept the conditions of use and prices established by the collecting societies for the use of works included in the repertoire.

Given the potential of abuse of market power through the licensing practices of collecting societies, some countries have adopted measures of control of their activities, either under the copyright act, the competition act or a specific act.<sup>45</sup> In many cases, tariffs and conditions of use established by copyright licensing societies are subject to review by an administrative body and once the tariffs are approved, the collecting societies receive immunity from liability under the rules of competition law. But this is not the case everywhere however, like Germany where the Antitrust Act provides that if immunity leads to abuse, the Federal Cartel Office may still intervene. In any case, several reports indicate that actions have been brought before the courts against such copyright collectives on charges of abuse of dominant position.

#### 4 *Abuse of right or copyright misuse*

Interestingly, the most elaborate answer to question 9D on the notion of abuse of rights as a possible limitation on the exercise of copyrights originates from the country where the system of statutory exceptions is the most restrictive. Indeed, judging from the reports received, the country where the defence of abuse of rights seems to have been admitted most frequently in favour of users is France, where even the most sacred right must yield to those of others. In his very extensive report, Dr Caron distinguishes between limitations imposed on the grounds of an abuse of right by the copyright owner, and limitations imposed because, even in the absence of abuse, the legitimate exercise of the right would cause prejudice to one or more third parties.

Like any other private right under French civil law, copyrights are granted for specific ends. These ends are determined by the institution creating the right and one may exercise a right only in compliance with the ends which justify its existence. Abnormal use of a right consists in the deviation from its intended use, either with the intent to cause prejudice, out of carelessness, without legitimate interest, or by diverting the right from its social function. While the defence of abuse of right in relation to copyright matters is admissible under French civil law, Dr Caron reminds us that such a defence remains an exceptional corrective measure. This being said, the report then provides an interesting analysis of the distinction made by French tribunals between economic rights and moral rights - the latter having been called at times discretionary rights or attributes of the personality, the exercise of which constitutes an abuse only in rare cases. Although the notion of abuse of right is essentially a civil law concept, it has been introduced in two articles of the French Code de la propriété intellectuelle. Both provisions deal with the 'notorious' abuse in the exercise of rights, either economic or moral, by the representatives of a deceased author<sup>46</sup>. In cases of 'notorious' abuse by the representatives of a deceased author, courts have the power to order any appropriate measure of relief. As possible cases of abuse of right by a living author, the report raises the examples of opposing claims between the copyright owner and the owner of a tangible copy embodying the work, and of the abusive exercise by an author of his moral right to repent and withdraw recognised under French copyright law, thereby annulling all previous contractual obligations relating to a work.

In some cases, an author will not be allowed to exploit his work despite the fact that the exercise of his copyright is legitimate. The French report points to circumstances where the image, the name or the right to privacy of a third party are likely to be affected by the disclosure or

<sup>44</sup> See: Australian report.

<sup>45</sup> See: Reports from Australia, Canada, Germany, Spain.

<sup>46</sup> Code de la propriété intellectuelle, art. L. 121-3 (moral right) and art. L. 122-9 (economic right).

exploitation of a work. French courts have repeatedly dealt with claims of private individuals, some more famous than others, according to which the exploitation of a particular work by the rights holder allegedly caused them harm. On a number of other occasions, courts have restricted the right to exploit a work whose content went against the public order and the good morals, or whose information was blatantly erroneous or dangerous for the public. Even the freedom of expression of journalists and historians, for whom more leeway in the portrayal of news, people and events is tolerated, may be subject to restrictions on anyone of these grounds.

The defence of abuse of rights has also been invoked in a number of recent cases in Belgium. According to Ms Janssens, Belgian authors have long held that the exercise of copyrights is subject to the control of the courts and also to the application of the principle of abuse of right. In Belgium, copyright follows the general civil law principle according to which anyone who abuses his rights may be held liable for the prejudice caused to others. Courts are reported to make increased reference to this notion as a limitation on the exercise of copyright. As Ms Janssens points out, this tendency may only grow in the future, particularly in view of articles 8(2) and 40(2) of the TRIPS Agreement mentioned above. These provisions allow Members to adopt measures against the abuse of intellectual property rights by right holders which unreasonably restrain trade.

In other civil law countries, abuse of right is viewed as a possible limitation on the exercise of copyrights, but no relevant case law is mentioned<sup>47</sup>. In contrast, the German report refers to the notion of estoppel (*Verwirkung*), which has been applied in a small number of copyright cases. As the report explains, courts generally start with the assumption that copyright is an absolute right with a long period of protection and that mere inactivity on the part of the rights owner to enforce his rights against actual infringements by third parties is not a reason in itself to apply the principle of estoppel. This principle can only be applied when, in addition to simple inactivity, the copyright owner has clearly shown that he is not interested in enforcing his rights and that the infringer has relied on that belief. However the notion of estoppel referred to in the German report is based solely on the copyright holder's inaction with respect to the enforcement of his rights and does not equate to the notion of abuse of right, act which may give rise to a claim for damages against the copyright owner. It would have been interesting to know for example, whether § 226 of the *Bürgerliches Gesetzbuch* (BGB) on 'Schikaneverbot'<sup>48</sup>, § 826 BGB on 'Sittenwidrige vorsätzliche Schädigung'<sup>49</sup>, and § 950 BGB on 'Verarbeitung'<sup>50</sup> can find an application in copyright cases.

In some countries, the notion of abuse of rights is not part of the legal system or it is of no application to copyright cases<sup>51</sup>. In common law countries, there is no legal concept similar to the civil law notion of abuse of right. In the United States however, defendants in copyright infringement proceedings may raise, in specific circumstances, the rights holder's own misuse of his rights as a defence to their infringing acts. The copyright misuse defence is more closely related to antitrust law than to tort law. But contrary to antitrust law proceedings, a defendant who invokes a copyright misuse defence does not have to prove that the market is adversely affected by the

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<sup>47</sup> See: Reports from Canada (Québec), Greece, Italy, Japan, The Netherlands, Spain and Switzerland.

<sup>48</sup> § 226 BGB states that 'the exercise of a right is inadmissible, when its only aim may be to cause damages to others'.

<sup>49</sup> § 826 BGB states that 'Anyone who intentionally causes prejudice to another, in a manner which goes against the normal standard of behaviour, is liable for compensatory damages to the injured person'. See: Schack, H., 'Geistiges Eigentum contra Sacheigentum', GRUR 02/1983, pp. 56-61.

<sup>50</sup> § 950 BGB states that '(1) Anyone who manufactures a new moveable thing through the processing or reorganisation of one or several elements acquires the property in the new thing, provided that the value of the processing or the reorganisation is not substantially smaller than the value of the elements. As processing are also considered the writing, drawing, painting, printing, engraving or a similar handling of the surface. (2) Existing rights in the element expire with the acquisition of the property in the new thing'. See: BGH, Urteil von 27.9.1990 - I ZR 244/88 (OLG Karlsruhe) reproduced in GRUR 07/1991, 523.

<sup>51</sup> See: Reports from Australia, Denmark, Mexico, and Sweden.

copyright owners actions. Copyright misuse has been successfully used as a defence, limiting the exercise of a copyright holder's exclusive rights. The American report gives the example of anti-competitive language inside a licensing agreement, which may amount to misuse of copyright if the licensing agreement attempts to use copyright to control competition outside the scope of the monopoly grant. Misuse of a license bars recovery for infringement even if the misuse does not amount to an antitrust violation<sup>52</sup>.

As to the United Kingdom, the report indicates that although the UK does not share the notions of abuse of rights or of misuse of copyright to limit a copyright holder's exclusive rights, there have been occasions in which the courts have refused to grant relief in copyright infringement cases, by exercising the power given to them under section 171(3) of the Copyright Act. According to the British reporter, it would certainly be conceivable that, in the area of copyright licensing for example, courts limit the extent of protection granted to copyright owners for abuse of their own, lawful rights.

## 5 Consumer protection law

Whether we like it or not, copyright works are increasingly referred to and offered on the market as commercial goods. This is particularly true in the digital networked environment, where sound recordings, videos, books, articles and computer programs are licensed to the end-user as consumer products, either by the rights holder or a distributor, and often through non-negotiated agreements. These agreements set out the terms and conditions of use of the copyright material acquired by the end-user and may include, among others, clauses on scope of use, delivery, right of refund, warranties, and remedies. Today's production and distribution of copyright works are indeed far from the romantic view of authorship<sup>53</sup> or of the traditional philosophy behind the *droit d'auteur* regime, where exclusive rights are granted to physical authors of literary and artistic works as an extension of their personality and as a reward for their effort<sup>54</sup>. The fact is that the copyright regime is no longer an isolated set of rules establishing the conditions of transfer or license of protected works. Other bodies of law are now called in to determine the form and content of digital transactions relating to copyright material, as part of what is now known as 'Electronic Commerce'.

Admittedly, in most jurisdictions, general consumer protection rules are likely to apply to the digital networked environment in the same way as to traditional trade practices, subject to certain possible adaptations. And although some consumer lobby groups advocate for the preservation of a digital private copying exemption on the grounds of fair trade practices and consumer rights<sup>55</sup>, the mention of consumer protection rules in question 9E of the ALAI questionnaire, although this may not have been sufficiently clear, was primarily aimed at the terms and conditions under which copyright material is licensed to end-users. The recognition of a private use exemption in the digital environment is a copyright policy matter, and must therefore be decided in the copyright arena. However, whether or not a private use exemption is admitted on the Internet, consumers' rights may be affected by certain licensing practices, and particularly by unfair terms included in mass market license agreements, which in turn may be regulated under consumer protection law. Such regulation would constitute in fact a limitation on the exercise of a copyright owner's exclusive rights, rather than a limitation on the scope of rights. For example, the directives on the protection of consumers

<sup>52</sup> *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990); and *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597 (5th Cir. 1996).

<sup>53</sup> See: Lemley, M., *Texas Law Review* (1997).

<sup>54</sup> See: De Nayer, B., 'Droit d'auteur et protection des intérêts des consommateurs dans la société de l'information', *Revue Européenne de Droit de la Consommation* 1998, pp. 3-25; and Quaedvlieg, IIC 4/1998, p. 432.

<sup>55</sup> See: 'The Consumer Fair Practice Campaign warns that Information Poverty could result from the new EU Copyright proposals', Press Release from the European Fair Practices in Copyright Campaign, 29 June 1998.

in respect of distance contracts<sup>56</sup> and on unfair terms in consumer contracts<sup>57</sup> could, in my opinion, find application to copyright contracts concluded by European residents in the digital networked environment, thereby circumscribing the exercise of a rights holder's copyright.

Along with a few other reports, the Spanish report indicates that consumer protection is not foreign to some of the intellectual property limitations, including those aimed at preventing the owners from impairing or blocking the normal use of the work by the legitimate user. The Spanish report adds however that the general rules on contracts and obligations, as well as specific rules on consumer protection may serve to annul any contractual clause aimed at restricting or eliminating these limitations. It also points out that the widespread collective interest of users to gain easier and cheaper access to works in the information highway has already been considered by the Spanish legislator, by substituting the owner's exclusive rights with a right to remuneration. Four reports mention that regulation of electronic commerce is either underway in their country or desirable<sup>58</sup>. Other reports state in a general fashion that consumer protection rules may find an application in the context of access to copyright material but that there is no relevant case law at this time<sup>59</sup>. A number of reports make reference also to their national legislation on misleading advertising and comparative advertising as possible limitations to an author's freedom of expression, deriving from consumer protection law<sup>60</sup>.

Besides possible unfair contractual terms and unworkable distance selling contracts, a key element on how the consumers' rights may be adversely affected by licensing practices relates to the question of whether copyright limitations are of mandatory application or whether they can be set aside by contract. This was the object of question 6A of the ALAI questionnaire and the answers are summarised and discussed in Professor Spoor's General Report. In practice, users' rights may be affected by contractual terms contained in copyright licenses in the sense that, if copyright limitations are deemed to be mere default rules, licensors will certainly restrict or eliminate the users' benefit from those statutory limitations. Whether it is desirable to encourage unrestricted freedom of contract with respect to these matters or to attribute a mandatory status to the statutory limitations is essentially a public policy decision. Moreover, should public authorities consider it in the public interest to regulate contractual practices in this field, they would still have to decide where to regulate, that is in copyright law, in competition law, in contract law or in consumer protection law.

Referring back to the proposed Article 2B UCC, it is remarkable that, at this point of the discussions on the draft, the issue of copyright pre-emption, or copyright overridability, is still highly debated. Given the Article's definition of 'information', which includes 'data, text, images, sounds, mask works, or works of authorship', the proposed Article would clearly apply to the licensing to consumers<sup>61</sup> of any form of copyright material. The reporter's notes specify that the definition of 'information' has been drawn in broad terms and that the reference made to 'works of authorship' is meant to encompass literary works, computer programs, motion pictures, compilations, collected works, audio-visual works and the like. In his notes, the Reporter reminds the reader that Article 2B

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<sup>56</sup> 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. No. L-144 , 04/06/1997, p. 19-27. See also the Belgian Report.

<sup>57</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J.E.C. No. L-095 , 21/04/1993, p. 29-34.

<sup>58</sup> See: Reports from Australia, Canada, Germany, and The Netherlands.

<sup>59</sup> See: Reports from Belgium, Italy, Japan, and Switzerland.

<sup>60</sup> See: Reports from Belgium, Canada, Mexico, and Sweden.

<sup>61</sup> Article 2B UCC, sect. 2B-102, where 'consumer' is defined as follows: 'an individual who is a licensee of information or informational rights that are intended by the individual at the time of contracting to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for profit-making, professional, or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments'.

deals with general contract law and commercial law principles, that it does not promulgate a consumer protection code, nor does it propose to settle the issue of copyright pre-emption. However, considering the implications for the consumers and in view of the strong lobby exercised by consumer organisations, a section was introduced in the draft to confirm the prevalence of State consumer protection rules over contractual provisions to the contrary. Proposed Article 2B also contains a provision granting consumers a right of refund in cases of contracts concluded between a distributor and an end-user, if the end-user's right to use the information or informational rights is subject to a license from the publisher and there was no opportunity to review the license before the end-user became obligated to pay the distributor<sup>62</sup>. Without going in too much detail about the pro's and con's of proposed Article 2B and the impact of the legalisation of mass market licenses on the rights of consumers, it makes no doubt that its provisions will have an impact on the exercise of intellectual property rights.

## 6 *Public domain material*

Increased awareness of the necessity to maintain access to public domain material is very important today, particularly in view of the obvious tendency towards private appropriation of different forms of information, outside of the copyright law paradigm.<sup>63</sup> The most recent evidence of this trend is the *sui generis* right on databases recognised in Europe, which extends protection against unauthorised extraction of any non-original element included in a database – covering therefore any information, news, fact or other type of public domain material.<sup>64</sup> Furthermore, with the development of digital technology, producers may be tempted to secure an economic advantage by blocking access to and monopolising more or less valuable public domain material. In answer to question 9F, most reports conclude however that elements of copyrighted works, which constitute public domain material, are simply outside the scope of copyright protection and are therefore freely available for use. Of course, as some reports indicate, it could be argued that, in particular cases, the selection of these elements and their incorporation into an original work enables the owner of the copyright in the resulting work (e.g. the compilation) to prevent another from taking advantage of the skill and labour in the selection process by copying the same public domain elements. Under copyright law, it would not constitute an infringement for anyone to reproduce public domain material included in a copyright work.

A particular subject matter is part of the public domain either because it does not demonstrate a sufficient level of originality to receive protection under the copyright regime, because the period of protection has lapsed or because it is expressly excluded from protection. Whereas most countries expressly exclude official documents, daily news and other similar elements of information from copyright protection, these types of works are the object of no such provision under the French Code de la propriété intellectuelle. According to Ms Bénabou, these types of works fall outside of copyright protection as a matter of principle in the French jurisprudence, but not, as in other countries, on the basis of safeguarding the freedom of expression or the right to information. Instead, courts are said to have repeatedly confirmed that these types of works should not be subject to any form of private appropriation, because they form part of the common good by their very nature and their importance for the community. Admittedly, the definition of what constitutes an 'official document' not protected by copyright has raised some controversy in the French jurisprudence.

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<sup>62</sup> Article 2B UCC, sect. 2B-617.

<sup>63</sup> Hugenholtz, P.B., 'Saving the Public Domain: Copyright v. Freedom of Expression in Europe', paper presented at the 'Intellectual Products: Novel Claims to Protection and their Boundaries', Conference of the Engelberg Center on Innovation Law and Policy, La Pietra, Italy, 25-28 June 1998.

<sup>64</sup> 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. 7.

While not considered susceptible of protection because of their social function, daily news and pure factual information are also likely to lack the sufficient level of originality to receive protection under the *droit d'auteur* regime. In the same vein, courts are reported to have stressed at times the social utility of photographic works depicting historical or newsworthy events, in which case protection has yielded in favour of the public.

Several reports refer as well to provisions included in their national copyright legislation or to specific case law, in support of some access to public domain material. With respect to non-protected elements included in a computer program, the German report indicates for example that Article 6 of the European Directive on the legal protection of computer programs has been implemented in the German Copyright Act, so as to grant the lawful user of a computer program the right to proceed, under certain conditions, to the decompilation of the software in order to achieve interoperability with other programs. In the United States, where facts, ideas and methods of operation are expressly excluded from copyright protection, courts have developed guidelines for computer software infringement analyses, in order to distinguish between 'generic' unprotectable elements of a computer program and original forms of expression. The Australian report points to a provision in the Copyright Act according to which, where film copyright has expired, causing the film to be seen or heard in public does not thereby infringe copyright in any underlying works within the film. Under Mexican copyright law, anyone may make a free use of anonymous works, as long as the identity of the author or the rights holder is not made known. And in Sweden, the Church of Scientology is reported to have tried to prevent access to material which they claimed was secret but which was available in public libraries. The Scientologists purportedly claimed that the contents of these documents had been made accessible initially over Internet by fraudulent action and that it should be an obligation for public authorities and courts to prevent its further distribution. Since we do not know what the conclusion of the case was, we cannot say whether the argument of public access to freely available material was retained against the Church of Scientology.

### *Concluding remarks*

A general conclusion to this General Report could be that, in the mind of most national reporters, the copyright regime already provides sufficient guarantees of protection for the users' fundamental rights, the public interest and the public domain, so that one does not need to rely on other bodies of law to establish a balance between the collective and individual interests. Of course, some reports had to admit to the fact that certain types of exercise of copyrights do constitute forms of abuse, which should be and are sanctioned under the competition laws or the general civil law notion of abuse of right. The section on consumer protection was meant as a provocation; to make everyone realise that the information market, including transactions on copyright material, is undergoing profound modifications in view of the digital networked environment. Mentalities change with the development of technology, and so do manufacturing and consuming habits. The modern day 'romantic author' now presents itself as a major computer software enterprise, an important producer of films or sound recordings, a powerful publisher, an 'Electronic Copyright Management System' or a monopolistic collecting society. It is to these entities and their licensing practices that the individual user is now confronted when he wants to 'consume' copyright protected works on the Internet.

As a few reports hinted at, the copyright regime is in a turmoil. Not only does the copyright balance of interests appear blurred in the digital environment, but the mode of exercise of rights by their owners commonly adds to the confusion. Given the constant expansion of copyright protection, where does the counterbalance to the interests of authors, e.g. those of the users, now lay? Are copyright rules default or mandatory rules? Can they be overridden by contract? If statutory limitations are based on such fundamental principles of law as the protection of fundamental rights, of public interest concerns, of free competition, of consumer protection and of access to public

domain material, should they not be mandatory? If that were the case, then no one would need looking for limitations outside of copyright law, unless of course the exercise of rights constitutes an abuse of intellectual property rights or a practice which unreasonably restrains trade or adversely affects the transfer of technology.